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# QUESTION OF DIPLOMATIC ASYLUM

## Report of the Secretary-General

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# II. REPORT OF THE SECRETARY-GENERAL PREPARED PURSUANT TO OPERATIVE PARAGRAPH 2 OF GENERAL ASSEMBLY RESOLUTION 3321 (XXIX)

## BACKGROUND

### 1. Terminology

1. The term "diplomatic asylum" in the broad sense is used to denote asylum granted by a State outside its territory, particularly in its diplomatic missions (diplomatic asylum in the strict sense), in its consulates, on board its ships in the territorial waters of another State (naval asylum), and also on board its aircraft and of its military or para-military installations in foreign territory. The other form of asylum granted to individuals, namely, that which is granted by the State within its borders, is generally given the name "territorial asylum". The terminology employed in this entire field lacks uniformity. The terms "internal asylum", "external asylum" and "political asylum" are used by some to denote diplomatic asylum and by others to refer to territorial asylum. The State in whose territory diplomatic asylum is sought is know as the "local" or "territorial" State - or even, as will be seen from foot-note 75 below, the "State of refuge" - while the person granted asylum may be called either a "refugee" or an "asylee". As a general rule, this report respects the terminology employed in the documents studied because the meaning of the different terms referred to above is usually apparent from the context.

### 2. Historical evolution

#### (a) Diplomatic asylum in diplomatic missions and consulates

##### (i) Asylum in Europe in the sixteenth and seventeenth centuries

2. Diplomatic asylum came into being at the same time as permanent diplomacy. It was unknown as long as ambassadors were assigned only temporary missions. But with the transformation - begun in the fifteenth century in the Italian States and sanctioned at the Congress of Westphalia in 1648 - of temporary embassies into permanent ones, it was felt necessary to add inviolability of the ambassador's dwelling to the personal inviolability that he had traditionally enjoyed in order to remove him from the influence of the receiving State. Their places of residence being thus protected from intrusion, ambassadors acquired the habit of receiving persons sought by the authorities of the territorial State. This practice seems to have grown considerably in Europe in the sixteenth and seventeenth centuries, as is attested to by the fact that the inviolability of embassy premises, at first restricted to the ambassador's dwelling, was in turn claimed in respect of his carriage, the buildings situated in the same quarter of the city, and later the entire quarter (hence the expression franchise des quartiers or freedom of the ward or quarter). It was recognized by law and by custom, as is demonstrated, for example, by a Venetian statute of 1554, which provides that "he who has taken

refuge in the house of a diplomat shall not be followed there, and his pursuers are to feign ignorance of his presence ... ", 1/ and by a statement of Charles the Fifth couched in the following terms:

> "May the houses of ambassadors provide inviolable asylum, as did formerly the temples of the gods, and may no one be permitted to violate this asylum on any pretext whatever." 2/

The institution was also to receive approval in the form of an arbitral award delivered by Pope Clement VIII in 1601 on the occasion of a conflict between the King of France and the King of Spain, as will be seen further on. Finally, the principle of diplomatic asylum was almost unanimously recognized by the legal writers. 3/ They even strove, as the notion of sovereignty developed, to find for this principle a basis which would make it acceptable to the sovereigns of receiving States, who were growing increasingly jealous of their prerogatives. That is how the fiction of extraterritoriality came about, which was described by Grotius in the following terms:

> "I am fully persuaded, therefore, that nations have seen fit, in the case of the person of ambassadors, to make an exception to the universally accepted custom of regarding all foreigners who are present in the territory under the jurisdiction of a State as subject to the laws of the country. Hence, according to the law of nations, since an ambassador represents by some kind of fiction the actual person of his master, he is regarded, by a similar fiction, as being outside the territory of the Power to which he has been assigned to discharge his functions." 4/

3. Although firmly established in law and in fact, diplomatic asylum nevertheless gave rise to controversy in Europe in the sixteenth and seventeenth centuries. In the first place, it was barely tolerated in the case of offenders who had acted against the sovereign or the public welfare. The Venetian statute referred to above made exemption from prosecution specifically subject to the condition that the person concerned had committed a common crime, and European diplomatic history of the sixteenth and seventeenth centuries abounds in incidents in which the local authorities disregarded the inviolability of the embassy and seized political offenders. Thus, in 1540 the Republic of Venice used threats to demand the surrender of some magistrates of the Republic who were accused of high treason and

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1/ Daru, Histoire de Venise, vol. VI, background documents, p. 83, quoted in Egidio Reale, "Le droit d'asile", Recueil des cours de l'Académie de droit international, 1938, vol. I, p. 513.

2/ Cérémonial diplomatique du droit des gens, vol. I, pp. 480-482, quoted in Egidio Reale, op. cit., loc. cit., p. 513.

3/ Of the ancient writers, Egidio Reale, op. cit., loc. cit., mentions in particular Conradinus Brunus in De legationibus (1548), Albericus Gentilis in De legationibus (1594) and Francisco Suarez in De Legibus et Deo legislatore (1612).

4/ Grotius, De jure belli ac pacis, book II, chap. XVIII, para. 8.

who had found refuge in the French Embassy in Venice; it maintained that asylum could not be granted for the crime of treason, and, to the fury of the King of France, Francis I, its demand was met. 5/ Invoking this precedent, England in 1609 secured the surrender of a chaplain accused of high treason who had taken refuge with the Venetian Ambassador to London. 6/

4. Even in the case of offences which were apparently devoid of any political character, the territorial authorities did, at times, enter embassy premises to seize the offender. Revealing in this regard is the incident which gave rise to the arbitral award delivered by Pope Clement VIII, to which reference was made earlier. 7/ Some Frenchmen, considering themselves insulted by a group of Spanish soldiers, killed two of the soldiers and wounded several others. They then fled to the French Embassy in Madrid. As an indignant mob was threatening to set fire to the Embassy, the Spanish authorities arrested the offenders despite the protests of the Ambassador. The Court of Spain apoligized for the violation of the Embassy but kept the prisoners. Pope Clement VIII was invited to arbitrate the dispute and found for the King of France, censuring the violation of asylum. The prisoners were handed over to the Pope, who, in turn, surrendered them to the French Ambassador at Rome.

(ii) Subsequent evolution of diplomatic asylum in Europe and in Latin America

5. At the end of the seventeenth century the practice of asylum began to fall into disrepute. This was because the franchise des quartiers referred to above was being grossly abused. When an ambassador raised his sovereign's flag over the houses of a quarter of the city, the entire quarter became exempt from local jurisdiction and the representatives of the territorial authorities were denied access until they had received the ambassador's permission to enter. As a result, the quarter quite naturally became the haunt of criminals and the threat that this posed to public safety was bound to induce the territorial State to react. It is also possible that, as the modern conception of the State developed, the local authorities found it increasingly difficult to tolerate a practice which they probably regarded as threatening their sovereignty.

6. The first blow at the franchise des quartiers was dealt by the King of Spain, who, at the end of the seventeenth century, prevailed upon most of the ambassadors resident in Madrid to agree that exclusion from Spanish jurisdiction should henceforth be restricted to their dwellings. Likewise, Pope Innocent XI, following up the unavailing efforts of his predecessors, succeeded in persuading England, the Republic of Venice, Poland, Spain and Austria to agree to the abolition of the franchise des quartiers which their ambassadors had hitherto enjoyed at Rome. The less conciliatory attitude of the Court of France gave rise to a dispute. At the height of the quarrel, King Louis XIV seized the Comtat Venaissin, and the Pope

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5/ Ch. Martens, Causes célèbres du droit des gens, vol. I, para. 1.

6/ Case cited in Egidio Reale, op. cit., loc. cit., pp. 514-515.

7/ Related by Egidio Reale, op. cit., loc. cit., p. 515.

countered by excommunicating the Parliament of Paris, which had sided with the King. After the death of Innocent XI, the conflict died down, and in 1693 the Court of France finally abandoned the principle of franchise des quartiers at Rome. 8/

7. Throughout the eighteenth century, however, ambassadors continued to grant asylum in their dwellings, as is demonstrated by two famous episodes in diplomatic history. One concerns the Duke of Ripperda, Minister for Finance and Foreign Affairs to Philip V of Spain, who, accused of betraying the trust of his office, was apprehended in 1726 at the residence of the British Ambassador at Madrid. The other, which dates from 1747, involves one Christopher Springer, a merchant born in Russia and domiciled at Stockholm, who, having been found guilty of complicity in an act of high treason, took refuge with the British Ambassador at Stockholm, but was finally handed over by the Ambassador to the Swedish authorities. 9/

8. At least some of the legal writers of the period disputed the principle of asylum. In his treatise De foro legatorum tam in causa civili quam in criminali, Cornelius van Bynkershoek wrote:

> "Certainly, if reason be the arbiter, I doubt whether anything more preposterous than this right of asylum attached to ambassadors' houses has ever been invented. Few institutions are so absurd as not to have been created for one or two ostensibly sound reasons at least; but, in this instance, can any such reason be advanced? ... All the privileges of ambassadors, which they enjoy by virtue of the tacit consent of nations, have the sole aim of ensuring that they may discharge the functions of their office in full security without restraint or impediment on the part of any person. But nothing prevents them from so doing even if they are not permitted to shelter or hide criminals, thus exempting them from the jurisdiction of the sovereign in whose territory they reside, and this not on account of themselves or their peoples, but to help a third party who has no connexion with them. All that is so obvious that there is hardly any point in demonstrating it seriously." 10/

Likewise, Wicquefort stated that "an ambassador cannot shield subjects from the justice of their sovereign or prevent the sovereign from imposing his justice upon them without wronging him and interfering with the rights of the crown". 11/

9. Vattel's position is less categorical. While proclaiming the inviolability of the ambassador's dwelling, he considers that "a sovereign is not obliged to permit a foreign ambassador to turn his house into an asylum to which he admits

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8/ Information taken from Egidio Reale, op. cit., loc. cit., p. 522.

9/ For a detailed account of these two cases, see Moore, A Digest of International Law, (1906) vol. II, pp. 765 et seq.

10/ A. van Bynkershoek, Traité du juge compétent des ambassadeurs, pp. 247-257, quoted in Egidio Reale, op. cit., loc. cit., p. 523.

11/ A. Wicquefort, L'Ambassadeur et ses fonctions, vol. I, pp. 875-876.

the enemies of the Prince and the State and all manner of criminals and shields them from the punishment they deserve ... In the case of certain common crimes committed by persons who are often more unfortunate than guilty or whose punishment is not of great importance to the tranquillity of society, an ambassador's dwelling may well serve as asylum, and it is better to permit this kind of offender to escape than to expose ministers to frequent molestations on the ground that a search must be made ... But in the case of an offender whose detention or punishment is of great importance to the State, the Prince must not be deterred by respect for a privilege which was never meant to be used to harm and destroy States ... Accordingly, it is the sovereign who must decide in each case, to what extent the right of asylum attributed by an ambassador to his dwelling should be respected." 12/

10. From the nineteenth century onwards, diplomatic asylum almost ceased to be granted in Europe except during political disturbances. In Greece, for example, during the Revolution of 1862, refuge was given in legations and consulates to persons whose lives were in danger. In Spain, in 1841 and again in 1843, Chevalier d'Alborgo, chargé d'affaires of Denmark, received into his dwelling a number of Spaniards who were being sought for political reasons, including the Marquis of Casa-Irujo, who later became the Duke of Sotomayor. This led to the Chevalier becoming a grandee of Spain, with the title of Barón del Asilo, but did not prevent the Duke of Sotomayor, then Minister for Foreign Affairs, from ordering the authorities to enter the house of his former benefactor during the insurrection of 26 March 1848 in order to seize some political opponents. 13/ In Portugal during the Revolution of 1910, which brought down the monarchy, a few legations granted asylum to supporters of the ancien régime. Various instances of asylum in China, Persia, Morocco and Turkey could also be cited. 14/

11. At a time when diplomatic asylum was on the decline in Europe and elsewhere it was making major advances in Latin America. 15/ The reasons for this have been summarized as follows in the pleading submitted by the Government of Colombia to the International Court of Justice in the asylum case:

> "The American institution of asylum, with the special characteristics which it assumes on the continent, is, in short, the result of two coexisting phenomena deriving from law and politics respectively and in evidence throughout the history of this group of States: on the one hand, the power of democratic principles, respect for the individual and for freedom of thought; on the other hand, the unusual frequency of revolutions and armed

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12/ Vattel, Droit des gens, book IV, chap. IV, para. 118.

13/ Information taken from Moore, op. cit., p. 767 et seq.

14/ For a description of these cases, see, for example, Robin, "Le droit d'asile diplomatique et sa suppression en Haiti", Revue générale de droit international public, 1908, p. 481 et seq.

15/ It should be noted that no case of diplomatic asylum seems to be on record in the North American continent.

struggles which, after each internal conflict, have often endangered the safety and life of persons on the losing side." 16/

12. The following are some instances of the application of the principle of asylum in Latin America:

- In 1850, the former President of the Republic of Ecuador took refuge in the Consulate of Colombia (then called New Grenada) in Quito and then in that of the United States. 17/

- In 1865, the President of the Republic of Peru and his ministers took refuge in the Legation of France in Lima. 18/

- In May 1870, the Minister of Great Britain to Guatemala granted asylum to a Guatemalan politician.

- In 1874, the Minister of the United States in Bolivia granted asylum to two persons sought by the Bolivian Government. 19/

- On a number of occasions, including one case in 1875, political refugees found asylum in the Legation of the United in Haiti. 20/

- In 1885, the President of the Republic of Ecuador and his Minister of the Interior were granted asylum in the Legation of Colombia.

- In 1891, the conflict between the President and Congress of Chile led to the granting of asylum to two persons in the Legation of the United States in Santiago. On 21 August of the same year, two other groups of persons, respectively 5 and 19 in number, took refuge in the legations of Spain and the United States. 21/

Of course this list is purely illustrative. Many other examples are mentioned in the records in the asylum case 22/ and in various publications. 23/

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16/ ICJ, Pleadings, Oral Arguments, Documents, Asylum Case, vol. I, p. 25.

17/ See Tobar y Borgono, L'asile interne devant le droit international (1911), p. 293.

18/ See Carlos Wiese, Le droit international appliqué aux guerres civiles, p. 203.

19/ Moore, op. cit., p. 701.

20/ See J. M. Yepes, Le panaméricanisme et le droit international, cited in ICJ, Pleadings, Oral Arguments, Documents, Asylum Case, vol. I, p. 284.

21/ Moore, op. cit., p. 791.

22/ ICJ, Pleadings, Oral Arguments, Documents, Asylum Case, vol. I, especially pp. 25, 284, 358-365, and vol. II, especially p. 91.

23/ Inter alia, Moore, op. cit., pp. 781-845.

13. The development of the doctrine of diplomatic asylum in the nineteenth century will be dealt with only briefly here because the same trends recur in twentieth-century doctrine, which will be analysed in detail in chapter IV (Studies by non-governmental organizations concerned with international law) and in chapter V (Qualified authorities on international law). Nineteenth-century authors are unanimous in denying the right of diplomatic asylum to criminal law offenders, but such unanimity does not exist with regard to perpetrators of political crimes. Certain writers reject the fiction of extraterritoriality and hold that diplomatic asylum, which is thus deprived of any juridical basis, is - whatever the nature of the crime underlying the request for asylum - simply an infringement of the sovereignty of the territorial State. Faustin-Hélie writes:

> "There would be no more sovereignty if within each State there was an independent territory which could serve as a refuge for all criminals and a hotbed for all kinds of conspiracies, and which could oppose its own law to the law of the country. The independent authority of ambassadors would completely absorb that of Governments." 24/

G. F. de Martens observes that the universal law of nations does not recognize the fiction of extraterritoriality and concludes:

> "The Minister has no legitimate grounds for harbouring from justice an individual over whom he has no jurisdiction. The right of asylum may therefore be denied or limited." 25/

Blüntschli expresses himself as follows:

> "The residence of a person enjoying the right of extraterritoriality may not serve as an asylum for individuals sought by the judicial authorities. Such a person is obliged to deny entry to his residence to fugitives of every kind or, if they have entered, to surrender them to the competent authorities ... No right of asylum is attached to the residence of an envoy. On the contrary, the latter is obliged to surrender a person sought by the national police or judicial authorities who has taken refuge with him or to authorize a house search for the fugitive." 26/

De Heyking writes:

> "The extraterritoriality of the embassy may in no case be regarded as implying a right of asylum ... Surrender of the culprit may be demanded where

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24/ Faustin-Hélie, Traité d'instruction criminelle (1866), vol. II, para. 127.

25/ G. F. de Martens, Précis du droit des gens modernes de l'Europe, 1864 edition, book VII, chap. V, para. 220.

26/ Blüntschli, Le droit international codifié, trans. Lardy (1886) paras. 151 and 200.

the Ambassador considers himself entitled to halt the processes of justice by giving refuge to criminals (indiscriminately), and, if such extradition is denied, the Embassy may be entered." 27/

Finally, Pinheiro-Ferreira makes the following observations:

"Time and the good sense of the general public have already made short work of these exaggerated claims of the diplomats. Nevertheless, relying on the fiction of extraterritoriality with which the Romanism of their publicists has imbued them, they insist on this presumed right of asylum of their embassies whenever, as representatives of a powerful court to a weak government, they believe they can assert what they pompously call the prerogatives of the diplomatic corps.

"If the foreign Minister presumed to arrogate to himself the absurd prerogative of affording offenders freedom from punishment in his embassy by granting them asylum there and if he denied a request to make the offender leave, he would in essence be failing to show the respect due to the constituted authorities; and if the case in question was so serious that the authorities could not limit themselves to taking measures to prevent the criminal's escape outside of the embassy, they would have no alternative but to advise the envoy, out of consideration for his official capacity, to secure his papers properly and to take all other measures he deemed fitting so that the embassy might be inspected wherever the offender might be hiding, without exposing the envoy's archives, his person or his staff to the slightest danger.

"If the envoy should again refuse this request and leave the authorities no choice but to use force, he would have placed himself in the position of not being able to remain in the country. He would therefore have to be ordered out, with due consideration for his official position but with all necessary precautions to ensure that the criminal was apprehended. Once the legation has left, after being given every facility needed in order to remove all articles of importance to the mission, the embassy no longer enjoys any immunity." 28/

14. Other authors, however, favour maintaining the right of asylum for political refugees. Pradier-Fodéré, for example, after stating that nothing, even the presence of a criminal, can justify violation of the embassy's immunity, considers the hypothetical case of local authorities demanding the surrender of the refugee. He feels that here it is necessary to distinguish between ordinary crimes and political ones and offers the following opinion:

"If the competent authorities request the extradition of individuals accused of ordinary crimes, I do not believe that it is possible to justify a refusal. Abolition of the right of asylum as applied to such offenders is no

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27/ De Heyking, L'extraterritorialité (1883), p. 16 et seq.

28/ Quoted in G. F. de Martens, op. cit., pp. 130-131.

longer in question today. The Minister will surrender the culprit. But if a politcal refugee is sought by a victorious party ... who would then seriously maintain that the representative of a civilized nation must coldbloodedly surrender him to the fury of his would-be murderers? ... The verdict must be for diplomatic asylum in political matters, but an asylum which is restricted, controlled and purged of all abuses which infringe on the sovereignty of States." 29/

Calvo expresses himself in the following terms:

"It would be desirable for each Government to determine precisely to what extent it intends to recognize what is known as the right of asylum. Until a definite rule has been laid down in this matter, however, we can be guided only by general humanitarian considerations and the sense of fairness which nations should have towards each other. We therefore grant that when a country is embroiled in civil strife, the residence of a legation can and even must guarantee shelter to politicians forced by a threat to their life to take temporary refuge there." 30/

15. In the twentieth century the institution continues to be widely upheld in Latin America, as indicated in the records of the asylum case. 31/ Elsewhere the most striking example that can be cited for the period before the Second World War is that of the Spanish Civil War, which will be treated in chapter III of this report (see paras. 142-150 below). 32/ The cases of diplomatic asylum after the Second World War are too well-known to require recapitulation here. 33/

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29/ Pradier-Fodéré, Traité de droit international public européen et américain (1887), vol. III, No. 1424.

30/ Calvo, Le droit international théorique et pratique, 5th ed., vol. III, para. 1523.

31/ See note 22 above. See also Revue générale de droit international public, vol. XV (1908), p. 461 et seq., and American Journal of International Law, vol. 3 (1909), p. 562 et seq.

32/ See also, inter alia, Revue générale de droit international public, vol. XXI (1914), p. 132, and vol. XXII (1915), p. 242.

33/ Certain recent cases of the granting or refusal of diplomatic asylum are described or mentioned in the American Journal of International Law, vol. 60 (1966), p. 877; in the Revue générale de droit international public, vol. 67 (1963), p. 383; vol. 71 (1967), pp. 793 and 1071; vol. 72 (1968), pp. 223-224, 804-805 and 1059-1060; vol. 73 (1969), pp. 480-481 and 445; vol. 74 (1970), pp. 754-755; vol. 75 (1971), pp. 849-850; vol. 78 (1974), pp. 765-782; in the Annuaire français de droit international, 1956, p. 898; 1957, p. 855 and 1961, p. 26; and in Whiteman, Digest of International Law, pp. 428-498.

(b) Asylum on ships

16. Since the beginning of the nineteenth century, this form of asylum has been practised fairly frequently by the major naval Powers. The doctrinal controversies regarding its juridical basis to which it has given rise will be considered in chapters IV and V. We will confine ourselves here to giving some historical examples.

(i) Asylum on warships

17. In Naples during the troubles of 1848 the Duke of Parma found asylum on the Hecate, a ship flying the British flag. The following year, Lord Palmerston declared that it was not proper for a British warship to accept a person who was being prosecuted under criminal law or was seeking to avoid execution of a sentence but that a British warship had always been recognized as a place of refuge for any person fleeing political persecution, "whether the refugee was seeking to escape from the arbitrary acts of a monarchical government or from the unbridled violence of a revolutionary committee". 34/

During the revolution of 1862, the Greek royal couple found asylum on the British frigate Scylla and other persons took refuge on the French warship Zénobie. United States warships granted asylum on a number of occasions to Latin American politicians. In April 1831, for example, the Vice-President of Peru and General Miller were received on board the St. Louis with the agreement of the Peruvian Government on the understanding that they would remain on board only long enough to escape mob violence. 35/

18. Other Latin American politicians (including Chileans in 1892, 36/ Salvadorians

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34/ 50 British and Foreign State Papers, 803, quoted in Moore, op. cit., p. 849. It should be noted that the United Kingdom and other countries have had frequent occasion to receive fugitive slaves on board their warships. These cases do not really involve asylum, however, because the persons concerned were not trying to escape from the authorities in their country but from their masters.

35/ Information taken from Moore, op. cit., p. 849 et seq.

36/ Following the granting of asylum to Salvadorian citizens, the following provision was introduced into the American Naval Rules of 1896:

> "The right of asylum for political or other refugees has no foundation in international law. In countries, however, where frequent insurrections occur, and constant instability of government exists, local usage sanctions the granting of asylum, but even in the waters of such countries officers should refuse all applications for asylum except when required by the interests of humanity in extreme or exceptional cases, such as the pursuit of a refugee by a mob. Officers must not directly or indirectly invite refugees to accept asylum."

in 1894 and Guatemalans in 1895) also found refuge on warships of the United States. 37/

19. In 1862, when the city of New Orleans was occupied by United States forces, three Spanish warships took on board a large number of passengers, including American citizens who were not permitted to leave the city without authorization. An incident resulted between the countries concerned which gave the United States Government occasion to declare, in response to the Spanish Government's claim that asylum could be granted on warships at least to political offenders, that no warship of any nation could discharge or take on board, in a United States port held by American forces or in the hands of insurgents, any person not belonging to the civilian, military or naval personnel of the country whose flag the ship was flying. 38/

20. Another famous case concerning the American continent is that of the ships Mindello and Alfonso Albuquerque. These two Portuguese ships had given asylum in March 1894 to mutinous Brazilian sailors. The Brazilian Government claimed that the mutineers had been guilty of piracy and therefore, as common criminals, had no right to the protection granted them. The Portuguese Government regarded them as rebels, that is, as political offenders to whom asylum could be granted. 39/

21. Among twentieth-century cases, the dispute between Argentina and Paraguay after the revolution which broke out in the latter country in 1911 may be mentioned. After the revolutionaries were routed, many of them found refuge on Argentine vessels. Paraguay protested against this, contending inter alia (1) that asylum should not have been granted in this particular case because the persons concerned were not political refugees but common criminals or deserters - categories excluded from the privilege of asylum by the 1889 Treaty of Montevideo, and (2) that the Argentine naval authorities had fraudulently turned an Argentine merchant vessel, the Lambaré, into a military transport in order to be able to make it a place of asylum. The incident led to the breaking off of diplomatic relations between Argentina and Paraguay. 40/

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37/ It should be noted that during the Chilean revolution of 1892 the Balmacedist President-designate found refuge on a German warship, the Leipzig.

38/ See Moore, op. cit., p. 849 et seq.

39/ See J. B. de Martens-Ferrão, "Le Différend entre le Portugal et le Brésil considéré du point de vue du droit international", Revue de droit international et de législation comparée, 1894, p. 378 et seq., and J. E. Rolin, "Note rétrospective au sujet du différend survenu en 1894 entre le Portugal et le Brésil", ibid., 1895, p. 593 et seq. See also Moore, op. cit., pp. 853-855.

40/ For a detailed description of this incident, see Revue générale de droit international public, vol. XIX (1912), p. 623 et seq. More recent examples of the granting or refusal of asylum on warships are analysed or mentioned in Revue générale de droit international public, vol. 75 (1971), pp. 1139-1144.

(ii) Asylum on commercial vessels

22. Here we may cite the case of a former Spanish minister who in 1840 took refuge aboard a French cargo ship, the Océan, while it was anchored in a port in the Spanish province of Valencia. In the course of a customs and police check at the next port of call, he was recognized and brought back on shore and imprisoned. Also worthy of mention is the case of the Chili, a British merchant ship, which after an unsuccessful military revolt in Ecuador took a number of refugees on board, giving rise to a protest from the Minister for Foreign Affairs of Ecuador. 41/ In addition to the case of the Honduras, which will be treated in chapter II of this report (para. 88 below), the famous example of the Acapulco may be mentioned. This American postal ship transported a Guatemalan statesman, General Barrundia, from Mexico to Salvador. During a stop at a Guatemalan port, the local authorities requested and obtained authorization from the American chargé d'affaires to apprehend the political refugee. General Barrundia refused to surrender and was killed on the bridge. The last example is that of the French ship Panama, which in 1885 received a Haitian revolutionary on board. The local authorities requested the surrender of the refugee but yielded in the face of the French authorities' refusal to grant the request. 42/

23. The preceding summary shows that diplomatic exile has in fact been granted not only in embassies and on warships but also in consulates and even on commercial vessels, that it has been granted not only to political offenders but also to common criminals, and that it has been granted under the most varied circumstances in order to save human beings from popular wrath, from factional retribution, from prosecution tainted with partiality and from the threat of normal prosecution. The varied nature of the relevant cases is accompanied by a lack of consistency in the attitude of States, which not only developed historically but also shows variations as between States within a given period and even for a given State depending on whether it is a State of asylum or a territorial State and depending on the circumstances in each case; what is more, the official position of a State regarding diplomatic asylum may not necessarily coincide with its actual attitude. We shall see further on in this report whether the efforts made by States in this field in the twentieth century and the prevailing doctrine make it possible today to define more precisely the concept of diplomatic asylum as a legal institution.

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41/ For more details, see Revue générale de droit international public, vol. XIX (1912), p. 631.

42/ Other examples of asylum on merchant ships, involving Latin American nationals among others, are mentioned in Moore, op. cit., pp. 855-883, in Fauchille, Traité de droit international public, vol. I, second part, p. 988 et seq., in the Revue générale de droit international public, vol. 73 (1969), pp. 1139-1140, and in the British Yearbook of International Law, 1949, p. 468.

# CHAPTER I

## RELEVANT INTERNATIONAL AGREEMENTS 43/

24. The origins of the conventional law of diplomatic asylum may be traced to the turbulent period following the establishment of independence by the Latin American States in the early part of the nineteenth century. Diplomatic correspondence of the period reveals a fairly widespread though far from constant practice of granting asylum in embassies and legations in Latin America based on an amalgam of political, legal and humanitarian considerations. In one of the earliest recorded cases, the United States Department of State advised the American Minister to Venezuela that "the extent ... to which this protection may be justly carried out must be determined by the Minister himself, under the exigencies of each particular case, and with reference to the established principles of the law of nations". 44/

25. The lack of anything more precise than "the established principles of the law of nations" prompted a number of Governments to attempt to achieve greater precision as to the specific legal content of the doctrine of diplomatic asylum.

26. Before studying the relevant treaties, it is worth recalling that on a number of occasions diplomatic representatives of Latin American countries and others accredited to Latin American Governments have been led by events to try to define some principles relevant to the subject. Thus, the Rules of Lima were formulated in 1865, the Rules of La Paz in 1898 and the Rules of Asunción in 1922.

27. The Rules of Lima arose out of a case in which asylum was granted to the Peruvian general Canseco in May 1865 by the United States Minister in Peru. Serious difficulties developed and the diplomatic corps accredited to the Peruvian Government met and drew up on 19 May 1865 the following points: (1) that apart from inhibitions in their instructions or in conventional stipulations, there were limits to the privilege of asylum which the prudence of diplomatic agents

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43/ In the present chapter, the expression "relevant international agreements" has been interpreted to mean multilateral agreements which include substantive provisions bearing on diplomatic asylum. One should, however, point out that certain multilateral treaties, although they do not explicitly deal with the question, have afforded some States an opportunity to state their position on the subject while the treaties in question were being drafted. These treaties are cited in chapter III of this report. It should furthermore be mentioned that some bilateral agreements contain provisions (either positive or negative) bearing on diplomatic asylum. This is the case with the Treaty of Friendship of 19 March 1917 between Argentina and Paraguay, article 14 of which provides that the right of asylum in legations of States Parties shall not be granted to individuals charged with offences under ordinary law. This is also the case in numerous consular conventions, of which a number of examples will be found in notes 208 and 209 below, and in agreements concerning the headquarters of certain international organizations (see note 139 below).

44/ Diplomatic Correspondence of the United States: Inter-American Affairs, 1831-1860, vol. XII, p. 470.

ought to counsel; (2) that the diplomatic corps adopted the instructions given by Brazil to its minister, according to which asylum was to be conceded with the greatest reserve, and only for such time as was necessary in order that the fugitive should secure his safety in another manner - an end which it was the duty of the diplomatic agent to do all in his power to accomplish. 45/ These principles, which were intended to apply only to political offences, were provisionally adopted subject to approval by the accrediting Governments.

28. Less than a year later, several Peruvians found asylum with the acting chargé d'affaires of the French Legation in Lima, who refused to comply with a request by the Peruvian Government for their surrender. The French chargé d'affaires suggested shortly afterwards to the Peruvian Minister for Foreign Affairs that the diplomatic corps should be called together to establish definite rules governing such matters. Meetings were accordingly held in January 1867 under the chairmanship of the Minister for Foreign Affairs of Peru. They were unsuccessful and on several occasions even led to the assumption of negative stances. The Minister for Foreign affairs of Peru in particular stated that his Government would henceforth not recognize diplomatic asylum as it had been practised up to that time. It would be recognized only within those limits established by international law, which permited the solution of any questions arising in exceptional cases of asylum. Inasmuch as the right of asylum existed in the other Latin American countries and Peru was permitted to exercise it through its legations, it renounced that privilege for its part since it did not concede it to the legations of those States in its own territory. 46/

29. The Rules of La Paz were drawn up by mutual agreement in December 1898 by the heads of the legations of Brazil, the United States and France in Bolivia. They establsihed the following rules governing not only the conditions for granting asylum but also the obligations of the asylee:

> "Every person asking asylum must be received first in the outer or waiting room of the legation, and there state his name, official capacity, if any, residence, and reasons for demanding refuge; also if his life is threatened by mob violence or is in active danger from any attack.
>
> "If, according to the joint rules laid down by the committee composed of the Brazilian, American, and French ministers, he shall be adjudged eligible for protection, he must subscribe to the following rules in writing:
>
> "First. To agree that the authorities shall be at once notified of his place of refuge.
>
> "Second. To hold no communication with any outside person, and to receive no visitors except by permission of the authority quoted above.

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45/ Pradier-Fodéré, Traité de droit international public européen et américain (1887), vol. III, p. 316 et seq.

46/ Ibid., p. 322. See also Moore, A Digest of International Law, vol. II, p. 839 et seq.

"Third. To agree not to leave the legation without permission of the resident minister.

"Fourth. To hold himself as virtually the prisoner-guest of the minister in whose legation he is.

"Fifth. To agree to peaceably yield himself to the proper authorities when so demanded by them and requested by his host.

"Sixth. To quietly depart when so requested by the minister, should the authorities not demand his person after a reasonable time has elapsed." 47/

30. The Rules of Asunción were established in 1922 by the diplomatic missions to Paraguay of Argentina, Bolivia, Brazil, Cuba, France, Germany, Peru, Spain, the United Kingdom, the United States and Uruguay. They read as follows: 48/

"Any person who, invoking reasons of a political character, seeks asylum in the residence of a foreign legation, shall set forth the facts which have led him to ask for this asylum; and the chief of the legation shall be the one to judge such facts.

"Once asylum is granted, the person to whom it is granted shall promise, in writing, upon his word of honour:

"1. To refrain from all participation in political questions.

"2. To receive no visits without prior consent of the foreign representative, who will reserve the right to be present in the conversations.

"3. To maintain no written communications without prior censure of the chief of the legation.

"4. Not to leave the legation without the consent and authorization of the head of the same; failure to keep this promise will mean the loss of the right to renewed refuge within the legation.

"5. To submit to the decisions of the head of the mission, concerning the termination of the asylum or leaving the country, with the guarantees which he may deem proper.

"These principles shall be observed provided they are not contradicted by instructions received by each head of mission."

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47/ Moore, op cit., pp. 783-784.

48/ The text has been taken from a document published by the Ministry of Foreign Affairs of Argentina under the title "Project of Convention on the Right of Asylum", Buenos Aires, 1937, pp. 26-27.

31. These rules show a certain similarity to those of La Paz, but they reflect in a more explicit way the concern of the diplomatic agents to isolate the refugees from the outside world and to avoid any political activity on their part; they also provide for penalties if the person concerned should leave the legation without being authorized to do so.

32. The various treaties on asylum in force between Latin American countries are considered below in chronological order. The Treaty of Peace and Friendship, concluded on 20 December 1907 at the Conference on Peace held in Washington by Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua 49/ with a view to maintaining peace in their mutual relations and strengthening their ties at the diplomatic, economic, commercial, cultural and legal levels, contains a provision concerning asylum but is no longer in force and is therefore mentioned here only for the record. 50/ This very unusual provision, under which the signatory States undertook to respect the right of asylum on board merchant vessels of any nationality in respect of political and related crimes, reads as follows:

"Article X

"The Governments of the contracting Republics bind themselves to respect the inviolability of the right of asylum aboard the merchant vessels of whatsoever nationality anchored in their ports. Therefore, only persons accused of common crimes can be taken from them after due legal procedure and by order of the competent judge. Those prosecuted on account of political crimes or common crimes in connexion with political ones can only be taken therefrom in case they have embarked in a port of the State which claims them, during their stay in its jurisdictional waters, and after the requirements hereinbefore set forth in the case of common crimes have been fulfilled."

1. The Treaty on International Penal Law signed at Montevideo in 1889 51/

33. At the first South American Congress on International Law, held at Montevideo in 1888-1889, a number of instruments were adopted, among them a Treaty on International Penal Law 52/ concluded on 23 January 1889, which includes, in addition to the final clauses entitled "General provisions, the five following titles:

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49/ Reproduced in de Martens, Nouveau Recueil général de traités, series 3, vol, III, p. 94.

50/ The treaty was ratified by all the signatory States in February and March 1908. Upon being denounced by Nicaragua in 1920, it ceased to have effect in accordance with article XIX (information taken from International Legislation, ed. by Manley O. Hudson, vol. II, p. 901).

51/ Text in OAS, Official Records (OEA/Ser.X/7), Treaty Series 34.

52/ As at 31 December 1973, the Treaty was in force as between Argentina, Bolivia, Paraguay, Peru and Uruguay.

Title I. On jurisdiction (arts. 1-14)

Title II. On asylum (arts. 15-18)

Title III. Extradition (arts. 19-29)

Title IV. Proceedings for extradition (arts. 30-43)

Title V. Of the precautionary arrest (arts. 44-46).

34. Title II covers territorial asylum in articles 15, 16 and 18 and diplomatic asylum in article 17, which reads as follows:

> "Such persons as may be charged with non-political offences and seek refuge in a legation shall be surrendered to the local authorities by the head of the said legation, at the request of the Ministry of Foreign Relations, or of his own motion.
>
> "Said asylum shall be respected with regard to political offenders, but the head of the legation shall be bound to give immediate notice to the Government of the State to which he is accredited; and the said Government shall have the power to demand that the offender be sent away from the national territory in the shortest possible time.
>
> "The head of the legation shall, in his turn, have the right to require proper guarantees for the exit of the refugee without any injury to the inviolability of his person.
>
> "The same rule shall be applicable to the refugees on board a man-of-war anchored in the territorial waters of the State."

35. By requiring heads of legations to hand those guilty of ordinary offences over to the local authorities upon demand and by restricting the enjoyment of diplomatic asylum to political offenders, this text merely confirmed the generally accepted position of Latin American countries. However, it specified the rights and obligations of the State of asylum and of the territorial State, the State of asylum being required to notify the territorial State of the asylum and the territorial State being entitled to demand the asylee's removal from its territory.

36. It should be noted that, in the asylum case, Colombia invoked article 23 of the above-mentioned Treaty, which is part of title III (Extradition) and which reads as follows:

> "Political offences, offences subversive of the internal or external safety of a State, or common offences connected with these, shall not warrant extradition.
>
> "The determination of the character of the offence is incumbent upon the nation upon which the demand for extradition is made; and its decision shall

be made under and according to the provisions of the law which shall prove to be most favourable to the accused." 53/

37. Peru asserted, however, that it was apparent from mere examination of the treaty that the American legal experts who had drawn up, discussed it and approved it did not regard the institutions of asylum and extradition as identical but rather as completely independent in the system of international law and the structure of the treaty, since they had laid down appropriate rules for each of them. 54/

38. The Court simply stated that the treaty "did not contain any provision concerning an alleged rule of unilateral and definitive qualification" whose existence in American international law Colombia sought to demonstrate.

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53/ Ibid.

54/ ICJ, Pleadings, Oral Arguments, Documents, Asylum Case, vol, I, p. 138.

2. The Bolivarian Agreement on Extradition signed at Caracas in 1911 55/

39. On 18 July 1911, at a congress held at Caracas, the Bolivarian countries 56/ - Bolivia, Colombia, Ecuador, Peru and Venezuela - concluded the Bolivarian Agreement on extradition. 57/ In view of the disputes arising out of this Agreement which were before the International Court of Justice during the asylum case, it seems useful - even though the Agreement, as its title indicates, deals essentially with extradition - to make a brief analysis of its content.

40. In article 1 the contracting States agree mutually to deliver up, in accordance with the provisions of the Agreement, persons who have been charged or convicted by the judicial authorities of any one of the contracting States of one or more of the crimes or offences specified in article 2. Article 3 deals with the case in which the crime or offence giving rise to the request for extradition was committed outside the requesting State. Articles 4 and 5 specify the cases in which extradition will not be granted, namely, political offences or related acts (except for attempts upon the life of a chief of state), minor offences, existence of a previous judgement, prescription, amnesty, pardon and so forth, and it is laid down in article 4 that should any question arise as to whether an act is a political offence or related act, the decision of the authorities of the requested State shall be final. Articles 6, 7, 8, 15 and 16 contain procedural rules. Article 9 lays down the conditions for provisional arrest of the fugitive. Articles 10, 11 and 14 lay down certain guarantees for the extradited person. Article 12 deals with the surrender of evidence and article 13 with the case in which more than one request for extradition is made. Article 17 deals with the duration of the agreement. Article 18, on asylum, reads as follows:

> "Except as provided in the present Agreement, the signatory States recognize the institution of asylum, in accordance with principles of international law."

Finally, article 19 deals with cases in which transit through a third State is necessary.

41. In the Memorial it submitted to the International Court of Justice in the asylum case, Colombia pointed out that article 4 of the Bolivarian Agreement had laid down the rule that the State receiving a request for extradition had unilateral competence to qualify the offence. It maintained that the same solution should be applied in disputes concerning asylum, which is the subject of article 18. Colombia stated:

"The fact that those who concluded the Bolivarian Agreement made no mention

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55/ Text in OAS, Official Records (OEA/SER.X.1), Treaty Series No. 34.

56/ So called bec[illegible]y were founded by Bolivar at the beginning of the nineteenth century.

57/ On 31 December 1973 the treaty was in force between the five signatory States.

> of the said rule cannot be interpreted as meaning that a system other than unilateral qualification should apply to asylum. Such a divergence of systems would be inadmissible in itself, that is to say, if it were to require the application of a different method for the qualification of an offence in the operation of two institutions - extradition and asylum - having the identical purpose of protecting the human person." 58/

In the view of the Peruvian Government, on the other hand, the régime of diplomatic asylum could not be assimilated to that of extradition:

> "Asylum in a legation, once the obsolete fiction of extraterritoriality is rejected, has no basis other than humanity or equity and constitutes an obvious exception to that same principle of territorial sovereignty of which the régime of extradition constitutes a recognition. Accordingly, no argument can be based on the fact that extradition gives rise in principle to a qualification of the offence by the State of Refuge." 59/

This divergence of interpretation gave the Court the opportunity to define, in a frequently quoted passage, the difference between territorial asylum and diplomatic asylum (see para. 96 below).

42. On the subject of article 18, Peru stated that the use of the preposition "except" (fuera) indicated that, in the opinion of those who drafted the Agreement, that article was alien, not belonging to the provisions of the Agreement on Extradition. In its view, the article was included in the Agreement only in a desire to obviate the disadvantages of an arbitrary refusal to grant asylum; moreover, it was probable that "the purpose of introducing that anomalous provision was to provide another milestone on the way towards codification". 60/ Colombia, however, considered the word "fuera" to be the equivalent of "moreover" or "in addition", meaning that the Bolivarian Agreement included, in addition to provisions concerning extradition, an obligation with regard to internal asylum. In that connexion, it pointed out that the main object of the Caracas Congress had been to establish legal rules which would reduce the friction arising from civil wars and that it had been intended to cover all problems associated with the consequences of civil war: extradition, asylum and neutrality. 61/ That, in Colombia's view, was the raison d'être of article 18.

43. Colombia also pointed out that article 18 had "recognized" the existence of the "institution of asylum", thereby indicating that at the time of signature of

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58/ ICJ, Pleadings, Oral Arguments, Documents, Asylum Case, vol. I, p. 27.

59/ Ibid., p. 139

60/ Ibid., pp. 135 and 136.

61/ Ibid., pp. 337 and 339-340.

the Agreement there was already a set of established concepts and rules for its application. It stated:

> "Thus we find ourselves confronted with the classic phenomenon of the transformation of a customary right into a series of rules of affirmative law. In other words, the status juris in the matter of asylum to which we have referred existed in Latin America in 1911 and its historical development had even attained such a degree of consolidation that it could be considered as a continental institution.... the Bolivarian Agreement did not result in the creation ex novo of a State's power to grant asylum to political refugees but was merely the recognition of a rule of customary law established by precedents and cases known to or furnished by the signatory countries." 62/

After explaining the difference between a contract or treaty, instruments in the case of which any modification was dependent on the will of the parties, and the institutional legal act, which did not need such consent since it had its own force, Colombia asserted that by using the word "institution" the signatories of the Bolivarian Agreement had intended to indicate that asylum was not an isolated fact but an established system, rules for the application of which had been laid down as it evolved over time. Colombia added that article 18 contained a rule whose flexibility was intended to permit the institution of asylum to be adapted to new methods of application which the development of American international law might necessitate in future. 63/

On that point Peru stated, inter alia:

> "The expression 'institution' is a generic term ... there are legal institutions and there are non-legal institutions: moral and religious institutions, styles, conventions are institutions ... Hauriou was defining the legal institution, and in particular the State institution, when he said that the institution was 'an ideal working process or enterprise which takes concrete form and continues in legal existence in a social environment'. But the concept of growth implicit in that definition does not show at what time the institution ceases to be an ideal working process or enterprise and takes concrete legal form in a social environment. We think that asylum, precisely because of its humanitarian nature, is indeed an ideal working process but that, even in the Americas, the circumstances necessary to give it concrete legal form are still absent." 64/

44. As will be seen in chapter II (para. 95 below), the Court confined itself to affirming, on the subject of the expression "in accordance with the principles

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62/ Ibid., p. 18.

63/ Ibid., p. 19.

64/ Ibid., p. 136.

of international law" in article 18 of the Bolivarian Agreement, that the principles of international law did not recognize any rule of universal and definitive qualification by the State granting diplomatic asylum.

3. The Convention on Asylum signed at Havana in 1928 65/

45. This Convention was adopted on 20 February 1928 by the Sixth International Conference of American States, held at Havana. It was signed by all States which were then members of the Pan American Union. 66/ 67/

46. The Convention was very important in the asylum case because it was at the time the only treaty instrument on asylum ratified by both parties to the dispute. It has four articles of which two are provisions of substance. 68/ Article 1 deals with persons accused or condemned for common crimes 69/ and article 2 with political offenders, although the Convention gives no definition of these two terms.

47. Article 1 reads as follows:

> "It is not permissible for States to grant asylum in legations, warships, military camps or military aircraft, to persons accused or condemned for common crimes, or to deserters from the army or navy.
>
> "Persons accused of or condemned for common crimes taking refuge in any of the places mentioned in the preceding paragraph, shall be surrendered upon request of the local government.
>
> "Should said persons take refuge in foreign territory, surrender shall be brought about through extradition, but only in such cases and in the form established by the respective treaties and conventions or by the consitution and laws of the country of refuge."

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65/ Text in OAS, Official Records (OEA/SER.X/1), Treaty Series No. 34.

66/ The United States delegation, at the time of signing, established an express reservation "placing on record that the United States does not recognize or subscribe to as part of international law the so-called doctrine of asylum". The Dominican Republic signed and ratified the Convention but subsequently denounced it. Haiti signed and ratified the Convention, later denounced it but then withdrew its denunciation.

67/ The Convention is in force in the following States: Brazil, Colombia, Costa Rica, Cuba, El Salvador, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Uruguay (information provided by the Secretariat of the Organization of American States).

68/ Article 3 states that "obligations previously undertaken by the contracting parties through international agreements" are not affected and article 4 contains the final clauses.

69/ And with deserters from the army or navy.

48. It will be noted that although the article deals essentially with diplomatic asylum, it also refers, in the third paragraph, to the question of extradition. This technique of combining provisions dealing with two separate institutions has been criticized and it should be noted that in the Montevideo Convention of 1933 (see para. 59 below) article 1 of the Havana Convention was replaced by a new text which does not include this third paragraph.

49. At the International Court of Justice the Colombian Government maintained that the negative and prohibitory form of words used in article 1 with regard to persons accused or condemned for common crimes made it possible to affirm a contrario sensu that the States which had ratified the Convention had every latitude to grant asylum to political refugees. 70/ The Government of Peru, however, stated that the intention of those who drafted the Convention had been to put an end to abuses and, to that end, to impose upon States a minimum course of action, which was defined in article 2. 71/

50. Article 2 of the Convention reads as follows:

"Asylum granted to political offenders in legations, warships, military camps or military aircraft, shall be respected to the extent in which allowed, as a right or through humanitarian toleration, by the usages, the conventions or the laws of the country in which granted and in accordance with the following provisions:

"First: Asylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety.

"Second: Immediately upon granting asylum, the diplomatic agent, commander of a warship, or military camp or aircraft, shall report the fact to the Minister of Foreign Relations of the State of the person who has secured asylum, or to the local administrative authority, if the act occurred outside the capital.

"Third: The Government of the State may require that the refugee be sent out of the national territory within the shortest time possible; and the diplomatic agent of the country who has granted asylum may in turn require the guaranties necessary for the departure of the refugee with due regard to the inviolability of his person, from the country.

"Fourth: Refugees shall not be landed in any point of the national territory nor in any place too near thereto.

"Fifth: While enjoying asylum, refugees shall not be allowed to perform acts contrary to the public peace.

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70/ ICJ, Pleadings, Oral Arguments, Documents, Asylum Case, vol. I, p. 20.

71/ Ibid., p. 404.

"Sixth: States are under no obligation to defray expenses incurred by one granting asylum."

51. The first part of the first paragraph is virtually identical with the first part of the second paragraph of article 17 of the 1889 Montevideo Treaty (see para. 34 above). The end of the paragraph, on the other hand, is entirely new. In that connexion, Peru pointed out in the Counter-Memorial it submitted in the asylum case that this provision contained "no general or unconditional recognition of asylum", the grant of which was still conditional upon the existence of "the usages, 72/ the conventions or the laws of the country in which granted". 73/ Colombia interpreted this phrase as applying to its own usages, laws and international obligations. 74/ Peru, however, considered that such an interpretation was tantamount to admitting that a convention that was binding on the country of asylum could be invoked even against countries that were not bound by that convention and to ignoring the basic rule of international law that States have no obligations to each other beyond those they have signed jointly. 75/ Chapter II (para. 98 below) gives the Court's interpretation of the phrase in question.

52. The conditions listed in paragraphs "First" to "Sixth" of article 2 - which, according to the Court, were all designed "to give guarantees to the territorial

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72/ The word used in the French text of the Havana Convention is "coutume". The corresponding terms in the Spanish and English versions are "usos" and "usages". In the documents of the asylum case, the Spanish word "usos" is rendered in the Colombian Memorial by "coutume" and in the Peruvian Counter-Memorial by "usage".

73/ ICJ, Pleadings, Oral Arguments, Documents, vol. I, p. 133.

74/ Ibid., p. 31.

75/ Ibid., p. 141. The problem of interpretation raised by Colombia and Peru unquestionably results from the ambiguity of the Spanish expression "país de refugio", which is rendered in the English text by "country in which granted". According to the preparatory work for the Convention, the words "to the extent in which allowed ... by the usages, the conventions or the laws of the country in which granted" were inserted in the first paragraph of article 2 of the Havana Convention in order to safeguard the position of those States which did not recognize diplomatic asylum as forming part of international law. One wonders, therefore, whether the expression "país de refugio" should not be interpreted as designating the territorial State, and, indeed, it was so defined in the draft submitted by Brazil in 1953 at the second session of the Inter-American Council of Jurists (see para. 77 below). This definition appears in article 9 of the draft and reads as follows:

"2. The State of refuge is the State in whose territory is situated the legation, ship, camp or military aircraft in which a person charged with a crime has been granted asylum."

State and appear, in the final analysis, as the consideration for the obligation which that State assumes to respect asylum" 76/ - reproduce some of the rules enunciated in the 1889 Montevideo Treaty or in the rules of Asunción. However, they contain one innovation, namely, the reference to "urgent cases" in the paragraph "First". The interpretation of this expression gave rise to considerable difficulties in the International Court of Justice, and the arguments of the Court on this point were disputed in several dissenting opinions (see paras. 113-115).

53. The wording of article 2, "Third" was interpreted differently by Colombia and Peru. Colombia maintained that once the State granting asylum had exercised the power to grant asylum, the obligation of the territorial State stated in paragraph "Third" became peremptory and, it could be said, automatic. Any other interpretation "would have the effect of depriving the institution of asylum of all content and transforming diplomatic asylum - which is temporary by nature - into indefinite refuge". 77/ Peru, on the other hand, considered that it was only when the Government of the territorial State required that the refugee should leave its territory that the diplomatic agent might in turn require the necessary guarantees. As long as the Government of the territorial State had not availed itself of the right to require that the refugee should leave its territory, the request for guarantees had no legal basis. 78/

54. It may be noted that the Havana Convention contains no express provision on the qualification of the offence giving rise to the request for asylum, an omission which, in conjunction with the absence of definitions of an offence under common law and a political offence, was bound to lead to difficulties in application. The question of the right of qualification occupied a central place in the asylum case and will be considered in chapter II in connexion with the summary of the judgement of the Court of 20 November 1950 (paras. 94-99 below) and the summary of the dissenting opinions of some of the judges (para. 112 below). 79/

55. The Havana Convention has another lacuna: it does not state the penalty to be applied when asylum is granted to a political offender in violation of the conditions laid down in article 2. This lacuna gave rise to the Haya de la Torre

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76/ ICJ Reports, 1950, p. 282.

77/ ICJ, Pleadings, Oral Arguments, Documents, Asylum Case, vol. I, p. 355.

78/ Ibid., p. 148.

79/ The Sixth International Conference of American States in Havana also adopted other conventions which contain provisions on diplomatic asylum. The Convention regarding Diplomatic Officers, adopted on 20 February 1928, states in article 17 that diplomatic officers are obliged to deliver to the competent local authority that requests it any person accused or condemned for ordinary crimes who may have taken refuge in the mission. The Convention regarding Consular Agents, adopted on the same date, states in article 19 that consuls are obliged to deliver, upon the simple request of the local authorities, persons accused or condemned for crimes who may have sought refuge in the consulate.

case, in which the International Court of Justice, as will be seen in chapter II (para. 134 below), declared that, by remaining silent on the point under consideration, the authors of the Convention had intended to leave the adjustment of the consequences of the situation to considerations of convenience or of simple political expediency.

4. The Convention on Political Asylum signed at Montevideo in 1933 80/

56. Pursuant to a resolution on the future codification of international law adopted by the Sixth International Conference of American States on 18 February 1928, the American Institute of International Law was instructed by the Council of the Pan American Union to prepare for submission to the Seventh International Conference of American States draft instruments with a view to the codification of various subjects, including political asylum.

57. The American Institute of International Law therefore prepared a draft instrument on this subject, which was transmitted to the Seventh International Conference of American States, which met at Montevideo at the end of 1933. On the basis of the draft, the Conference on 26 December 1933 adopted the Convention on Political Asylum, which was signed by Argentina, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, 81/ Ecuador, El Salvador, Guatemala, Haiti, 82/ Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Uruguay. It was not signed by the United States delegation, which made the following declaration:

> "Since the United States of America does not recognize or subscribe to, as part of international law, the doctrine of asylum, the delegation of the United States of America refrains from signing the present Convention on Political Asylum". 83/

58. The Convention has nine articles, four of them substantive provisions. 84/

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80/ Text in OAS, Official Records (OEA/SER.X/7), Treaty Series No. 34).

81/ The Dominican Republic ratified the Convention but denounced it later.

82/ Haiti ratified the Convention, later denounced it but then withdrew its denunciation.

83/ The Convention is in force between Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay and Peru (information provided by the Secretariat of the Organization of American States).

84/ Article 5 states that the Convention shall not affect obligations previously entered into by the High Contracting Parties by virtue of international agreements. Articles 6 to 9 contain the final clauses.

In the words of the preamble, it aims to "conclude a Convention on Political Asylum to define the terms of the one signed in Havana" (i.e. the 1928 Convention on Asylum).

59. Article 1 is designed to replace article 1 of the Havana Convention by a new text. The main difference lies, as was shown above (para. 48), in the deletion of the third paragraph of article 1 of the Havana Convention. Another important difference concerns the definition of the conept of the accused person. Under the terms of article 1 of the Montevideo Convention, only persons who have been duly prosecuted or sentenced by ordinary courts are deemed to be accused persons.

60. Article 2 - a key provision - provides that the qualification of the offence as political is the right of the State granting asylum.

61. Article 3 reads as follows:

> "Political asylum, as an institution of humanitarian character, is not subject to reciprocity. Any man may resort to its protection, whatever his nationality, without prejudice to the obligations accepted by the State to which he belongs; however, the States that do not recognize political asylum, except with limitations and peculiarities, can exercise it in foreign countries only in the manner and within the limits recognized by said countries." 85/

62. Article 4 is designed to limit the consequences of possible disputes between the State of Asylum and the territorial State. When the withdrawal of a diplomatic agent is requested by the territorial State because of the discussions that may have arisen in some case of political asylum, he shall be replaced without a breach of diplomatic relations and consequently without breaking the continuity of the protection accorded to the refugee.

5. The Treaty on Political Asylum and Refuge, signed at Montevideo in 1939 86/

63. As will be shown in chapter III below (paras. 142-150), the question of diplomatic asylum arose in a new form and with particular acuteness in connexion with the Spanish civil war. The result was a renewal of interest in the whole

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85/ There is a noteworthy difference between the Spanish and French versions and the English versions of this article: where the Spanish and French texts say that States that recognize political asylum only subject to certain conditions can exercise it only in so far as they have recognized it - a rule that seems difficult to reconcile with the principle, laid down at the beginning of the article, that diplomatic asylum is not subject to reciprocity - the English text provides that States that do not recognize political asylum, except with limitations and peculiarities, can exercise it in foreign countries only in the manner and within the limits recognized by said countries.

86/ Text in OAS, Official Records (OEA/SER.X/1), Treaty Series No. 34.

question of asylum; one way in which this renewed interest was expressed was the formulation of a draft convention on the right of asylum, inspired by the Minister for Foreign Affairs of Argentina, Mr. Saavedra Lamas, which dealt with both diplomatic and territorial asylum. The draft convention was put before the Assembly of the League of Nations (see foot-note 155 below). It was also transmitted to the foreign ministries of Latin American countries, but the question was not included on the agenda of the Eighth International Conference of American States, which met at Lima in 1938. The draft convention none the less served as a basis for the Treaty on Political Asylum and Refuge which was signed on 4 August 1939 by Argentina, Bolivia, Chile, Paraguay, Peru and Uruguay during the Second South American Congress on Private International Law, which met at Montevideo to review the 1889 Treaties (see paras. 33-38 above). 87/

64. The Treaty, longer and more detailed than the earlier one, has a preamble in which the signatory States state that the "principles governing asylum which were established by the Treaty on International Penal Law signed at Montevideo on January 23, 1889 require amplification in order that they may cover the new situations which have arisen and may serve to confirm the doctrines already sanctioned in America". It contains a Chapter I, entitled "On Political Asylum" (arts. 1-10), a Chapter II entitled "On asylum in Foreign Territory" (arts. 11-15), "General Provisions", including an article on the settlement of disputes (art. 16), and final clauses (arts. 17-19). Only the provisions of chapter I will be discussed.

65. Under article 1, diplomatic asylum may be granted without distinction of nationality, but the State which grants asylum does not thereby incur an obligation to admit the refugees into its territory.

66. Article 2 contains several innovations: (1) the places of asylum include, besides those listed in the Havana Convention, embassies and the residences of chiefs of mission; (2) asylum may be granted not only to persons pursued for political offences or under circumstances involving concurrent political offences which do not legally permit of extradition, but also to those "pursued for political reasons". Article 3 denies the benefit of asylum (1) to persons accused of political offences who have been indicted or condemned for common offences by the ordinary tribunals; (2) to deserters from the armed forces "except when the act is clearly of a political character". In the second paragraph it provides that "The determination of the causes which induce the asylum apertains to the State which grants it".

67. Article 4 reproduces a rule which appears in several of the earlier instruments, namely, the obligation to communicate the names of the refugees to the administrative authorities of the locality. However, this obligation is waived in "grave circumstances" or when circumstances make such communication dangerous to the safety of the refugees. Article 5 is also consistent with earlier agreements in providing that refugees shall not be permitted to commit acts which may disturb the public tranquillity or may tend toward participation in or influence upon political activities and in laying down that asylum shall be terminated if this prohibition is violated.

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87/ As at 31 December 1973 the Treaty was in force between Paraguay and Uruguay.

68. Article 6 deals with the question of the removal of the refugee in terms very similar to those of paragraph "Third" of article 2 of the Havana Convention; it states, however, that in the absence of the guarantees demanded for the safety of the refugee, his departure may be postponed until the local authorities make them available.

69. Article 7, reproducing the rule laid down in article 2, "Fourth", of the Havana Convention, provides that refugees, once they have left the territorial State, shall not be landed in any other part of it. The article adds that if an ex-refugee should return to the country in question, he shall not be accorded new asylum if the disturbance which led to the original grant subsists.

70. Article 8, which clearly owes its origin to events which occurred during the Spanish civil war, provides that if the number of refugees exceeds the normal capacity of the places of refuge specified in article 2, the diplomatic agents or military commanders may provide other places for the lodging of the said refugees, the local authorities being notified of that measure.

71. Article 9 provides that men-of-war or military airplanes temporarily located in dry docks or workshops for repairs shall not accord protection to persons who take refuge in them." 88/

72. Article 10 reads as follows:

> "If, in a case of severance of relations, the diplomatic representative who has granted asylum should have to leave the territory of the country where he is located, he shall depart from it accompanied by the refugees; or, if this should be impossible for some reason not dependent upon the choice of the refugees or of the diplomatic agent, he may deliver them to the agent of a third State, with the guaranties specified in this treaty. Such delivery shall be effected by the transfer of the said refugees to the premises of the diplomatic mission which shall have accepted the charge in question, or by leaving the refugees on the premises where the archives of the departing diplomatic mission are kept; and these premises shall remain under the direct protection of the diplomatic agent to whom that function has been intrusted. In either case, the local Ministry for Foreign Affairs shall be duly advised, in conformity with the provisions of Article 4."

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88/ This provision appears almost word for word in the draft convention submitted by Argentina to the Assembly of the League of Nations. It is accompanied by the following commentary in that draft:

> "Although a warship is always a floating portion of the State to which it belongs, it has been thought advisable not to extend the faculty of asylum to the ships being repaired in the shipyards of a foreign country, because of the fact that, at that moment, they exercise no function before the government of that country." (Republic of Argentina, Ministry of Foreign Affairs, Draft convention on the right of asylum, Buenos Aires, 1937).

73. This Treaty is clearly concerned with extending the protection offered by diplomatic asylum and making it more effective. Not only political offenders, but persons pursued for political reasons and even, in some limited cases, persons who have committed related offences and deserters from land and naval forces, may take advantage of asylum. Moreover, asylum may be granted not only in the customarily recognized places but also in the residence of a chief of mission and even in premises specially provided for the lodging of refugees. Finally, the safety of the refugees is further protected by certain guarantees such as, for example, the reservation governing the obligation to communicate the names of the refugees, the provisions concerning the severance of diplomatic relations and the article concerning the guarantees necessary for removal.

6. The Convention on Diplomatic Asylum signed at Caracas in 1954 89/

74. A few months after the International Court of Justice had delivered its judgement in the asylum case, the Council of the Organization of American States, at a meeting on 14 February 1951, adopted a resolution on asylum, 90/ excerpts of which are reproduced below:

> "In view of the statement of the Representative of Guatemala, of February 7, whereby his Government requests that a point on 'Reaffirmation of the Right of Asylum as an American juridical principle' be included in the Program of the Fourth Meeting of Consultation of Ministers of Foreign Affairs; and
>
> "WHEREAS ... it is worth while and desirable, at all times, to strengthen an institution like that of the right of asylum, inspired by noble humanitarian principles ...
>
> "RESOLVES:
>
> ...
>
> "2. To declare that the Right of Asylum is a juridical principle of the Americas set forth in international conventions and included as one of the fundamental rights in the American Declaration of the Rights and Duties of Man, approved by the Ninth International Conference of American States at Bogotá; 91/
>
> "3. To recommend to the Inter-American Juridical Committee that, in its current labors, it give preferential attention to the study of the topic of the regimen of political asylees, exiles, and refugees, with which it was charged by the Council acting provisionally as Organ of Consultation."

75. In pursuance of this resolution, the Inter-American Juridical Committee prepared two draft conventions at its 1952 session, one on territorial asylum and the other on diplomatic asylum. The draft convention on diplomatic asylum largely reproduced the provisions of the 1928 Havana Convention and the 1933 Montevideo Convention. However, it contained important new provisions regarding the evacuation of the asylee: article 10 required the diplomatic agent to request evacuation of the asylee once the latter was granted the status of a political offender and required the territorial State to grant the necessary guarantees and safe-conduct without unwarranted delay; article 11 clarified certain points regarding the conditions under which evacuation was to take place. 92/

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89/ Text in OAS, Official Records (OEA/Ser.X/1), Treaty Series No. 34.

90/ Quoted in OAS, Annals, vol. 3, No. 2, 1951, p. 119.

91/ Reproduced in Yearbook on Human Rights for 1948 (United Nations publication Sales No. 1950.XIV.4), p. 440 et seq.

92/ See the text of the draft in Segunda Reunión del Consejo Interamericano de Jurisconsultos (Buenos Aires, Argentina, 20 April-9 May 1953), Records and Documents, vol. II (document CIJ-19), pp. 81-86.

76. The Inter-American Juridical Committee's draft was transmitted to the Inter-American Council of Jurists, which considered it at its second session at Buenos Aires in April-May 1953 together with two drafts, one submitted by Argentina and the other by Brazil. The Argentine draft convention 93/ partly reproduced the provisions of the Montevideo Treaty of 1939 but also contained some new provisions; among other things, it laid down the rule that the granting of asylum was optional rather than mandatory, excluded terrorists and persons guilty of an attempt on the life of a head of State from the enjoyment of asylum and regulated certain specific situations (overthrow of the Government to which the diplomatic mission granting asylum is accredited, cases in which the territorial State indicates that it intends subsequently to request the extradition of the asylee, etc.). A number of the above-mentioned points were taken into consideration in the Caracas Convention (see in particular, in para. 81 below, articles 2, 10 and 17 of the Caracas Convention).

77. The Brazilian draft convention 94/ gave particular emphasis to the question of qualification and proposed that the settlement of any dispute concerning qualification should be entrusted to an arbitral tribunal composed of three chiefs of mission accredited to the territorial State, two of them to be designated, respectively, by each of the parties, while the third would in principle be the dean of the diplomatic corps unless the parties agreed otherwise. According to one variant, the asylee would remain in the mission throughout the proceedings, which, depending on the tribunal's decision, would result in the surrender of the asylee or in the issue of a safe-conduct. According to a second variant, the asylee would remain in custody in the country of asylum during the proceedings. The tribunal would decide whether he would be released or detained during the extradition proceedings. This Brazilian proposal was not adopted, and the rule giving the right of qualification to the State of asylum is the one that prevailed in the Caracas Convention (see article 4 of that Convention in para. 81 below).

78. The Inter-American Council of Jurists referred the draft conventions of the Inter-American Juridical Committee, Argentina and Brazil to a working group; the latter prepared a new draft, 95/ which was approved by the Council on 8 May 1953, with a number of changes, by 15 votes in favour with 4 abstentions (Brazil, the Dominican Republic, Peru and the United States). The draft convention thus adopted 96/ was transmitted to the Tenth International Conference of American States, held at Caracas in March 1954.

79. On the basis of this draft, the Tenth Conference on 28 March 1954 adopted a Convention on Diplomatic Asylum, 97/ which was signed by Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, 98/ Cuba, the Dominican

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93/ See the text of the draft in ibid., pp. 81-86.

94/ See the text of the draft in ibid., pp. 98-102.

95/ See the text of this draft in ibid., pp. 126-129.

96/ Reproduced in the Final Act of the Second Meeting of the Inter-American Council of Jurists, document CIJ-17.

97/ On the same day, the Conference adopted a convention on territorial asylum.

98/ Signed on 16 June 1954.

Republic, 99/ Ecuador, El Salvador, Guatemala, 100/ Haiti, 101/ Honduras, 102/ Mexico, Nicaragua, Panama, Paraguay, Peru, 103/ Uruguay 104/ and Venezuela. 105/

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99/ With the following reservations:

"The Dominican Republic subscribes to the above Convention with the following reservations:

"First: The Dominican Republic does not agree to the provisions contained in Article 7 and those following with respect to the unilateral determination of the urgency by the State granting asylum; and

"Second: The provisions of this Convention shall not be applicable, consequently, insofar as the Dominican Republic is concerned, to any controversies that may arise between the territorial State and the State granting asylum, that refer specifically to the absence of a serious situation or the non-existence of a true act of persecution against the asylee by the local authorities."

100/ With the following reservation:

"We make an express reservation to Article 2, wherein it declares that the States are not obligated to grant asylum, because we uphold a broad, firm concept of the right to asylum.

"Likewise, we make an express reservation to the final paragraph of Article 20 (Twenty), because we maintain that any person, without any discrimination whatsoever, has the right to the protection of asylum."

101/ Haiti ratified the Convention, later denounced it but then withdrew its denunciation.

102/ With the following reservation:

"The delegation of Honduras subscribes to the Convention on Diplomatic Asylum with reservations with respect to those articles that are in violation of the Constitution and laws in force in the Republic of Honduras."

103/ Signed on 22 January 1960.

104/ With the following reservations:

"The Government of Uruguay makes a reservation to Article 2, in the part that stipulates that the authority granting asylum, is, in no case, obligated to grant asylum nor to state its reasons for refusing it. It likewise makes a reservation to that part of Article 15 that stipulates: '... the only requisite being the presentation, through diplomatic channels, of a safe-conduct, duly countersigned and bearing a notation of his status as asylee by the diplomatic mission that granted asylum. En route, the asylee shall be considered under the protection of the State granting asylum.' Finally, it makes a reservation to the second paragraph of Article 20, since the Government of Uruguay understands that all persons have the right to asylum, whatever their sex, nationality, belief, or religion."

105/ The Convention is in force between Brazil, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Haiti, Mexico, Panama, Paraguay, Peru, Uruguay (with a reservation) and Venezuela (information provided by the secretariat of the Organization of American States.

80. Among the salient points of this Convention, which is longer and more detailed than its predecessors, are the following: the first paragraph of article 1, which unequivocally imposes on States Parties the obligation to respect asylum in accordance with the provisions of the Convention; article 2, which makes asylum a discretionary right of the State; article 6, which gives an illustrative definition of the concept of urgency; articles 4 and 7, which stipulate that it rests with the State granting asylum to determine the nature of the offence and whether urgency is involved; article 10, which closes a gap in the earlier conventions by making provision for the contingency that the government of the territorial State has not yet been recognized by the State granting asylum (which may happen, for example, in the case of a government established as a result of the revolution which gave rise to the request for asylum); article 19, which covers the possibility of a rupture of diplomatic relations; and article 20, which stipulates that asylum is not subject to reciprocity.

81. In order to illustrate the relationship between this Convention and those which preceded it, the substantive provisions of all these instruments have been reproduced below under seven major headings, so as to enable the solutions provided by the Conventions concerned for each of the questions considered to be compared: 106/

(1) Recognition of the right to grant asylum

Article 1

Asylum ... shall be respected by the territorial State in accordance with the provisions of this Convention.

...

Article 2

Every State has the right to grant asylum; but it is not obligated to do so or to state its reasons for refusing it.

The corresponding provisions of the earlier conventions read as follows:

Havana Convention of 1928:

"/Asylum/ ... shall be respected to the extent in which allowed, as a right or through humanitarian toleration, by the usages, the conventions or the laws of the country in which granted and in accordance with the ... provisions /of the Convention/."
(art. 2, first para.)

106/ This presentation has in some cases required articles to be split and their order altered. It should be noted, however, that the substantive provisions of the four Conventions in question are reproduced almost in their entirety.

Montevideo Convention of 1933:

"Any man may resort to its protection ... without prejudice to the obligations accepted by the State to which he belongs."
(art. 3)

Montevideo Treaty of 1939:

"Asylum may be granted ... without prejudice to the rights and obligations of protection appertaining to the State to which the refugees belong."
(art. 1, first para.)

(2) Places where asylum may be granted

Article 1

Asylum granted in legations, war vessels, and military camps or aircraft ... shall be respected ...

For the purposes of this Convention, a legation is any seat of a regular diplomatic mission, the residence of chiefs of mission, and the premises provided by them for the dwelling places of asylees when the number of the latter exceeds the normal capacity of the buildings.

War vessels or military aircraft that may be temporarily in shipyards, arsenals, or shops for repair may not constitute a place of asylum.

The corresponding provisions of the earlier conventions read as follows:

Havana Convention of 1928:

"Asylum ... in legations, warships, military camps or military aircraft, shall be respected ..."
(art. 2, first para.)

Montevideo Convention of 1933:

"... legations, warships, military camps, or airships ..."
(art. 1, first para.)

Montevideo Treaty of 1939:

"Asylum may be granted only in embassies, legations, men-of-war, military camps or military airplanes ... The chiefs of mission may also receive refugees in their residences, in cases where the former do not live on the premises of the embassies or legations."
(art. 2)

"When the number of refugees exceeds the normal capacity of the places of refuge specified in Article 2, the diplomatic agents or military commanders may provide other places, under the protection of their flag, for the safety and lodging of the said refugees. In such cases, the agents or commanders must communicate that fact to the authorities."
(art. 8)

"Men-of-war or military airplanes temporarily located in dry-docks or workshops for repairs shall not accord protection to persons who take refuge in them."
(art. 9)

(3) To whom may asylum be granted?

Article 1

Asylum granted ... to persons being sought for political reasons or for political offences shall be respected ...

(i) Persons who may be given asylum

...

The corresponding provisions of the earlier conventions read as follows:
Havana Convention of 1928:
"Asylum granted to political offenders ... shall be respected ..."
(art. 2, first para.)
Montevideo Treaty of 1939:
"Asylum may be granted ... exclusively to persons pursued for political reasons or offences, or under circumstances involving concurrent political offences, which do not legally permit of extradition."
(art. 2)

(ii) Persons who may not be given asylum

Article 3

It is not lawful to grant asylum to persons who, at the time of requesting it, are under indictment or on trial for common offences or have been convicted by competent regular courts and have not served the respective sentence, nor to deserters from land, sea, and air forces, save when the acts giving rise to the request for asylum, whatever the case may be, are clearly of a political nature.

Persons included in the foregoing paragraph who de facto enter a place that is suitable as an asylum shall be invited to leave or, as the case may be, shall be surrendered to the local authorities, who may not try them for political offences committed prior to the time of the surrender.

The corresponding provisions of the earlier conventions read as follows:
Havana Convention of 1928:
"It is not permissible for States to grant asylum ... to persons accused or condemned for common crimes, or to deserters from the army or navy."
(art. 1, first para.)

"Persons accused of or condemned for common crimes taking refuge in any of the places mentioned in the preceding paragraph shall be surrendered upon request of the local government."
(art. 1, second para.)

Montevideo Convention of 1933:

"It shall not be lawful for the States to grant asylum ... to those accused of common offences who may have been duly prosecuted or who may have been sentenced by ordinary courts of justice, nor to deserters of land or sea forces."
(art. 1, first para.)

"The persons referred to in the preceding paragraph who find refuge in some of the above-mentioned places shall be surrendered as soon as requested by the local government."
(art. 1, second para.)

Montevideo Treaty of 1939:

"Asylum shall not be granted to persons accused of political offences, who shall have been indicted or condemned previously for common offences, by the ordinary tribunals."
(art. 3, first para.)

"Asylum may not be granted to deserters from the sea, land, or air forces, except when the act is clearly of a political character."
(art. 3, third para.)

(iii) The question of nationality

Article 20

...

Every person is under /the/ protection /of diplomatic asylum/, whatever his nationality.

The corresponding provisions of the earlier conventions read as follows:

Montevideo Convention of 1933:

"... any man may resort to its protection, whatever his nationality ..."
(art. 3)

Montevideo Treaty of 1939:

"Asylum may be granted without distinction of nationality ..."
(art. 1, first para.)

(4) Urgency

Article 5

Asylum may not be granted except in urgent cases ...

Article 6

Urgent cases are understood to be those, among others, in which the individual is being sought by persons or mobs over whom the authorities have lost control, or by the authorities themselves, and is in danger of being deprived of his life or liberty because of political persecution and cannot, without risk, ensure his safety in any other way.

The corresponding provision of the Havana Convention reads as follows:

"Asylum may not be granted except in urgent cases ..."
(art. 2, "First")

(5) Duration of asylum

Article 5

Asylum may not be granted except for the period of time strictly necessary for the asylee to depart from the country with the guarantees granted by the Government of the territorial State, to the end that his life, liberty, or personal integrity may not be endangered, or that the asylee's safety is ensured in some other way.

The corresponding provision of the Havana Convention reads as follows:

"Asylum may not be granted except ... for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety."
(art. 2, "First")

(6) Appreciation of the conditions required for the grant or maintenance of asylum

Article 4

It shall rest with the State granting asylum to determine the nature of the offence or the motives for the persecution.

Article 9

The official furnishing asylum shall take into account the information furnished to him by the territorial government in forming his judgement as to the nature of the offence or the existence of related common crimes; but this decision to continue the asylum or to demand a safe-conduct for the asylee shall be respected.

(i) Qualifications for the grounds for asylum

The corresponding provisions of the earlier conventions read as follows:

1933 Montevideo Convention:

"The judgement of political delinquency concerns the State which offers asylum."
(art. 2)

1939 Montevideo Treaty:

"The determination of the causes which induce the asylum appertains to the State which grants it."
(art. 3, second para.)

(ii) determination of urgency

Article 7

... it shall rest with the State granting asylum to determine the degree of urgency of the case.

This provision has no equivalent in the earlier conventions.

(7) The obligations of the State of asylum during the period of asylum

Article 8

The diplomatic representative, commander of a warship, military camp, or military airship, shall, as soon as possible after asylum has been granted, report the fact to the Minister of Foreign Affairs of the territorial State, or to the local administrative authority if the case arose outside the Capital.

The corresponding provisions of the earlier conventions read as follows:

(i) Obligation to inform the territorial State

1928 Havana Convention:

"Immediately upon granting asylum, the diplomatic agent, the commander of a warship, or military camp or aircraft, shall report the fact to the Minister of Foreign Relations of the State of the person who has secured asylum, or to the local administrative authority, if the act occurred outside the Capital."
(art. 2, "Second")

1939 Montevideo Treaty:

"The diplomatic agent or military commander who grants asylum shall immediately communicate the names of the refugees to the Ministry for Foreign Affairs of the State where the act in question occurred, or to the administrative authorities of the locality, if the said act has taken place outside the seat of government, except when grave circumstances materially impede such communication or make it dangerous to the safety of the refugees."
(art. 4)

(ii) Obligations concerning the behaviour of persons granted asylum

Article 18

The official furnishing asylum may not allow the asylee to perform acts contrary to the public peace or to interfere in the internal politics of the territorial State.

The corresponding provisions of the earlier conventions read as follows:

1928 Havana Convention:

"While enjoying asylum, refugees shall not be allowed to perform acts contrary to the public peace". (art. 2, "Fifth")

1939 Montevideo Treaty:

"While the asylum continues, the refugees shall not be permitted to commit acts which may disturb the public tranquillity or may tend toward participation in, or influence upon, political activities. The diplomatic agents or military commanders shall require of the refugees information as to their personal history, and a promise not to enter into external communications without the express intervention of the former. This promise shall be in writing and signed; and if the refugees should refuse to accept, or should violate, any of these conditions, the diplomatic agent or commander shall immediately terminate the asylum. The refugees may be forbidden to carry with them articles other than those destined for personal use, the papers which belong to them, and the money necessary for their living expenses, the deposit of any other securities or articles in the place of asylum being prohibited."
(art. 5)

(8) The end of asylum

Article 11

The Government of the territorial State, may, at any time, demand that the asylee be withdrawn from the country, for which purpose the said State shall grant a safe-conduct and the guarantees stipulated in article 5.

(i) The right of the territorial State to demand the removal of the refugee and the correlative obligations of that State

The corresponding provisions of the earlier conventions read as follows:

1928 Havana Convention:

"The Government of the State may require that the refugee be sent out of the national territory within the shortest time possible; and the diplomatic agent of the country who has granted asylum may in turn require the guarantees necessary for the departure of the refugee with due regard to the inviolability of his person, from the country."
(art. 2, "Third")

1939 Montevideo Treaty:

"The Government of the State may demand that a given refugee be removed from the national territory within the shortest possible time; and the diplomatic agent or military commander who has granted the asylum may, for his part, demand the necessary guarantees before the refugee is permitted to leave the country, with due regard for the inviolability of the latter's person, and of the papers belonging to him and carried with him at the time when he received asylum, as well as for the funds necessary to support him for a reasonable time. In the absence of such guarantees, the departure may be postponed until the local authorities shall make them available."
(art. 6)

(ii) The right of the State of asylum to demand the removal of the person granted asylum and the corresponding obligations of the territorial State

Article 12

Once asylum has been granted, the State granting asylum may request that the asylee be allowed to depart for foreign territory, and the territorial State is under obligation to grant immediately, except in case of force majeure, the necessary guarantees, referred to in article 5, as well as the corresponding safe-conduct.

This provision has no equivalent in the earlier conventions.

(iii) The removal of the refugee - physical conditions of removal

Article 13

In the cases referred to in the preceding articles, the State granting asylum may require that the guarantees be given in writing, and may take into account, in determining the rapidity of the journey, the actual conditions of danger involved in the departure of the asylee.

The State granting asylum has the right to transfer the asylee out of the country. The territorial State may point out the preferable route for the departure of the asylee, but this does not imply determining the country of destination.

If the asylum is granted on board a warship or military airship, departure may be made therein, but complying with the previous requisite of obtaining the appropriate safe-conduct.

Article 14

The State granting asylum cannot be held responsible for the prolongation of asylum caused by the need for obtaining the

information required to determine whether or not the said asylum is proper, or whether there are circumstances that might endanger the safety of the asylee during the journey to a foreign country.

These provisions have no equivalent in the earlier conventions.

The case of transit through a third country

Article 15

When, in order to transfer an asylee to another country, it may be necessary to traverse the territory of a State that is a party to this Convention, transit shall be authorized by the latter, the only requisite being the presentation, through diplomatic channels, of a safe-conduct, duly countersigned and bearing a notation of his status as asylee by the diplomatic mission that granted asylum.

En route, the asylee shall be considered under the protection of the State granting asylum.

This provision has no equivalent in the earlier conventions.

Point of landing of the person enjoying asylum

Article 16

Asylees may not be landed at any point in the territorial State or at any place near thereto, except for exigencies of transportation.

The corresponding provisions of the earlier conventions read as follows:

1928 Havana Convention:

"Refugees shall not be landed in any point of the national territory nor in any place too near thereto." (art. 2, "Fourth")

1939 Montevideo Treaty:

"Once they have left the State, the refugees shall not be landed in any other part of it. In case an ex-refugee should return to the country in question, he shall not be accorded new asylum if the disturbance which led to the original grant subsists." (art. 7)

Question of the admission of the refugee to the territory of the State of asylum

Article 17

Once the departure of the asylee has been carried out, the State granting asylum is not bound to settle him in its territory; but it may not return him to his country of origin, unless this is the express wish of the asylee.

The corresponding provision of the 1939 Montevideo Treaty reads as follows:

"The State which grants asylum does not thereby incur an obligation to admit the refugees into its territory, except in cases where they are not given admission by other States."
(art. 1, second para.)

The case in which the territorial State signifies its intention of demanding the extradition of the person enjoying asylum

Article 17

...

If the territorial State informs the official granting asylum of its intention to request the subsequent extradition of the asylee, this shall not prejudice the application of any provision of the present Convention. In that event, the asylee shall remain in the territory of the State granting asylum until such time as the formal request for extradition is received, in accordance with the juridical principles governing that institution in the State granting asylum. Preventive surveillance over the asylee may not exceed thirty days.

Payment of the expenses incurred by such transfer and of preventive control shall devolve upon the requesting State.

These provisions have no equivalent in the earlier conventions.

(9) Other issues

(i) Non-recognition by the State of asylum of the Government of the territorial State

Article 10

The fact that the Government of the territorial State is not recognized by the State granting asylum shall not prejudice the application of the present Convention, and no act carried out by virtue of this Convention shall imply recognition.

This provision has no equivalent in the earlier conventions.

(ii) Recall of the diplomatic agent or severance of diplomatic relations

Article 19

If as a consequence of a rupture of diplomatic relations the diplomatic representative who granted asylum must leave the territorial State, he shall abandon it with the asylees.

If this is not possible for reasons independent of the wish of the asylee or the diplomatic representative, he must surrender them to the diplomatic mission of a third State, which is a party to this Convention, under the guarantees established in the Convention.

If this is also not possible, he shall surrender them to a State that is not a party to this Convention and that agrees to maintain the asylum. The territorial State is to respect the said asylum.

The corresponding provisions of the earlier conventions read as follows:

1933 Montevideo Convention:

"When the withdrawal of a diplomatic agent is requested because of the discussions that may have arisen in some case of political asylum, the diplomatic agent shall be replaced by his Government, and his withdrawal shall not determine a breach of diplomatic relations between the two States."
(art. 4)

1939 Montevideo Treaty:

"If, in a case of severance of relations, the diplomatic representative who has granted asylum should have to leave the territory of the country where he is located, he shall depart from it accompanied by the refugees; or, if this should be impossible for some reason not dependent upon the choice of the refugees or of the diplomatic agent, he may deliver them to the agent of a third State, with the guarantees specified in this treaty. Such delivery shall be effected by the transfer of the said refugees to the premises of the diplomatic mission which shall have accepted the charge in question, or by leaving the refugees on the premises where the archives of the departing diplomatic mission are kept; and these premises shall remain under the direct protection of the diplomatic agent to whom that function has been entrusted. In either case, the local Ministry for Foreign Affairs shall be duly advised, in conformity with the provisions of article 4."
(art. 10)

(iii) The question of reciprocity

Article 20

Diplomatic asylum shall not be subject to reciprocity.

...

The corresponding provisions of the earlier conventions read as follows:

1933 Montevideo Convention:

"Political asylum, as an institution of humanitarian character, is not subject to reciprocity ...; however, the States that do not recognize political asylum, except with limitations and peculiarities, can exercise it in foreign countries only in the manner and within the limits recognized by said countries."
(art. 3)

# CHAPTER II

# DECISIONS OF TRIBUNALS

## 1. Decisions of municipal tribunals 107/

82. A number of decisions of municipal tribunals refer to the concept of extraterritoriality. To the limited extent to which that concept is linked to the institution of diplomatic asylum, it seemed useful to give, on a strictly illustrative basis, 108/ a very brief summary of the decisions in question.

83. In the Couhi case, 109/ the Italian Criminal Court of Cassation held, in a decision of 11 February 1921, that a crime committed in a foreign country at an Italian embassy, legation or consulate by an Italian who did not belong to the diplomatic or consular service must be held to be committed abroad. In the Societé anonyme des grands Garages parisiens case, 110/ a French Conseil de Préfecture held, on 22 December 1930, that the fiction of extraterritoriality was a privilege enjoyed by persons attached to the diplomatic service for themselves and for objects intended for their use in the hôtels and other places occupied by them; the sales of motor-cars to embassies or legations could not be treated as exports, since the embassies or legations in question could not be considered as being outside France. In a decision of 20 June 1930, 111/ the German Federal Insurance Office declared that the principle of the inviolability of the premises of the official representation, although based on the principle of extraterritoriality, did not include the fiction that the house of the official representation was to be regarded as territory of the sending State. Accordingly, the employment of a German employee with an official representation of Germany or of a German State in a foreign State could not be regarded as employment in Germany. In the Afghan Embassy case, 112/ the German Reichsgericht (in Criminal Matters) held, in a decision of 8 November 1934, that the German courts had jurisdiction with regard to a crime committed in the Afghan Legation in Berlin, since that crime should be considered as having been committed in German territory. The tribunal expressed itself as follows:

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107/ The decisions of municipal tribunals referred to in this section are not concerned, properly speaking, with diplomatic asylum. It nevertheless seemed useful to mention them here because of the indirect interest of such decisions, and more especially of their preambular paragraphs stating the reasons adduced, with regard to the question under consideration.

108/ Preference has been given to relatively recent cases, but better-known examples could have been cited, such as the Nitchencoff case described in Moore, A Digest of International Law, vol. II, p. 778, or the Trochanoff and Munir Pasha v. Aristarchi Bey cases, both mentioned by Sir Cecil Hurst in "Les immunités diplomatiques", Recueil des Cours de l'Académie de droit international, 1926, vol. II, p. 146 et seq.

109/ International Law Reports, 1919-1922, p. 305.

110/ Ibid., 1929-1930, p. 301.

111/ Ibid., p. 305.

112/ Ibid., 1933-1934, p. 385.

"The principles of international law do not lay down that the residential and official premises of the envoy are foreign territory and that persons and things with respect to which extraterritoriality can be claimed must, when on those premises, be regarded as being outside national territory. ... The privilege of extraterritoriality goes only so far as is necessary in order to secure the inviolability of the envoy and his retinue. ... It would be contrary to the purpose of the principle of inviolability of envoys to regard a crime committed against the envoy on the legation premises as a crime committed abroad."

Similarly, the Court of Appeals of the District of Columbia, in a judgement delivered on 12 July 1963 in the case of Fatemi et al. v. United States, 113/ held that a foreign embassy was not a part of the territory of the sending State and that persons committing crimes against local law therein could be prosecuted if not protected by the inviolability of diplomatic premises or by diplomatic immunity. The court added:

"The modern tendency among writers is towards rejecting the fiction of exterritoriality. ... As early as 1867 the doctrine of extraterritoriality was abandoned by European nations. Recently, in the case of R. v. Kent, 114/ the British courts held that 'A crime committed in a foreign embassy is a crime committed in the United Kingdom and the offender, if not protected by diplomatic immunity, is liable to prosecution in British courts'."

Lastly, in the case of Belgian State v. Maréchal, 115/ the Belgian Conseil d'Etat, in a decision of 30 April 1954, stated, in connexion with a claim in respect of war damage arising out of the destruction of property in the buildings of the Belgian Embassy in Berlin, that the parts of foreign territory in which international custom or treaty gave Belgium rights of extraterritoriality did not, by virtue of that fact, become Belgian territory.

84. Of more direct interest in connexion with the question under consideration is the decision of 15 October 1953 by the Jerusalem District Court Execution Office in the case of Heirs of Shababo v. Heilen. 116/

85. These are the facts in the case: Following a car accident in which Heilen, a soldier in the Belgian army on duty with the Belgian Consulate-General, had run over and killed a pedestrian, the heirs of the victim brought an action for damages against Heilen, the Consulate-General of Belgium in Jerusalem and the Consul General of Belgium in Israel. After judgement had been given against Heilen, 117/ the judgement creditors sought to enforce the judgement. As the judgement debt was

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113/ Ibid., vol. 34, p. 148.

114/ Ibid., 1941-1942, p. 365.

115/ Ibid., 1954, p. 249.

116/ Ibid., 1953, p. 400 et seq.

117/ See International Law Reports, 1953, p. 391.

not paid, application was made to the Chief Execution Officer for examination of the judgement debtor as to means. The judgement debtor having failed to appear in court in response to a duly issued summons, a warrant for his arrest was issued. It then appeared that Heilen was remaining within the precincts of the Belgian Consulate-General in Jerusalem, and although the police were normally bound to arrest a judgement debtor wherever he might be and bring him before the Execution Office, they felt in this case, in accordance with instructions received, that they were not entitled to enter the precincts of the Consulate-General and effect therein an arrest contrary to the wish of the Consul-General. Application was thereupon made by the judgment creditor to the Chief Execution Office for an order to the police to enter the Consulate-General for the purpose of making the arrest. The judgement debtor was not represented at the hearing, but the representative of the Attorney-General opposed the application, arguing that the warrant could only be executed outside the area of the Consulate-General.

86. The Chief Executive Officer held that there was no principle of international law which permitted the premises of a Consulate-General to be used as a place of refuge so as to frustrate the normal course of justice. He said inter alia:

> "The representative of the Attorney-General argued that the entry of the police into the building of the Consulate-General using force if need be, breaking down doors, etc., is tantamount to an act of execution against it, that is to say, any step such as this is to be regarded as an act in rem for executing the judgment, which is forbidden, according to the argument of the representative of the Attorney-General. He added that even if the Consul-General is not entitled, according to the rules of public international law, to refuse entry to the police, as agents of the Execution Office, or to prevent them from arresting the judgment debtor who is inside the building seeking asylum, then this would still not entitle the police to break into the premises and meet one wrong by another. The correct procedure, so he argued, would be for them to act through the diplomatic channels. It appears, therefore, that there are two questions involved: First, is the Consul-General entitled to oppose the entry of the police into the Consulate-General for the purpose of arresting a judgment debtor inside its premises; and secondly, if the answer is in the negative, are the police entitled, nonetheless, in the face of unjustified opposition, to break into the premises for the purpose of effecting the arrest?
>
> "I consider that the refusal of the Consul-General to allow the police to enter the Consulate-General's premises and to arrest the judgment debtor is completely unfounded in international law. A considerable number of authorities were cited to me by counsel for the plaintiffs, and these make it clear that no such immunity is granted to the premises of consulates.
>
> "...
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> "... What we are concerned with is the right of entry into the Consulate-General and the right of arrest there. These rights can only be challenged if it can be established that the Consulate-General is immune from them by virtue of diplomatic immunity. This is not the case. All the authorities of

international law show that a consulate does not enjoy this immunity. Oppenheim, International Law, 6th edition, vol. I, p. 752, dealing with this subject, stresses on p. 754 that the inviolability of consular premises is one of the matters frequently stipulated for in treaties between States. Hackworth, Digest of International Law, vol. 2, paragraph 191, p. 621, contains the following statement of the law:

"'Foreign ambassadors, ministers, and other accredited diplomatic officers are entitled under international law to certain well-recognized immunities from the local jurisdiction, including, among others, immunity of their official residences and offices from invasion by local authorities. Such authorities may not enter an embassy or a legation for the purpose of serving legal process or of making an arrest. While foreign consular officers do not under international law share this diplomatic immunity, they are nevertheless, as representatives of their governments bearing commissions from their own government and recognized as such officials by the government of the state in which they serve, entitled to special respect and consideration by the local authorities. They may usually display on the buildings or offices used by them for official purposes the coat of arms and the national flag of their country. The consular archives and other official property of the consulate are exempt from search or other interference by the local authorities, and not infrequently the consular buildings or offices themselves are declared by treaty provisions to be inviolable. Such treaty provisions, however, are usually coupled with prohibition against the use of the consular premises for purposes of asylum.'

"...

"It is sufficient for me to recall the distinction existing between diplomatic representatives and consular representatives with regard to inviolability. A consulate does not enjoy such immunity. This is the rule, and any derogation from it has to be provided for by treaty. See also Morgenstern in British Year Book of International Law, vol. 25 (1948), p. 236, at pp. 250 and 251.

"Furthermore, even if the Consulate is granted immunity of this character by virtue of some agreement or treaty, the common practice is, as Hackworth points out in the passage already cited, to interpret such immunity as being subject to a general reservation prohibiting the Consul from allowing the Consulate premises to be used for purposes of asylum (compare also the various agreements regarding the immunities of the United Nations buildings, as expounded by Brandon in British Year Book of International Law, vol. 28 (1951), p. 101). In so far as concerns premises of a diplomatic mission entitled to this immunity by international law, the question arises in what circumstances is it permissible to grant asylum to refugees (see Miss Morgenstern's article already cited). The representative of the Attorney-General argued that the whole problem of asylum relates only to 'political offenders', and as the judgment debtor in this case does not belong to that category, it is impossible to treat his case by way of analogy. I am fully aware that the Consul has not sought to base his refusal on the ground of asylum, but it is obvious, in my

view, that his refusal to permit the entry of the police into the consular premises in order therein to carry out the arrest is tantamount to granting asylum to the judgment debtor, who is sheltering, so to speak, in the shadow of the Consul's immunity. It is true that the judgment debtor is not a man fleeing from a criminal trial, but his case would seem to be a fortiori, that is to say, if it is forbidden to grant asylum to an offender (except a political offender on humanitarian grounds if he is a fugitive from a miscarriage of justice or from mob violence), there is even less justification for extending asylum to a man who is avoiding the duly-constituted civil authority which is in the process of executing a civil judgment against him. The common feature in both these cases is the negative factor, namely, that the diplomatic representatives, let alone the consular representatives, are not entitled to close their doors in the face of the proper civil authority seeking entry in order to effect a lawful arrest. This is not the purpose for which the franchise de l'hotel exists.

"I now turn to the last question, namely, are the police entitled forcibly to enter the Consulate-General against the will of the Consul-General having regard to his unjustified refusal to permit such entry, or is the redress to be sought only through the diplomatic channel? Here, too, there is a large number of clear authorities supporting the argument of counsel for plaintiffs. Again I wish to stress that these authorities refer to diplomatic immunity, and their application to a case of alleged consular immunity is, therefore, all the stronger. Oppenheim at p. 713 states:

"'... The immunity of domicile granted to diplomatic envoys comprises the inaccessibility of these residences to officers of justice, police, of revenue, and the like, of the receiving States without the special consent of the respective envoys. Therefore, no act of jurisdiction or administration of the receiving Government can take place within these residences, except by special permission of the envoys... But such immunity of domicile is granted only in so far as it is necessary for the independence and inviolability of envoys, and the inviolability of their official documents and archives. If an envoy abuses this immunity, the receiving Government need not bear it passively. There is, therefore, no obligation on the part of the receiving State to grant an envoy the right of affording asylum to criminals, or to other individuals not belonging to his suite. Of course, an envoy need not deny entrance to criminals who want to take refuge in the embassy. But he must surrender them to the prosecuting Government at its request; and if he refuses, any measures may be taken to induce him to do so, apart from such as would involve an attack on his person. Thus, the embassy may be surrounded by soldiers, and eventually the criminal may even forcibly be taken out of the embassy.' (My emphasis.)

"Similarly, Miss Morgenstern in the 1948 volume of the British Year Book cites, at p. 251, footnote I, the following instruction from the Law Officers of the Crown:

/...

"'If (the consul) refuses to give entry (for the purpose of arrest of any person charged with crime, whether of a political nature or not) arrest might be made without his concurrence.'

"To conclude, the refusal of the Consul-General to permit the police to enter the Consulate-General and arrest a man who has by the process of law been found liable to indemnify the widow and children of a man killed by him, is a serious act derogating from the sovereignty of the State and one which constitues interference in a matter within its exclusive jurisdiction. This is what the International Court of Justice at The Hague has had to say regarding such an act:

"'Such a derogation from the territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.' (I.C.J. Reports, 1950, p. 275.)

"No such legal basis has been established in the case before me.

"For these reasons I am of the opinion that my previous order of arrest is not to be limited. My opinion is that the police, who are under the obligation to execute the warrant of arrest issued by the Execution Office, are entitled, and in case of need even bound, to execute the warrant inside consular premises, regardless of whether or not their entry upon such premises should be opposed."

(Report: Pesakim Mehoziim, vol. 9 (1954), p. 502.)

NOTE. - Before this warrant could be executed, Heilen's period of compulsory military service in the Belgian Army came to an end and he succeeded in leaving Israel. The issue was then taken up through the diplomatic channels, and in the course of conversations the Belgian Government maintained its point of view according to which the Jerusalem District Court had no jurisdiction in this case at all. A compromise solution was eventually reached, whereby the Belgian Government agreed to make a payment of thirty thousand Israel Pounds, a sum in fact slightly greater than that awarded by the Court.

87. With regard to the question of asylum on ships, mention can be made, again on an illustrative basis, of several decisions dealing with the legal status of warships and merchant ships. In the Vilca case, the Supreme Court of Chile held, in a decision rendered on 15 May 1929, 118/ that under the rules of international law a warship enjoyed the privileges of extraterritoriality. On 13 December 1932, a German court (the Prussian Supreme Administrative Court), taking up the question of whether a warship constituted part of the territory of the home State, held that under international law they were regarded as "moving territories" but added: 119/

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118/ See International Law Reports, 1931-1932, p. 293.

119/ Ibid., pp. 93-94.

> "The sole purpose of this fiction is to subject the acts occurring on board the ships to a given jurisdiction. It would be an exaggeration of the fiction to hold that a trade carried on on board a sea-going vessel was so carried on on fictitious land."

Another German court, the Administrative Court of Baden, defined as follows, in a decision of 21 June 1932, the distinction made in that regard between warships and merchant ships: 120/

> "According to recognized principles of constitutional and international law, national ships, after having left territorial waters and when on the high seas, are regarded as moving parts of the States whose flag they fly. It is only in respect of State-owned vessels that the principle prevails that they are subject to the jurisdiction of their State also in foreign territorial waters and rivers; as regards trading ships this only applies to ships while on the high seas, and to a certain extent while in coastal waters."

In a case in which the Kingdom of Greece and the Federal Republic of Germany were the opposing parties, the Second Chamber of the German Arbitral Commission on Property, Rights and Interests stated in a decision of 28 June 1960: 121/

> "Although the authors of international law often describe the trading vessel on the open sea as 'floating territory' of the State under whose flag it sails, this is merely a metaphorical expression to signify that, under these circumstances, the vessel remains under the sovereignty of that State. But that it cannot really be a part of its territory has been luminously demonstrated by Verdross when stating that this 'floating territory' cannot be surrounded by any territorial waters and that it cannot have the effect, either in respect of height or of depth, of extending the sovereignty of such State over the air-space above the vessel or over the portion of the sea underneath it (cf. Verdross, Völkerrecht, 4th ed., 1959, p. 217 et seq.). Besides, international law provides several exceptions to the sovereignty of a State over its merchant fleet on the open sea ..."

A United States court, the District Court, Southern District, New York, observed in a decision of 27 September 1963: 122/

> "Even though an American flag ship may for some purposes be deemed juridically a part of the United States, it does not follow that it is territorially a part of the United States ... the ordinary concept of 'territory' of the United States, or 'possessions' of the United States, would not include a ship in a foreign port in a foreign land."

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120/ Ibid., p. 94.

121/ Ibid., vol. 34, p. 266.

122/ Ibid., p. 41.

88. More directly related to the question under consideration is a decision rendered on 9 February 1885 by a Nicaraguan court. 123/ A political fugitive from Nicaragua named Gómez had taken passage at San José de Guatemala for Punta Arenas, Costa Rica, on board the United States mail steamer Honduras which was to enter en route the port of San Juan del Sur, Nicaragua. The Government of Nicaragua made it known that it intended to have Mr. Gómez arrested upon the arrival of the Honduras at San Juan del Sur. When he was requested by the authorities of Nicaragua to deliver Mr. Gómez, the captain of the Honduras, following the instructions of the United States' Minister to Central America, refused to comply with the request and set sail without proper clearance papers. 124/ An information was filed in a criminal court of instance of Nicaragua, charging the captain with the crime of "want of respect for the authorities" under article 177 of the Penal Code of Nicaragua. The Court held inter alia

(1) that the "open resistance or disobedience" to authority, which was essential to the crime in question, was not "clearly shown", because, while it was true that the captain did not comply with the request to deliver up Mr. Gómez, it was also true that the obligation to do so "did not exist, or at least is doubtful", and still more so in the form in which the demand was made, "since, although the ship from which such delivery was demanded is a merchant ship, and ships of this class, according to the general principles of international law, are subject to the local jurisdiction, this subjection is not absolute according to those same principles, but limited to crimes, as well as to offences falling within the jurisdiction of the police and committed on board of said ship";

(2) that the fact that Mr. Gómez took passage on the steamer "from one of the ports of the other republics of Central America", rendered the obligation to deliver him up "still more doubtful ..., because, when certain cases have arisen analogous to the one under consideration among nations more civilized than our own, it has been alleged, as a reason to justify the delivery, that both the embarking of the passenger, as well as his delivery, must be made in national waters";

(3) that Mr. Gómez was accused, not of common crimes, but of political

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123/ Described in Moore, A Digest of International Law, vol. II, pp. 867-870.

124/ The United States Secretary of State subsequently stated the following in a letter to the Minister to Central America:

> "Under the circumstances it was plainly the duty of the captain of the Honduras to deliver him up to the local authorities upon their request.
>
> "It may be safely affirmed that when a merchant vessel of one country visits the ports of another for the purposes of trade, it owes temporary allegiance and is amenable to the jurisdiction of that country, and is subject to the laws which govern the port it visits so long as it remains, unless it is otherwise provided by treaty.
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> "Any exemption or immunity from local jurisdiction must be derived from the consent of that country. No such exemption is made in the treaty of commerce and navigation concluded between this country and Nicaragua on the 21st day of June, 1867."

offences, under a decree of 9 September 1884, and that "it is a doctrine universally accepted in the works of writers on international law that if indeed merchant vessels are subject to the local jurisdiction as regards persons accused of common crimes, they are always exempt from that jurisdiction as regards those accused of political offences, all of which relieves the captain from the obligation of making the delivery demanded of him";

(4) that, while Governments have made little difficulty in stipulating "for the extradition, from places which enjoy extraterritoriality, of those accused of common crimes", yet something more is always required than "a simple verbal order", and besides, Mr. Gómez was "not a person accused of common crimes". The Court therefore concluded that the charge of disrespect was not established.

## 2. Decisions of international tribunals

### International Court of Justice

89. The question of diplomatic asylum has given rise to three judgements delivered by the Court in a single dispute between the same parties.

#### (1) Colombian-Peruvian asylum case

##### (a) Summary of the judgement delivered by the Court on 20 November 1950 125/

90. The dispute submitted to the Court by an application filed with the Registry on 15 October 1949 by the Government of Colombia arose from the fact that, on the evening of 3 January 1949, Mr. Víctor Raúl Haya de la Torre, a Peruvian citizen and leader of a political group in that country, had gone to the Colombian Embassy at Lima and requested the Ambassador to grant him asylum. Asylum having been granted, the Colombian Ambassador notified the fact in writing to the Ministry of Foreign Affairs of Peru, according to the provisions of the Convention on Asylum of 20 February 1928, and requested from the Peruvian Government the guarantees necessary for the departure of Mr. Haya de la Torre with the customary facilities.

91. The Peruvian Government refused to deliver the safe-conduct, asserting that Peru was under no legal obligation to accept the unilateral qualification of asylum given by the Colombian Ambassador. Direct negotiations having proved useless, the two countries agreed to submit the dispute to the International Court of Justice. The two Governments, having attempted in vain to draw up a special agreement to submit their dispute to the Court, finally agreed by an act (Acta) signed at Lima on 31 August 1949 that each party would have the right to submit its application unilaterally to the Court without this measure being considered as inimical by the other party.

92. In virtue of this agreement, the Government of the Republic of Colombia on 15 October 1949 filed the aforesaid application with the Registry, asking the Court to decide whether, within the limits of the obligations resulting in particular from the Bolivarian Agreement on Extradition of 18 July 1911 and the Convention on Asylum of 20 February 1928, both in force between Colombia and Peru, and in general from American international law, Colombia was competent, as the country granting asylum, to qualify the offence for the purposes of the said asylum. The application also requested the Court to state whether, in the specific case under examination, Peru, as the territorial State, was bound to give the guarantees necessary for the departure of the refugee from the country, with due regard to the inviolability of his person. Peru, in turn, submitted a counter-claim to the Court, which is summarized in a passage later (para. 102 below).

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125/ ICJ Reports, 1950, p. 266. The summary of the facts appearing in paras. 90-92 is taken from the Annual Report of the Secretary-General on the Work of the Organization (1 July 1949-30 June 1950), Official Records of the General Assembly, Fifth Session, Supplement No. 1 (A/1287), pp. 117-118.

93. The Court delivered its judgement on 20 November 1950. The members were: President BASDEVANT; Vice-President GUERRO; Judges ALVAREZ, HACKWORTH, WINIARSKI, ZORIČIĆ, DE VISSCHER, Sir Arnold McNAIR, KLAESTAD, BADAWI PASHA, KRYLOV, READ, HSU MO, AZEVEDO; Mr. ALAYZA Y PAZ SOLDAN and Mr. CAICEDO CASTILLA, Judges ad hoc; Mr. GARNIER-COIGNET, Deputy-Registrar. 126/

94. As to Colombia's first submission, the Court declared that it was beyond question that the diplomatic representative who had to determine whether a refugee was to be granted asylum or not must have the competence to make such a provisional qualification of any offence alleged to have been committed by the refugee, with the understanding that the territorial State would not thereby be deprived of its right to contest the qualification. Colombia nevertheless claimed that it had the right to qualify the nature of the offence by a unilateral and definitive decision binding on Peru, under the terms of the Bolivarian Agreement of 1911, the Havana Convention of 1928, and "American international law in general".

95. Article 18 of the Bolivarian Agreement was worded as follows:

> "Except as provided in the present Agreement, the signatory States recognize the institution of asylum, in accordance with the principles of international law."

In the view of the Court the principles of international law did not recognize any rule of unilateral and definitive qualification by the State granting diplomatic asylum. Article 4 of the Agreement, which Colombia had also invoked, dealt with extradition, and the arguments presented in that connexion were, in the Court's view, indicative of confusion between territorial asylum and diplomatic asylum.

96. The judgement contains the following paragraphs on this point:

> "In the case of extradition, the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty. The refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State.
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> "In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic

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126/ Judges ALVAREZ, BADAWI PASHA, READ and AZEVEDO, and Mr. CAICEDO, Judge ad hoc, declaring that they were unable to concur in certain points of the Judgement of the Court, availed themselves of the right conferred on them by Article 57 of the Statute and appended to the Judgement statements of their dissenting opinions. Judge ZORIČIĆ, while accepting the first three points of the operative part of the Judgement and the reasons given in support, stated that he was unable to agree with the last point of the operative part, as he considered that asylum had been granted in conformity with Article 2, para. 2, of the Havana Convention. On that point he shared the views expressed by Judge Read in his dissenting opinion. A summary of dissenting opinions follows immediately after the summary of the judgement.

asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case." 127/

97. The Colombian Government held that the Havana Convention implicitly granted the unilateral competence to qualify the offence to the State granting asylum. On this point the Court declared:

"A competence of this kind is of an exceptional character. It involves derogation from the equal rights of qualification which, in the absence of any contrary rule, must be attributed to each of the States concerned; it thus aggravates the derogation from territorial sovereignty constituted by the exercise of asylum. Such a competence is not inherent in the institution of diplomatic asylum. This institution would perhaps be more effective if a rule of unilateral and definitive qualification were applied. But such a rule is not essential to the exercise of asylum." 128/

98. The Colombian Government also invoked article 2, first paragraph, of the Havana Convention, which reads as follows:

"Asylum granted to political offenders in legations, warships, military camps or military aircraft shall be respected to the extent in which allowed, as a right or through humanitarian toleration, by the usages, the conventions or the laws of the country in which granted and in accordance with the following provisions:".

It interpreted that provision in the sense that the usages, conventions and laws of Colombia relating to the qualification of the offence could be invoked against Peru. In the Court's view the provision in question had to be regarded as a limitation of the extent to which asylum had to be respected.

"What the provision says in effect is that the State of refuge shall not exercise asylum to a larger extent than is warranted by its own usages, conventions or laws and that the asylum granted must be respected by the territorial State only where such asylum would be permitted according to the usages, conventions or laws of the State of refuge. Nothing therefore can be deduced from this provision in so far as qualification is concerned." 129/

99. On the subject of "American international law", the Court referred to Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law", and declared that it was incumbent

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127/ ICJ Reports, 1950, pp. 274-275.

128/ Ibid., p. 275.

129/ Ibid., p. 276.

on the Colombian Government to prove that there was a constant and uniform regional usage of unilateral qualification as a right appertaining to the State granting asylum and a duty incumbent on the territorial State. Neither the extradition treaties invoked by the Colombian Government and other conventions and agreements on which it had relied nor the particular cases of the granting of asylum which it had cited established the existence of such a custom. On this point the Court stated:

> "The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence." 130/

100. In the light of the foregoing, the Court, by 14 votes to 2, rejected Colombia's first submission, since it would imply that Colombia, as the country granting asylum, had a right to qualify the nature of the offence by a unilateral and definitive decision, binding on Peru.

101. As to the Colombian Government's second submission, that the Government of Peru was bound to give the guarantees necessary for the departure of Mr. Haya de la Torre from the country, with due regard to the inviolability of his person, the Court pointed out that under article 2 of the Havana Convention the territorial State might require that the refugee should be sent out of the country, and that only after such a demand could the State granting asylum require the necessary guarantees as a condition of his being sent out. The provision, in other words, gave the territorial State an option to require the departure of the refugee and that State became bound to grant a safe-conduct only if it had exercised that option. The Court declared that in the case before it Peru had not required the departure of the refugee and was therefore not obliged to deliver a safe-conduct. It consequently rejected Colombia's second submission by 15 votes to 1.

102. Peru in its counter-claim asked the Court to declare that asylum had been granted to Mr. Haya de la Toree in violation of the Havana Convention, first, because he had been accused, not of a common crime, but of a political crime, and, secondly, because the circumstances of the case did not include the element of urgency which was required, under the Havana Convention, to justify asylum.

103. As to the Government of Peru's first objection to the asylum, the Court noted that under article 1, first paragraph, of the Havana Convention "It is not permissible for States to grant asylum ... to persons accused or condemned for common crimes" and that the onus of proving that Mr. Haya de la Torre had been accused of or condemned for common crimes rested upon Peru. The Court found that

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130/ Ibid., p. 277.

the refugee was an "accused person" within the meaning of the Havana Convention. It considered, however, that the sole accusation contained in all the documents emanating from the Peruvian legal authorities was that of military rebellion, and that the Government of Peru had not established that military rebellion in itself constituted a common crime. It therefore declared that the first objection made by the Government of Peru was not justified and dismissed that part of the counter-claim by 15 votes to 1.

104. As to the second objection, namely, the alleged disregard of the requirement of urgency specified in article 2, "First", of the Havana Convention, the Court observed that the object of that Convention had been to fix the rules which the signatory States had to observe for the granting of asylum in their mutual relations in order "to put an end to the abuses which had arisen in the practice of asylum and which were likely to impair its credit and usefulness." 131/ Article 2 laid down precisely the conditions in which asylum granted to political offenders was to be respected by the territorial State. The Court called attention to the fact that all those conditions were designed to give guarantees to the territorial State and appeared, in the final analysis, as the consideration for the obligation which it assumed to respect asylum, in other words, to accept its principle and its consequences as long as it was regularly maintained. 132/

105. Article 2, "First", which reads as follows: "Asylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety", laid down, in the Court's view, the most important of the required conditions, "the essential justification for asylum being in the imminence or persistence of a danger for the person of the refugee". The Court observed that:

> "It has not been disputed by the Parties that asylum may be granted on humanitarian grounds in order to protect political offenders against the violent and disorderly action of irresponsible sections of the population. It has not been contended by the Government of Colombia that Haya de la Torre was in such a situation at the time when he sought refuge in the Colombian Embassy at Lima. At that time, three months had elapsed since the military rebellion. This long interval gives the present case a very speical character. During those three months, Haya de la Torre had apparently been in hiding in the country, refusing to obey the summons to appear of the legal authorities ... and refraining from seeking asylum in the foreign embassies where several of his co-accused had found refuge ... It was only on January 3rd, 1949, that he sought refuge in the Colombian Embassy. The Court considers that, prima facie, such circumstances make it difficult to speak of urgency." 133/

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131/ Ibid., p. 282.

132/ Ibid.

133/ Ibid., pp. 282 and 283.

106. The facts cited by the Government of Colombia indicated that the danger whose urgency, in its view, justified the asylum was that of political justice by reason of the subordination of the Peruvian judicial authorities to the instructions of the Executive. In that connexion, the Court declared:

> "... it is inconceivable that the Havana Convention could have intended the term 'urgent cases' to include the danger of regular prosecution to which the citizens of any country lay themselves open by attacking the institutions of that country; nor can it be admitted that in referring to 'the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety', the Convention envisaged protection from the operation of regular legal proceedings.
>
> "...
>
> "In principle, therefore, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents. The word 'safety', which in Article 2, paragraph 2, determines the specific effect of asylum granted to political offenders, means that the refugee is protected against arbitrary action by the government, and that he enjoys the benefits of the law. On the other hand, the safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals. Protection thus understood would authorize the diplomatic agent to obstruct the application of the laws of the country whereas it is his duty to respect them; it would in fact become the equivalent of an immunity, which was evidently not within the intentions of the draftsmen of the Havana Convention." 134/

Moreover, it had not been shown that the situation in Peru at the time implied the subordination of justice to the executive authority or that the suspension of certain constitutional guarantees entailed the abolition of judicial guarantees. The Court therefore concluded that on the date when Mr. Haya de la Torre had been given asylum in the Colombian Embassy, there had not existed a danger constituting a case of urgency within the meaning of article 2, paragraph 2, of the Havana Convention, and that the grant of asylum from that date until the time when the two Governments had agreed to submit their dispute to the Court had been prolonged for a reason which was not recognized by that provision of the Havana Convention. The Court therefore found, by 10 votes to 6, that the grant of asylum had not been made in conformity with article 2, paragraph 2, "First", of that Convention.

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134/ Ibid., p. 284.

(b) Summary of dissenting opinions appended to the judgement of 20 November 1950

(i) General observations

107. Judge Azevedo observed that care should be taken not to deprive an institution sanctioned by tradition and of unquestioned utility of its substance by strict adherence to formal logic. In his view, diplomatic asylum was a striking example of the necessity of taking into account, in the creation or adaptation of rules of restricted territorial scope, of geographical, historical and political circumstances which were peculiar to the region concerned - in the case in question, the 20 nations of Latin America. Asylum had rendered great humanitarian service; it was also a highly social institution and had a deep educational action towards the control of passions, the exercise of self-control, and respect for a rule which was so deep-rooted that it had become almost sacramental.

108. Judge Alvarez stated that, in view of the importance of asylum in Latin American countries, they had followed certain practices and had regulated the matter by conventions. By virtue of that fact, the institution of asylum was part of "American international law", an expression which was to be understood to mean, not an international law which was peculiar to the New World and entirely distinct from universal international law, but rather the complex of conventions, customs, practices, institutions and doctrines which were peculiar to the republics of the New World. In his view, there existed not only an American international law, but also a European international law, an Asian international law in the process of formation, and Soviet law. Judge Read noted that in the expression "American institution of asylum" the word "American" should be interpreted as referring to the 20 Latin American Republics.

(ii) Characteristics of the Latin American institution of asylum

109. Judge Azevedo, noting that there was some dispute as to whether diplomatic asylum could reasonably be assigned the function of removing a political offender from the jurisdiction of the territorial State, observed that that was only one example among others of reciprocal control, which must be tolerated in the absence of a super-State order. He added that the Latin American group treated the consequent restriction on sovereignty in accordance with the characteristics of the region, in which considerations of sovereignty easily gave way to a superior spirit of justice, in which asylum was not merely the result of humanitarian concern but a preoccupation of justice based on a certain reserve with regard to the executive organs of the government and the courts of the country of the accused or of the individual persecuted, and in which reciprocity, which was the basis of asylum, deprived the institution of any aspect of intervention. Similar ideas were expressed by Judges Alvarez and Badawi Pasha and Mr. Caicedo Castilla.

110. Another characteristic feature of asylum as practised in America, according to Judges Badawi Pasha, Read and Azevedo, lay in the fact that the institution was not exclusively or even chiefly designed to protect the refugee against mob violence. Judge Badawi Pasha pointed out in that connexion that the cases of asylum

cited in the arguments had all arisen in connexion with a revolution or a rebellion and that no reference had been made in that connexion to the threat of mobs or of justice at the hands of a political faction. "By a kind of general and implicit agreement", he added, "/this institution/ is to be regarded as a means enabling the authors of unsuccessful conspiracies to escape the severity of the acts of vengeance of the government in power and permitting members of a defeated government to evade the measures by which a successful conspiracy would seek to ensure its security." Asylum had thus become, he said, a factor of peace and moderation, and the danger of instability which might have resulted from it did not seem to have affected either its course or recurrence. Asylum as practised in Latin America found a general justification in the possibility of exceptional measures which characterized periods of revolution. Just as there were usages of war, a usage of revolution had arisen which was the object of implicit and general agreement among the States of the region.

(iii) The legal foundation of asylum

111. It was the opinion of Judge Alvarez that in view of the fact that the institution of asylum was utilized when the political order within a country was disturbed, and inasmuch as the situation resulting from that disorder might vary considerably, there was no customary American international law of asylum properly speaking, but there were certain practices or methods in applying asylum which were ordinarily followed by the States of Latin America. Judge Azevedo, however, considered that the few isolated cases of denial of asylum which were recorded were always the transitory or episodic counterpart of political situations in the process of consolidation and did not suffice to destroy the value of other concordant cases which, by their number, would clearly reveal an opinio juris. As for treaty provisions, there was no need to go into the matter of the derogative action of treaties upon custom or into the question of the compatibility of the two sources of law. It would be sufficient to emphasize that treaties often embodied principles already established by custom, and thus had a declaratory effect with regard to customary rules. It was therefore somewhat rash for a State to proclaim that it was bound only by the treaties which it had signed and ratified, particularly at a time when the contractual element was undergoing an obvious and deep change by virtue of the para-legislative action of an international character which was being developed even at the cost of substituting the majority principle for the principle of unanimity. Mr. Caicedo Castilla, relying primarily on article 18 of the Bolivarian Agreement of 1911, which recognized the institution of asylum in accordance with the principles of international law, also demonstrated the existence in both Colombia and Peru of one of the elements which were necessary for the existence of a custom, the psychological element, opinio juris sive necessitatis, with the result that diplomatic asylum was an international custom of Latin America.

(iv) The right of qualification

112. In the view of Mr. Caicedo Castilla, the State which granted asylum must necessarily have the right of qualification: under article 2 of the Havana Convention, the modalities of asylum, apart from the provisions laid down by the

Convention, were determined by the law of the country of refuge. The usages, conventions and laws of Colombia were, without exception, in favour of unilateral qualification: Colombia had always claimed and obtained the right to qualify in the case of asylum in Colombian embassies or legations, and it had always accepted unilateral qualification by accredited foreign embassies or legations on its soil. Furthermore, it had approved the Montevideo Convention of 1933 - under which "the judgement of political delinquency concerns the State which offers asylum" - by a law which proved the adherence of the executive and legislative organs of Colombia to the theory of unilateral qualification. Mr. Caicedo Castilla went on to argue that the State which granted asylum must have the right of unilateral qualification, since the institution was required to function in extreme circumstances in which even very highly cultured statesmen lost the serenity of mind which was indispensable for an impartial judgement of political opponents: to recognize the right of the local State to qualify the nature of the offence was to rely on the opinion of a government whose interests would urge it to act against the refugee, and thus render the institution absurd. According to Judges Alvarez and Azevedo, however, the appreciation of the State of refuge was not therefore definitive and irrevocable: the territorial State might challenge it and the case should, if the need arose, be submitted to arbitration or another means of peaceful settlement. In the case under discussion, according to Judge Alvarez, the Court could have ruled on the dispute opposing Colombia and Peru as to the nature of the offence imputed to the refugee and expressly declared that the offence in question was a political offence. Mr. Caicedo Castilla, however, expressed the view that recourse to arbitration or legal proceedings would turn asylum into a source of lengthy litigation, of embarrassing unpleasant judgements on the domestic situation of the territorial State, and, finally, of conflict between States.

(v) The concept or urgency

113. Judges Badawi Pasha and Read paid particular attention to this question. In order to interpret so variable and relative a concept as urgency, in Judge Badawi Pasha's view, it was essential to examine practice. In that connexion, Judge Read emphasized that the record in the case concerned left no room for doubt about the existence of an "American" institution of asylum, an extensive and persistent practice, based on positive law, on convention and on custom. The record cited numerous instances in which asylum had been granted that were clearly linked to political revolutions and the periods of disturbed conditions which followed revolts, and there was nothing to suggest that the granting of asylum had been limited to cases in which the fugitive was being pursued by angry mobs. There could be no doubt that the institution of asylum, which the Havana Conference had been seeking to regulate in 1928, was one in which asylum was freely granted to political offenders during periods of disturbed conditions following revolutions. The Governments represented at the Havana Conference, he pointed out, had given no indication of any intention to change the essential character of the institution, and it was unthinkable that, in using the ambiguous expression "urgent cases", they had been intending to bring to an end an institution based on 90 years of tradition and to prevent the grant of asylum to political offenders in times of political disturbance. That was all the more unthinkable inasmuch as the practice of the Governments in question had not changed following the entry into force of the Convention. Judge Badawi Pasha reached the same conclusion and observed that

inasmuch as the practice was subsequent to the Convention, it constituted a sound interpretation thereof, and inasmuch as it had existed before the Convention, it should be considered as one of the rules that the Governments of the Latin American States "must observe for the granting of asylum in their mutual relations" (Preamble to the Havana Convention).

114. To those arguments based on the nature of the institution as it appeared from practice and on the intention of the parties, Judges Badawi Pasha and Read added an argument drawn from the general economy of the Havana Convention. They argued that the Convention clearly distinguished between common criminals (to whom the rules of art. 1 applied) and political offenders (to whom the rules of art. 2 applied). While prohibiting asylum for common criminals (art. 1, first para.) it provided (art. 1, second para.) for cases in which asylum had nevertheless been granted to common criminals, cases which necessarily implied urgency in the strict sense (namely, pursuit by a mob, or justice at the hands of a political faction) and in which asylum was justified by the fact that even a common criminal was entitled to regular justice; it further provided that the territorial State might demand the surrender of the common criminal when the condition of urgency did not exist or had ceased to exist. To admit that the rules so laid down for common criminals applied equally to political offenders would eliminate the clear distinction drawn in the Convention between the two categories of offenders and deprive article 2 of any useful purpose.

115. The truth, according to Judge Badawi Pasha, was that the notion of urgency, and the consequences of asylum, differed according to whether the refugee was a common criminal or a political offender. In the former case, as soon as urgency in its strict sense had ceased, or if it had never existed, the territorial State might demand the surrender of the refugee, whereas in the latter case it was the nature of the situation (revolution or rebellion or, to use Judge Azevedo's words, constitutional abnormality) which determined the urgency and justified the request and immediate grant of a safe-conduct. In fact, the Convention of 1928 merely sought, by this reference to urgent cases, to exclude from asylum persons who were the subject of legal proceedings instituted in normal circumstances and in the absence of revolutionary disturbances or of possible exceptional measures. Since Colombia had provided abundant evidence of the existence of political disturbances in Peru at the time of the grant of asylum, the condition of urgency within the meaning of the Havana Convention was fulfilled

(vi) The question of safe-conduct

116. On this subject, Judge Alvarez observed that article 2, "Third", of the Havana Convention could not be interpreted as meaning that the territorial State was bound to deliver a safe-conduct only in cases in which it had itself demanded the departure of the refugee from its territory, since that interpretation might lead to the refugee's remaining indefinitely on the premises where he had been granted asylum, a result which was contrary to the very spirit of the institution. Besides, the authors of the Convention certainly had not intended to grant to the territorial State alone the right to demand the departure of the refugee, a solution which would have been contrary to practice. In the view of Judge Alvarez,

there was in that respect a gap in the system established by the Convention; the Court should in order to bridge that gap, actually have created the law, guided especially by the ideas prevailing in the New World on the subject of asylum and by the provisions of article 2 of the Convention, which provided that asylum should be of short duration and that the refugee should be able rapidly to find safety by some other means. Similar views were expressed by Mr. Caicedo Castilla.

(vii) The question of the maintenance of asylum

117. On this subject, Judge Azevedo held that it was wrong to consider that, by virtue of the provision of article 2 of the Havana Convention which limited the duration of asylum to "the time strictly indispensable for the person who has sought asylum to ensure in some other way his safety", the refugee must be surrendered to the local authorities at the first opportunity. Once asylum had been granted, the judgement made as to the necessary conditions could not be influenced by the vicissitudes which might subsequently arise, save in the exceptional case in which political developments led to the disappearance of the very reason for asylum, namely, the threat to life or liberty arising from a political activity. The grant of asylum constituted an admitted fact the circumstances of which must be fixed, once and for all, in view of any appreciation which might have to be made in the future. It was entirely independent of the maintenance of asylum for a necessarily indefinite period, since the determination of its duration did not depend exclusively on the person granting it.

118. Judge Badawi Pasha noted in that connexion that in the case under consideration the prolongation of asylum was entirely due to the pursuit of negotiations between the Parties and that it was impossible to deny that Colombia was entitled to maintain, by means of negotiations, what she considered to be her right or to deny that she was entitled to continue the asylum throughout such negotiations. A similar view was expressed by Judge Alvarez.

(2) Request for interpretation of the judgement of 20 November 1950 in the asylum case: summary of the judgement delivered by the Court on 27 November 1950 135/

119. A request for interpretation of the judgement of 20 November 1950 was presented to the Court on behalf of the Government of Colombia on the very day on which that judgement was delivered.

120. The Court decided on that request on 27 November 1950. It was composed as follows: President Basdevant; Vice-President Guerrero; Judges Alvarez, Hackworth, Winiarski, De Visscher, Sir Arnold McNair, Klaestad, Krylov, Read, Hsu Mo; Mr. Alayza y Paz Soldán and Mr. Caicedo Castilla, Judges ad hoc; Mr. Hambro, Registrar.

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135/ ICJ Reports, 1950, p. 395. The summary of the judgement is taken from the Annual Report of the Secretary-General on the work of the Organization (1 July 1950-30 June 1951) (Official Records of the General Assembly, Sixth Session, Supplement No. 1 (A/1844), p. 173).

121. In its judgement of 27 November, the Court pointed out that under the provisions of its Statute it could give an interpretation only if the object of the request was to obtain clarification of the meaning and scope of what had been decided by the judgement with binding force. It was also necessary that there should be a dispute between the parties as to the meaning or scope of that judgement.

122. The Government of Colombia asked the Court to reply to three questions:

Is the judgement of 20 November 1950 to be construed as meaning:

(a) That legal effect is to be attributed to the qualification made by the Colombian Ambassador at Lima of the offence imputed to Mr. Haya de la Torre?

(b) That Peru is not entitled to demand surrender of the refugee, and that Colombia is not bound to surrender him?

(c) Or, on the contrary, that Colombia is bound to surrender the refugee?

123. On the first question, the Court found that the point had not been submitted to it by the parties: the Court had been asked to decide only on a submission presented by Colombia in abstract and general terms.

124. The other two questions in reality amounted to an alternative, dealing with the surrender of the refugee. This point also had not been included in the submissions of the parties; the Court therefore could make no decision upon it.

125. Finally, no dispute between the parties as to the meaning of the judgement had been brought to the attention of the Court.

126. For these reasons, by 12 votes to 1, the Court found that the request for interpretation was inadmissible. Mr. Caicedo Castilla declared that he was unable to concur in the judgement. 136/

(3) Haya de la Torre Case: summary of the judgement delivered by the Court on 13 June 1951 137/

127. After the Court, by its judgement of 27 November 1950, had rejected Colombia's request for an interpretation of the judgement of 20 November 1950, Colombia instituted new proceedings by an application transmitted to the Court on 13 December 1950.

128. In its application and during the proceedings Colombia asked the Court (1) to determine the manner in which effect was to be given to the judgement of

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136/ Mr. Caicedo Castilla stated that, in his opinion, Article 60 of the Statute could be interpreted more liberally, as shown by the Permanent Court of International Justice in the Chorzów Factory case.

137/ ICJ Reports, 1951, p. 71.

20 November 1950 and to state whether, in pursuance of that judgement, Colombia was bound to deliver Mr. Haya de la Torre to the Government of Peru; and (2) alternatively, to declare, in the exercise of its ordinary competence, whether Colombia was bound to deliver Mr. Haya de la Torre to the Peruvian authorities.

129. Peru, for its part, requested the Court (1) to state in what manner the judgement should be executed by Colombia; (2) to dismiss the Colombian submissions by which the Court had been asked to state solely that Colombia was not bound to deliver Mr. Haya de la Torre to the Peruvian authorities; and (3) alternatively, to declare that the asylum ought to have ceased immediately after the judgement of 20 November 1950, and must in any case cease forthwith in order that Peruvian justice might resume its normal course, which had been suspended.

130. The Court ruled on 13 June 1951. It was composed as follows: President Basdevant; Vice-President Guerrero; Judges Alvarez, Hackworth, Winiarski, Zoričić, de Visscher, Sir Arnold McNair, Klaestad, Badawi Pasha, Read, Hsu Mo; Mr. Alayza y Paz Soldán and Mr. Caicedo Castilla, Judges ad hoc; Mr. Hambro, Registrar.

131. In its judgement, the Court examined, in the first place, the admissibility of the intervention of the Cuban Government. That Government having availed itself of the right conferred by Article 63 of the Court's Statute, had filed a Declaration of Intervention which stated its views on the interpretation of the Havana Convention. The Government of Peru having contended that the intervention was inadmissible, the Court observed that the subject-matter of the present case related to a new question - the delivery of Mr. Haya de la Torre to the Peruvian authorities - which had not been decided by the judgement of 20 November. In those circumstances, as the object of the intervention was the interpretation of a new aspect of the Havana Convention, the Court decided to admit it.

132. Proceeding next to discuss the merits of the case, the Court observed that both parties desired that the Court should decide on the manner in which the asylum might be terminated. The portion of the judgement of 20 November 1950 to which they referred was the passage in which, in pronouncing on the question of the regularity of the asylum, it declared that the grant of asylum had not been made in conformity with article 2, "First", of the Havana Convention on Asylum of 1928. The Court observed that the judgement had confined itself, in that connexion, to defining the legal relations which the Havana Convention had established between the Parties. It had not given any directions to the Parties, and entailed for them only the obligation of compliance therewith. The interrogative form in which they had formulated their submissions showed that they desired that the Court should make a choice among the various courses by which the asylum might be terminated. But those courses were conditioned by facts and by possibilities which, to a very large extent, the Parties alone were in a position to appreciate. A choice among them could not be based on legal considerations, but only on considerations of practicability or of political expediency; it was not part of the Court's judicial function to make such a choice.

133. On the question of whether Colombia was bound, in execution of the judgement on 20 November 1950, to deliver Mr. Haya de la Torre to the Peruvian authorities,

the Court pointed out that the Government of Peru had not demanded the surrender of the refugee. The question had not been submitted to the Court and had consequently not been decided by it. It was therefore not possible to deduce from the judgement of 20 November whether Colombia was or was not bound to surrender the refugee to the Peruvian authorities.

134. Proceeding to the alternative submission of Colombia and the second submission of Peru, the Court noted that, according to the Havana Convention, diplomatic asylum was a provisional measure for the temporary protection of political offenders and that, even if regularly granted, it could only last "for the period of time strictly indispensable for the person who had sought asylum to ensure in some other way his safety". However, the Convention did not give a complete answer to the question of the manner in which an asylum should be terminated. It did prescribe the grant of a safe-conduct, but made the right to claim a safe-conduct subject to two conditions: that asylum should have been regularly granted and maintained, and that the territorial State should have required that the refugee should be sent out of the country. No provision was made for cases in which those conditions were not met. The Latin American tradition of asylum, in accordance with which political refugees should not be surrendered, did not indicate that an exception should be made where asylum had been irregularly granted. If it had been intended to abandon that tradition, an express provision to that effect would have been needed, and the Convention contained no such provision. The silence of the Convention implied that the intention was to leave the adjustment of the consequences of that situation to decisions inspired by considerations of convenience or of simple political expediency. To infer from that silence that there was an obligation to surrender a person to whom asylum had been irregularly granted would be to disregard both the role of those extra-legal factors in the development of asylum in Latin America, and the spirit of the Havana Convention itself.

135. It was true, as the Court had stated in its judgement of 20 November, that in principle asylum could not be opposed to the operation of justice: the safety which arose out of asylum could not be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals, since protection thus understood would authorize the diplomatic agent to obstruct the application of the laws of the country, whereas it was his duty to respect them. Moreover, the Court could likewise not admit that the States signatories to the Havana Convention had intended to substitute for the practice of the Latin American republics a legal system which would guarantee to their own nationals accused of political offences the privilege of evading national jurisdiction. But it did not follow that the State granting an irregular asylum was obliged to surrender the refugee to the local authorities. Such an obligation to render positive assistance to those authorities in their prosecution of a political refugee would far exceed the findings of the Court and could not be recognized without an express provision to that effect in the Convention.

136. Since the Government of Peru had not shown that Mr. Haya de la Torre was a common criminal, he had to be treated, so far as the question of surrender was concerned, as a political offender. Colombia was therefore not obliged to surrender him to the Peruvian authorities.

137. With regard to the third submission of Peru, concerning the termination of the asylum, the Court's decision that the grant of asylum had not been made in conformity with article 2, "First", of the Havana Convention entailed a legal consequence, namely, that of putting an end to an illegal situation, and the Government of Peru was legally entitled to claim that the asylum should cease.

138. The Court accordingly declared unanimously that it was not part of the Court's judicial function to make a choice among the different ways in which asylum might be brought to an end; it declared, by 13 votes to 1, that Colombia was under no obligation to surrender Mr. Haya de la Torre to the Peruvian authorities; it declared unanimously that the asylum ought to have ceased after the delivery of the judgement of 20 November 1950, and should terminate. 138/

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138/ Mr. Alayza y Paz Soldán, Judge ad hoc, stated, in a declaration appended to the judgement, that, in view of the terms employed by the Court in the second point of the operative clause, he was unable to concur in the opinion of the majority.

# CHAPTER III

## CONSIDERATION OF THE QUESTION BY INTERGOVERNMENTAL ORGANIZATIONS 139/

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139/ This chapter is concerned with the work of the deliberative organs of intergovernmental organizations on the question. However, it is relevant to point out that the statutes of these organizations include provisions relating to this question. In the case of the United Nations, the Headquarters Agreement, in sect. 7 (b), lays down that, except as otherwise provided in the Agreement or in the Convention on the Privileges and Immunities of the United Nations ("the General Convention"), the federal, state and local law of the United States shall apply. It also provides in sect. 7 (c), again subject to the provisions of the Agreement and of the General Convention, that the federal, state and local courts of the United States shall have jurisdiction over acts done and transactions taking place in the headquarters district. Finally, although it contains no provision on asylum as such, the Agreement deals with refuge in sect. 9, which reads as follows:

> "(a) The headquarters district shall be inviolable. Federal, state or local officers or officials of the United States, whether administrative, judicial, military or police, shall not enter the headquarters district to perform any official duties therein except with the consent of and under conditions agreed to by the Secretary-General. The service of legal process, including the seizure of private property, may take place within the headquarters district only with the consent of and under conditions approved by the Secretary-General.
>
> "(b) Without prejudice to the provisions of the General Convention or article IV of this agreement, the United Nations shall prevent the headquarters district from becoming a refuge either for persons who are avoiding arrest under the federal, state, or local law of the United States or are required by the Government of the United States for extradition to another country, or for persons who are endeavouring to avoid service of legal process." (Emphasis added.)

The applicability of local law within the headquarters district and the jurisdiction of local courts over acts done and transactions taking place in the headquarters district are also provided for in the headquarters agreements of other organizations of the United Nations system (such as FAO (sect. 6 (b) and (c)), IAEA (sect. 7 (b) and (c)), and UNESCO (art. 5, para. 3).

Provisions analogous to those in sect. 9 of the United Nations Headquarters Agreement appear in the headquarters agreements of FAO (sect. 7), IAEA (sect. 9), UNESCO (art. 6) and ICAO (sect. 4).

## 1. The League of Nations

### (1) The work of the Committee of Experts for the Progressive Codification of International Law

139. The Committee of Experts for the Progressive Codification of International Law, established by the Assembly of the League of Nations with the task of "report/ing/ to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution", appointed a Sub-Committee at its first session in 1925 to conduct research into the question of diplomatic privileges and immunities. The Rapporteur of the Sub-Committee said in his report that he did not admit the validity of the theory that diplomats should enjoy the right of extraterritoriality. He added: "If a diplomatic agent gives shelter in the legation building to persons who are regarded by the local authorities as criminals, these authorities will obviously consider the act of the diplomatic agent to be reprehensible. They may accordingly take the defensive or precautionary measures .... There is no need for us to pronounce upon the question whether ... the diplomatic agent is obliged to surrender to the local authority any individual pursued by that authority for crime or misdemeanour, or whether he may continue to protect him and, if necessary, help him to escape. All that is not connected, at any rate directly, with diplomatic prerogatives." 140/ The second member of the Sub-Committee said that on the subject of extraterritoriality he was inclined rather to adhere to "the restrictive definition given by Strisower: 'The removal of certain persons or certain portions of territory from the legal authority of the country in respect of matters to which, according to general principles, such persons and such portions of territory ought on the contrary to be subject'" and to retain the term "extraterritoriality" simply as a metaphor, "'diplomatic ex-territoriality including no more than certain exemptions from the authority and power of the State enjoyed by the diplomatic residence .... Ex-territoriality in the limited meaning of the word refers only to the legal exceptions recognized in any particular State, and these must always be interpreted in a restrictive sense". 141/ This same member stated with regard to the right of asylum: "The question is a political one, and in the Cambridge draft 142/ it was thought better to give no opinion. Experience, even of quite recent date, would justify treaty regulation and, if not the complete abolition, in any case a restriction of the right of asylum, together with explicit provisions in regard to procedure.

> "Clearly the abolition of the right of asylum cannot dispose of the question of the admissibility of entrance into the diplomatic residence.
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> "I am in favour of compulsory resort to the diplomatic channel, except in cases of extreme urgency or of danger within the building." 143/

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140/ League of Nations publications, V. Legal, 1927. V.1 (document C.196.M70.1927.V), pp. 79-80.

141/ Ibid., pp. 86-87.

142/ See para. 263 below.

143/ League of Nations publications, V. Legal, 1927. V.1 (document C.196.M70.1927.V), p. 88.

140. At its second session in 1926, the Committee decided to send Governments questionnaires on seven subjects, including one (questionnaire No. 3) dealing with diplomatic privileges and immunities. The questionnaire included a first section on the extent of privileges and immunities which was accompanied by the following note: "Under the head of inviolability should be discussed the question of the existence and, in the affirmative, of the extent of the right to afford asylum to persons threatened with criminal proceedings." 144/

141. Of the 26 countries which replied to this questionnaire, only four raised the question of diplomatic asylum: Sweden thought it desirable "to consider the possibility of including in a future convention definite provisions to cover the case in which local authorities consider themselves bound to conduct a search for persons suspected of offences committed in the country in premises enjoying immunity". 145/ Switzerland said:

> "The question of asylum is closely bound up with that of the status of diplomatic premises; in practice, when disturbances occur, it forms a delicate problem which can hardly be neglected. If the premises of the diplomatic mission are not to be regarded as situated on foreign soil, the harbouring of criminals or political refugees seems, generally speaking to be an abuse of inviolability. On the other hand, it would be difficult to impose on a diplomatic agent the obligation of promptly expelling a person who has taken refuge on his premises to escape the violence of the mob; and in times of revolutionary disturbances it is always possible that there may, for the moment, be no 'local authority' ... to which to surrender the refugee. On this point it might be desirable to seek a solution which would respect the principle of non-interference, but would not expose the refugee to assassination." 146/

Czechoslovakia expressed the following views:

> "The inviolability of the official premises of the legation and of the diplomatic agent's private residence does not imply a right of asylum for a person threatened with criminal proceedings. If a criminal takes refuge in the building of the diplomatic mission or in the agent's private residence, he must be handed over to the local authorities and, further, the provisions of the international conventions on extradition will not apply in such cases." 147/

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144/ Ibid., p. 76.

145/ Ibid., p. 234.

146/ Ibid., p. 243.

147/ Ibid., p. 254.

Finally, Egypt proposed making specific the diplomatic agent's obligation to surrender any persons wanted by the local authorities for crimes or offences. 148/ 149/

### (2) The discussions in the League of Nations Council on the question of the Madrid "asylees" 150/

142. The question of diplomatic asylum was discussed by the Council of the League of Nations on two occasions - at its ninety-fifth session in December 1936 and at its ninety-sixth session in February 1937. These discussions were prompted by the plight of Spanish nationals who, because of the civil war in Spain, had sought and found refuge in a number of diplomatic missions in Madrid.

143. The question was brought before the Council by Chile, whose representative stated at the 4th meeting of the ninety-fifth session on 12 December 1936 151/ that in the exercise of "powers which have always been recognized in international law" his country's Ambassador to Madrid had given asylum to some 1,000 men, women and children and that there were a great many persons who had found asylum in other embassies and legations in Madrid. He said that all persons who had been granted the right of asylum must be evacuated from Madrid, since the situation had become untenable, and to that end he wished to obtain a guarantee from the responsible authorities that the right of asylum would be scrupulously respected, that is to say, the persons concerned must be given the assurance that they would be able to leave Spain without interference from any quarter. The representative of Chile proposed that the evacuation should be guaranteed by the International Committee of the Red Cross.

144. This proposal was supported by the representative of Bolivia, who said:

> "There exists a right, an American right perpetuated by age-long tradition and confirmed by the Conventions of Montevideo and Havana; I refer to the right of asylum. We do not question this right in the case of civil war; it proceeds from the concept of honour handed on to us, with so many other virtues, by Spain."

145. The representative of Spain said that he was prepared to examine the problem directly with each of the Governments concerned.

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148/ Ibid., p. 258.

149/ At its eighth session, the Assembly of the League of Nations decided not to retain, for purposes of codification, the question of diplomatic privileges and immunities.

150/ Since the present chapter discusses the work of international organizations, the question of the Madrid "asylees" is treated only to the extent that it was discussed in the League of Nations, although statements on the subject were also made outside the League.

151/ League of Nations - Official Journal, January 1937, pp. 19-21.

146. At the end of the discussion, the Council adopted a motion which limited itself to stating that there were problems of a humanitarian character in connexion with the present situation, in regard to which co-ordinated action of an international and humanitarian character was desirable as soon as possible.

147. Direct negotiations were not successful, and the question was again submitted to the Council at its ninety-sixth session by the representative of Chile. The inclusion of the question on the agenda was preceded by a long discussion held in private session, 152/ from which the following statements by the representatives of the Soviet Union and Chile are extracted:

> "Mr. LITVINOFF /Union of Soviet Socialist Republics/ said that the representative of Chile did not base his application on any article of the Covenant, nor (Mr. Litvinoff presumed) on any international law or practice. To the best of his belief, there was no international law which compelled a Government to allow foreign embassies and legations to accord the right of asylum. On that point, he understood that European countries were in a different position from Latin American countries, the latter having signed a special Convention on the matter of the right of asylum. European countries, including Spain, had never accepted that point of view."
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> ...
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> "Mr. EDWARDS /Chile/ ... /said that/ when the time came, /he/ would be prepared to cite cases, with names and dates, in order to prove to Mr. Litvinoff that the right of asylum had been recognized by most of the European Powers, and had been exercised in and by Spain right up to 1931."

148. At the 3rd and 5th meetings of the ninety-sixth session of the Council, 153/ the question of the existence of the right of diplomatic asylum, its recognition and its limits was discussed at length by the representatives of Chile, the Soviet Union and Spain among others. Following are extracts from the statements by these three representatives:

> "Mr. EDWARDS /Chile/ recalled that ... /the refugees/, or at any rate those in the Latin American embassies and legations, had been given asylum under the rules laid down in that matter by the Montevideo Convention of 1933 .... The question which /he/ had had the honour to submit to the Council ... was primarily and pre-eminently a humanitarian and moral question, and its urgency could not be gainsaid. It was his Government's desire to raise and deal with the question throughout as a humanitarian issue.
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> "Arguments had been put forward in the Council and outside the League disputing the existence and practice of the right of asylum and contending that

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152/ Ibid., February 1937, p. 65 et seq.

153/ Ibid., p. 96 et seq. and p. 130 et seq.

it was confined to Latin America. /He would/ say a few words to prove that the right of asylum had been exercised by European, American and Asiatic States in Europe, in America and in Asia until the present day. He proposed only to mention - very briefly - a few striking cases in the nineteenth and twentieth centuries, since it was not disputed that, in the eighteenth century, the right of asylum was freely exercised in Europe. If there were one particular country in Europe where the right of asylum had been exercised in the nineteenth and twentieth centuries, it was Spain; and Spain, in its turn, had exercised the right repeatedly in various countries, particularly in Latin America.

"Unhappily, Spain, in the course of the nineteenth century, had been the scene of sanguinary disturbances - in 1835, in 1848 and between 1865 and 1875 - due to causes closely resembling those responsible for the tragic curcumstances which were deplored today - namely, the impassioned conflict between two extremist ideological systems.

"The civil war between the Christinos and the Carlistas had raised the same problems in regard to non-intervention which arose today, and the persons taking asylum in the embassies and legations at Madrid had been numerous and highly respected.

"Spain herself, at the close of the nineteenth century, had exercised the right of asylum at Santiago de Chile in 1891, in the course of the Chilian civil war, together with France, Germany, the United States of America and Brazil, and, if he were correctly informed, at the time of the disturbances in Brazil in 1930, when almost all the embassies and legations at Rio de Janeiro had given asylum to refugees, the Spanish Embassy had done the same. On that occasion - and Mr. Edwards was glad to recall it - the Brazilian Government, giving proof, not only of its respect for the right of asylum but also of its broadminded and magnanimous attitude, had accorded every kind of facility for the evacuation to foreign countries with the least possible delay of all such political refugees without distinction.

"Moreover, the evacuation, at the earliest possible moment, of persons who had taken asylum, seemed to be the practice most generally adopted by all countries according and recognising the right of asylum. The diplomatic missions of Great Britain, France and the United States of America had frequently accorded asylum in Latin America. Great Britain had exercised that right in Europe and Asia in the nineteenth and twentieth centuries. At Constantinople, in 1895, the British Embassy had given asylum to the Grand Vizier when his life was in danger. In Iran, the right of asylum (bast) which had existed in that country for centuries past and had assumed the

strangest forms, had been recognised and practised by the British Legation at Teheran. 154/

"But was it even necessary to recall other cases to the Council in view of what was taking place in Spain at the present time? Was it not a fact that, of the fourteen embassies and legations which had given asylum, six were European - namely, Belgium, Norway, the Netherlands, Poland, Roumania and Turkey? Latin America, therefore, only accounted for a bare half of the countries concerned with the problem. The right of asylum, which it was endeavoured to dispute on the ground that it was a purely Latin-American theory, was being actually exercised in Spain today by almost as many European as Latin-American countries.

"To conclude the lengthy parenthesis on the right of asylum, Mr. Edwards desired to remind the Council that hundreds and even thousands of persons, amongst whom Spaniards were unquestionably included, had found asylum and had been transported on warships flying the British, French, American, Italian, German and other flags. What legal justification could there be for a distinction between the right of asylum exercised on warships in Spanish territorial waters and the right of asylum exercised in the embassies and legations of Madrid. Why should not the refugees in the latter case be evacuated in the same way as the refugees in the former case? Was it not a question of extra-territoriality in either case? Mr. Edwards would not like to think it possible for the League, which owed its very existence to the respect for right over might, to attach more weight to the exercise of the right of asylum under the protection of the guns of a warship than to the right of asylum exercised by an embassy or legation, which had no protection other than international law and that inviolability which was established by the custom of centuries.

"Mr. Edwards had been glad, at the December session, to be able to count on the warm and friendly support of the Bolivian representative, who, in eloquent language, had reminded the Council that the right of asylum was an American right embodied not only in a century-old tradition, but also in the Conventions of Montevideo and Havana. At the present session, he had been glad to have the support of Ecuador. The unanimous attitude of the American representatives on the Council in regard to the principle was thus apparent. Further, the Cuban Government had also warmly supported the Chilian request. Mr. Edwards had been particularly gratified to find the Netherlands, the

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154/ In a letter dated 27 January 1937 addressed to the President of the Council, the permanent delegate of Iran to the League of Nations made the following observation:

"... the representative of Chile informed the Council that the right of asylum had existed in Iran for centuries. The allusion was obviously to the practice of that right in remote times, and not to its present existence in Iran. In order, however, to dispel any misunderstanding, I should like to make it clear that the right of asylum has not for a long time past existed in Iran". (League of Nations - Official Journal, 1937, pp. 109-110).

country which might be called the cradle of international law, exercising the right of asylum in Madrid and warmly supporting the Chilian request.

...

"On those bases Mr. Edwards had prepared a draft which appeared to him to cover all aspects of the question, and which he would submit to the Council for consideration. The text was as follows:

'Memorandum setting forth the Principles applicable to the Evacuation of Persons who have been granted Asylum in the Embassies and Legations of Madrid, on the Basis of the Main Ideas communicated by the Doyen of the Diplomatic Corps at Madrid to the Secretary of State for Foreign Affairs of the Valencia Government

'1. Guarantees to be given for the safe departure abroad of persons who have been granted asylum.

'2. Old men, women and children to be allowed complete freedom of movement outside Spain.

'3. All males capable of bearing arms who have been granted asylum must reside, until the end of the civil war, in towns to be designated and in countries not coterminous with Spain. The authorities of the countries in which these persons are to reside would be approached by the League of Nations with a view to obtaining the necessary permission for them to stay there, and officials of the League of Nations would be responsible, in agreement with the authorities of the said countries, for exercising special supervision over these refugees, who would further be required to swear that they would not take part in the Spanish civil war.

'4. Evacuation under the supervision of a Commission of the League of Nations and departure from Madrid in motor-coaches, in each of which the persons granted asylum would be accompanied by a League representative.

'5. Embarkation in a Spanish port, under the supervision of the League of Nations, on vessels which would take them from Spain. The countries that have granted asylum would be called upon to contribute to the cost in proportion to the number of persons to whom they have given asylum.

'6. Guarantee that the property of persons evacuated will be respected until they can return to Spain and protect themselves in normal conditions.

'7. Guarantee of security for the departure of foreign Missions from Madrid.'

...

"Mr. ALVAREZ DEL VAYO /Spain/ recalled that, when the question had been dealt with at the private meeting of the Council, it had been agreed that it should be examined solely from the humanitarian standpoint. He would make a strenuous effort to confine himself to that aspect in replying to the representative of Chile. Naturally, he could not hope to follow or rival his special erudition on the right of asylum. Mr. Alvarez del Vayo was familiar with the Convention of Havana and that of Montevideo - Conventions relating to the right of asylum; Spain had no legal obligations under those Conventions, but that had not prevented her from extending some tolerance to the practice of the right of asylum at Madrid .... He did know that the second paragraph of Article 2 of the Havana Convention bound the Governments - Mr. Alvarez del Vayo attached special importance to the word 'bound' - to communicate, immediately, a list of the persons who had taken asylum to the Government in whose territory the missions were accredited. Up to the present, he had not been favoured with a list of persons who had found asylum with certain diplomatic missions at Madrid, though that did not mean that he was not aware of the activities of the former.

"The Spanish Government had recognised the right of asylum in practice, and if it were desired to open discussion on all the aspects of the problem, in particular its political aspect, he would be ready, on behalf of his Government, to agree to such a discussion with all its consequences. Mr. Alvarez del Vayo would be prepared to consider whether the right of asylum in practice - and the Spanish Government had accepted it in practice, while not being bound juridically - gave the persons concerned the right to go on plotting against the Government in the very buildings of the diplomatic representatives.

"From the legal standpoint, Mr. Alvarez del Vayo thought the representative of Chile's conception of extra-territoriality was mistaken. With all due respect to his Chilian colleague, he would venture to say that, in his opinion, Mr. Edwards was confusing the extra-territoriality of a vessel, which was a part of the national territory, with the extra-territoriality of embassies and diplomatic missions.

...

"The Spanish Government was prepared to reconsider the problem, and Mr. Alvarez del Vayo hoped that the whole of the problem could be settled satisfactorily.

...

"Mr. LITVINOFF ... ventured to make some remarks concerning the very circumstantial statement made in the Council by the Chilian representative. He was led to do so solely by the apprehension lest the fact that the alleged right of asylum in diplomatic missions had been discussed before the Council

should acquire the significance of recognition of that right, as a matter of principle, by organs of the League of Nations.

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"He therefore thought it necessary once again to confirm what he had already pointed out at a private meeting of the Council as to the absence in international law or practice of any recognition of the right of diplomatic missions to grant asylum to persons seeking refuge from the police or from the judiciary. Mr. Litvinoff referred, of course, not to the granting of asylum by diplomatic missions, which was occasionally practised, but to any recognition of that right by the State to which the missions were accredited. There had been, in the remote past, cases of such a practice in Europe, but they did not constitute a right, all the more because they had always aroused protests on the part of the interested State, and had even led to calamitous international conflicts. He could quote many instances from international experience in the sixteenth, seventeenth and eighteenth centuries, but would not take up the time of the Council.

"Mr. Litvinoff would refer those interested in the question to the case, for example, of Count Schlieben, who, in 1702, took refuge in the French Embassy at Copenhagen, as a result of which the French Government was obliged to recall its Ambassador, Count Chamailly; and to the case of the Duke of Ripperda, who took refuge in the house of the British Ambassador at Madrid. The house was surrounded by the Spanish police, and Ripperda was arrested in the embassy building. He would also mention the case of the Russian subject Springer, who took refuge, in 1747, in the British Legation at Stockholm. The Swedish Government requested that Springer be handed over to the Swedish authorities: that was done, and the British Minister was subsequently recalled.

"Satow, Pradier-Fodéré and other experts in international law mentioned the aforesaid cases as having laid the foundation of the European practice of non-recognition of the right of asylum. In connection with the case of Nikitchenkov, in 1865, akin to those he had mentioned, the French Court of Cassation laid it down: 'que cette fiction' (extraterritoriality) 'ne peut être étendue, qu'elle est exorbitante du droit commun, qu'elle se restreint restrictivement à l'ambassadeur et à ceux qui, lui étant subordonnés, sont cependant revêtus du même caractère public'.

"In reality, in modern times no case was known in which the granting of asylum was recognised as a right by the State in which it occurred. Even in Spain, where, as a result of frequent revolutions and civil wars in the nineteenth century, the practice had sometimes varied, there had been such cases as that in which the Spanish Government, in 1848, had searched the house of the Danish Chargé d'Affaires, who had given refuge to insurgents.

"Governments of the United States of America had also objected to any right of asylum. Thus, for example, in 1875, Secretary-of-State Fish wrote as follows to the United States Minister in Spain concerning Colonel Borreguero, who had sought refuge in the United States Mission: 'It is an annoyance and embarrassment, probably, to the Ministers whose

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legations are thus used, but certainly to the Governments of those Ministers, and, as facilitating and encouraging chronic conspiracy and rebellion, it is a wrong to the Government and to the people where it is practised - a wrong to the people, even though the Ministry of the time may not remonstrate looking to the possibility of finding a convenient shelter when their own day of reckoning and of flight may come'.

"That attitude of the United States of America was summed up by Moore in the following words: 'Since the practice of asylum is not sanctioned by international law, it can be defended only on the ground of the consent of the State within whose jurisdiction it is sought to be maintained' (MOORE, Digest, Vol. ii, p. 294).

"The same attitude found expression in paragraphs 50 and 51 of the Instructions for diplomatic and consular representatives of the United States (1906).

"Mr. Litvinoff might quote examples of non-recognition of any right of asylum in the practice of Latin-American countries also, including Chile. Thus, in 1891, during a civil war, the Chilian Government, on the plea that refugees and their supporters were abusing the right of asylum, had caused the United States and Spanish Missions to be surrounded. The protest of the American Minister was rejected by the Chilian Foreign Minister. In 1893, during an attempted rising by the supporters of President Balmacèdo, the Chilian Government demanded the surrender of the leaders of the insurgents who had taken refuge in the United States Mission. The United States Minister was instructed by his Government to expel the refugees, who were then arrested as they left the Mission.

"Naturally, the references of the representative of Chile to some cases in Eastern countries, where the practice of asylum was intimately connected with the regime of capitulation, could not be accepted as convincing; but, even so, Mr. Litvinoff felt bound to point out that the granting of asylum by the Russian Legation at Teheran in 1829 had led to the storming of the Legation and the murder of the Russian Minister, the famous writer Griboyedov. But there, too, such cases were a thing of the past, and he was sure that, at the present time, the countries of the East also refused to admit any right of asylum.

"The position of this question in international law was definitively set forth in the following words of Professor Strupp: 'Limited in the eighteenth century to the building of the Mission and then subject to dispute, the right of diplomatic asylum has disappeared from the international law of the European States, so that a criminal taking refuge in the building of a legation must be surrendered to the local authorities without any process of extradition'.

"The majority of European authors severely condemned the practice. Phillimore called it a 'monstrous and unnecessary abuse of what is called the right of asylum'. The same view was expressed by such authorities on

international law as Martens, Klüber, Heffter, Blüntschli, Wheaton, Pradier-Fodéré and Satow.

"Summing up his remarks, Mr. Litvinoff affirmed that, while the granting of asylum had sometimes been practised by diplomatic representatives, often even without the knowledge of their Government, that could not in any way create a principle of international law, the more so because the practice was always, or in the overwhelming majority of cases, accompanied by protests and objections from the Governments on the spot.

"He therefore held it to be quite obvious that to raise in the League of Nations the question of recognising a right of asylum would not, under any circumstances, be justified, either by international law or by international practice: and therefore that such a practice could be tolerated only by the goodwill and free consent of the interested Government."

...

"Mr. EDWARDS desired to say just a few words in reply to the representative of Soviet Russia, as he believed it would be discourteous not to do so.

"Mr. Edwards had not raised in the League the question of the recognition by the League of the right of asylum. That, of course, was not a question to be brought before the League, and in that sense he quite agreed with the representative of Soviet Russia, since the question was one to be decided by each Government individually. But he desired to call the attention of the representative of Soviet Russia to the fact that the right of asylum existed and was exercised ....

"Mr. Edwards would be very glad indeed to examine carefully the cases which the Soviet representative had been good enough to bring to the notice of the Council. He was quite sure he would learn a great deal by reading Mr. Litvinoff's statement; but he must add that there were certain facts on which the representative of Soviet Russia had been misinformed. He referred particularly to the cases of asylum in the United States Embassy in 1891 in Chile, for it just happened that one of the persons who had taken refuge in that Embassy had been Mr. Edwards' own father, and Mr. Edwards had been very near to him. He could assure Mr. Litvinoff that there was no such thing as the right of asylum not being recognised by President Balmacèdo at that time - far from it. The right of asylum in that particular case had been most striking. It had been so much respected that his father had been taken from the United States Embassy under the protection of the United States Ambassador, in a train on which the American flag had been hoisted, so that the right of asylum had been extended to the railroad until they reached the port where they had embarked.

"Mr. Edwards wished merely to add that, as in the above case, there might be other cases in which the Soviet representative had been misinformed. He had quoted a great number of authors who considered that the right of asylum

was non-existent and was even a monstrosity. Of course, it was well known that authors of international law usually disagreed among themselves, and Mr. Edwards thought he could quote (though not at the moment, for it would take time) a great many other authors who thought the opposite ...."

149. The Council did not have to take a decision on the principle of diplomatic asylum. It confined itself to adopting the report of its President, which took note of the statements of the interested representatives in the matter of the opening of direct negotiations on the problem of the evacuation of the refugees.

150. The question of the Madrid refugees was raised once again in the League of Nations at the fifth plenary meeting of the eighteenth session of the Assembly, held on 18 September 1937, by the representative of Spain, who stated that his Government had respected asylum in practice even though it had not been obliged to do so by any international convention and was ready, independently of the facilities already provided, to seek a rapid solution, satisfactory to everyone, of the problem of the refugees in the embassies and legations. 155/

## 2. The United Nations

### (1) The question of the right of asylum in the programme of work of the International Law Commission

#### (a) The question of the right of asylum at the first and second sessions of the International Law Commission

151. The question of the right of asylum was mentioned in the Survey of International

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155/ On the basis of this statement, a number of undertakings were made, by exchange of notes between Spain and Chile (the latter acting on behalf of several Latin American countries), with a view to evacuating the refugees (for the text of the notes, see Dictionnaire diplomatique de l'Académie diplomatique internationale, vol. IV, pp. 385-386). The problem was, however, not solved. After the capture of Madrid, it was further exacerbated, for diplomatic relations between Spain and Chile were broken for a time and were not restored until 12 October 1940, when the last five asylees at the Chilean Embassy were able to leave Spain.

It should also be noted that at the tenth plenary meeting of the eighteenth regular session of the League of Nations Assembly, held on 30 September 1937, the representative of Argentina, feeling that "the legal conscience of the community of nations has progressed sufficiently far to allow of the conclusion of a convention embodying the right of asylum in international legislation", submitted a draft convention on diplomatic asylum, known as the "Saavedra Lamas draft" after its author, at that time Minister for Foreign Affairs of Argentina. The statement by the Argentine representative before the League Assembly was devoted mainly to recalling the events connected with the Spanish Civil War and to an analysis of the proposed text. No decision was taken by the Assembly on the Saavedra Lamas draft, but it was to serve as the basis for the Montevideo Convention of 1939, analysed above in chapter I (paras. 63-73).

Law in relation to the Work of Codification of the International Law Commission, 156/ prepared in 1948 for the International Law Commission. At its first session in 1949, the Commission included the question in the provisional list of 14 topics for codification.

152. During consideration of the Draft Declaration on the Rights and Duties of States, three members of the Commission, Mr. Alfaro, Mr. Scelle and Mr. Yepes, submitted a proposal calling for the inclusion of an article on the right of asylum in the Draft Declaration. 157/ The original version of the proposal read as follows:

> "Every State has the right to accord asylum to persons of any nationality who request it in consequence of persecutions for offences which the State according asylum deems to have a political character. The State of which the refugee is a national has the duty to respect the asylum accorded and may not consider it an unfriendly act."

153. In submitting the proposal, Mr. Yepes said, inter alia:

> "Although the Latin American States were not alone in recognizing the right of granting asylum to political refugees, they had practised this right most often. They were to be congratulated on having acted in this manner, for they had prevented veritable hecatombs from taking place during the civil wars which had ravaged their countries in the nineteenth century. In the modern world, which was constantly threatened by internal revolt or military coup d'état, the right of asylum was essential for all nations, and not only for the Latin American countries. By making frequent use of the right of asylum, those countries had enabled political leaders who would otherwise have been sacrificed to the hatred and revenge of their opponents to render their countries invaluable service.
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> "The right of asylum was based on the fact that in politics there were no offences or crimes, but only errors or mistakes. A person considered at a given moment as a political criminal might later be brought to the apex of power, perhaps by the very persons who had persecuted him most strenuously ....
>
> "Although the right of asylum had been exercised at all times by all the countries in the world, and although it had been acknowledged as a State right by the custom of many countries, if not milleniums, the Latin American countries were the only ones to have established its juridical status by convention. /By concluding/ the Conventions of Havana and Montevideo, ... in 1928 and 1933 respectively, ... the Latin American Republics /had become/ the champions of the recognition of this humanitarian institution, which mitigated to some degree the violence and ferocity of political struggles.

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156/ United Nations publication, Sales No.: 1948.V.1.

157/ Yearbook of the International Law Commission, 1949, 16th meeting, p. 125, para. 67.

"The right of asylum was one of the noblest creations of customary international law. It would be inconceivable not to include it in a general declaration on the rights and duties of States, and the proposed additional article should therefore be included in the declaration which the Commission was preparing.

"... Recognition of the right of States to grant asylum did not bind them to grant it to all political refugees who asked for it. The States themselves were free to decide whether or not asylum should be given to a political refugee. The duty corresponding to the right of asylum was not that of granting asylum whenever it was requested, but that of respect for the asylum granted on the part of the State of which the refugee was a national. That State should in no case consider the granting of asylum as an unfriendly act against it.

"It was for the State granting asylum to decide whether the crime imputed to the refugee constituted a political crime or a common law offence. That was the rule laid down by conventional and customary law with regard to extradition. That rule had been expressly included in the Convention on the Right of Asylum adopted in 1933 by the Seventh Pan American Conference and also in another regional Convention concluded in 1939 between several Latin American States."

154. Mr. Yepes added that warships, military aircraft and legations or embassies had been enumerated in the original text of the article on the right to political refuge as places of asylum and that the list had finally been omitted so as to give each State full latitude in deciding the places where it would grant asylum.

155. In that connexion, Mr. Brierly drew attention to the practice, especially prevalent in Latin American countries, of granting asylum in legations or embassies. That practice had not been accepted by the majority of European States, and by the United Kingdom Government in particular. He therefore thought that the text of the article should be amended in order to specify that legations and embassies were not considered as places of asylum.

156. Mr. Brierly proposed to the Commission that the words "in its territory" should be added after the word "asylum" in the first line of the proposal reproduced in paragraph 2 above. Mr. Yepes thereupon said that if asylum in legations or embassies were excluded, this would constitute a retrogression as compared with the existing situation. The right of asylum in embassies was currently recognized in many countries and should therefore be respected.

157. Mr. Spiropoulos made the following observation:

"It would be advisable to investigate the existing legal situation with regard to the right to political refuge and the practical effects of adopting the proposed article.

"There could be no doubt that every State currently had the right to grant asylum in its legations and embassies; the question was whether that

asylum had to be respected. Another question was that of warships and military aircraft; opinions differed on that subject, and it would be desirable to know how the point would be settled by an international jurisdiction.

"If the Commission adopted the proposed article with Mr. Brierly's amendment, what would the legal position be with regard to legations or embassies and warships and military aircraft? A possible interpretation would be to claim that the right of asylum did not exist in such cases. It seemed, therefore, that there was a risk of altering existing international law."

158. The proposed amendment was rejected by 9 votes to 2. The first sentence of the proposed additional article (see para. 152 above) was adopted by 8 votes to 3, and the second was rejected by 7 votes to none. 158/

159. On the second reading, however, the Commission considered a text submitted by the Drafting Committee from which the words "which the State according asylum deems to have" had been deleted since it was felt that it could be left to the State according asylum to decide in the first instance as to the nature of the offence and that the final decision would be a matter for the competent international jurisdiction. 159/

160. Mr. Yepes criticized the deletion of the provision which he felt was necessary since, if it did not exist, the State of which the person seeking asylum was a national would have the right to define the offence. Naturally that State would always claim that the offence with which the refugee was charged was an infringement of ordinary law and not of a political nature. 160/

161. The Commission, in the belief that the question was too complex to be dealt with in a single article, finally decided not to include an article on the right of asylum in the Draft Declaration on the Rights and Duties of States. 161/ Mr. Yepes was asked to prepare a working paper on the question for submission to the Commission at its second session. At the beginning of the second session in 1950, Mr. Yepes said that as there was a case relating to the right of asylum currently

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158/ Yearbook of the International Law Commission, 1949, 16th meeting.

159/ A/CN.4/SR.20.

160/ Ibid.

161/ Ibid.

before the International Court of Justice, he preferred to postpone the submission of his working paper. 162/

(b) The recommendation addressed to the International Law Commission in General Assembly resolution 1400 (XIV)

162. At the fourteenth session of the General Assembly, during the consideration of the report of the International Law Commission on the work of its eleventh session, the representative of El Salvador submitted a draft resolution (A/C.6/L.443) calling on the International Law Commission to undertake as rapidly as was advisable

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162/ During the consideration by the Sixth Committee of the General Assembly in 1949 of the Draft Declaration on the Rights and Duties of States adopted by the International Law Commission at its first session, the representative of Cuba proposed the insertion in the Draft of an article on the right of asylum in general. In that connexion, the representative of Colombia said that the urgency of the question of the right of political refuge could not be denied. He added:

> "Moreover, it would be a mistake to think that the problem could only arise in that part of the world /Latin America/ where the right to asylum in embassies was acknowledged, and that it had been completely solved in Europe, where only the right of asylum on foreign territory was customary, and where the question had been finally decided by extradition treaties.
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> "Actually, the right to asylum in embassies and legations had originated in Europe; it was not enough to protest that that was an abuse of the right ... it might as well be admitted that, in practice, asylum was granted in embassies whenever it was requested. The only difference was that Latin America officially acknowledged the existence of that means of affording the right of asylum."

Referring to the question of the definition of offences, the representative of Colombia said:

> "One solution to the problem which had been adopted by a certain number of Latin-American countries was to leave it to the State granting asylum to decide whether the person seeking it was really a political refugee. Strictly speaking, to grant asylum was not a duty of the State but a right which it exercised and which it was not bound to exercise automatically in all cases. However, in view of the fact that a decision as to the nature of the offence committed might create political difficulties between the States concerned, another solution to the problem might be considered. The question might be referred to the International Court of Justice, thus removing all suspicion about the intentions of the State granting asylum inasmuch as those intentions might not always be strictly humanitarian." (Official Records of the General Assembly, Fourth Session, Sixth Committee, 173rd meeting, paras. 16 and 33-36)

the codification of the principles and rules of international law relating to the right of asylum. 163/ In introducing the draft, the representative of El Salvador pointed out that, although the right of asylum, with its twin aspects of territorial asylum and diplomatic asylum, was an ancient institution, accepted and applied in many parts of the world, practice in that area had not yet reached adequate uniformity. Consequently, the International Law Commission's work would have to consist both of codification and of the progressive development of international law. 164/

163. Most of the representatives who spoke on the subject expressed support for the Salvadorian draft. Although the representative of El Salvador emphasized several times that what he had in mind was general regulation, on a world-wide scale, of the right of asylum in both its diplomatic and its territorial aspect, most of the representatives who spoke on the substance of the question referred primarily to diplomatic asylum. The representative of Uruguay, for example, stated that the right of asylum had been instituted as a safeguard at least as important as habeas corpus, that situations believed to have disappeared forever had a tendency to recur in many parts of the world, and that for many countries, particularly those of Latin America, the granting of diplomatic asylum was a duty stemming from the solidarity of mankind. 165/ Several representatives, particularly those of Italy, 166/ Argentina, 167/ France 168/ and the Dominican Republic, 169/ nevertheless expressed reservations regarding the feasibility of codifying the right of asylum on a world-wide scale. The representative of Brazil 170/ added that the Salvadorian proposal might adversely affect Latin America's own interests, for a world body could hardly approach that problem in the same spirit as prevailed in the Latin American region. Similarly, the Mexican representative expressed the view 171/ that a universal codification might endanger the very existence of the institution and might adversely affect the Caracas Convention of 1954; he was in favour of obtaining recognition of that regional institution by the

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163/ Only the remarks made on the substance of the question are summarized below. However, it should be noted that, in view of the fact that the Commission on Human Rights was at that time in the process of preparing a draft declaration on the right of asylum, the debate also touched on the need to co-ordinate the work of the Commission on Human Rights with that of the International Law Commission. A summary of that aspect of the debate will be found in para. 195 below.

164/ Official Records of the General Assembly, Fourteenth Session, Sixth Committee, 602nd meeting, para. 9.

165/ Ibid., 604th meeting, para. 21.

166/ Ibid., 604th meeting, para. 6.

167/ Ibid., 606th meeting, para. 10.

168/ Ibid., 607th meeting, para. 10.

169/ Ibid., 604th meeting, para. 11.

170/ Ibid., 606th meeting, para. 29.

171/ Ibid., 608th meeting, para. 18.

world community, but not of its universal extension. The institution of asylum, he observed, 172/ was most highly developed in Latin America by reason of certain political and social conditions peculiar to the countries of that area. Since it constituted an exception to the principle of a State's sovereignty over its own territory, the institution could operate only within a regional community possessing a fairly well-established common tradition, and it seemed hardly likely that, so far as the world as a whole was concerned, States whose interests, legal philosophies and political systems were often conflicting would willingly accept the interference of other countries in their domestic affairs.

164. Although the representative of Bolivia 173/ shared with the representative of Mexico the view that asylum was a regional institution, other representatives, including those of Ecuador, 174/ Turkey, 175/ Greece 176/ and Costa Rica, 177/ ascribed a wider geographic scope to it. The representative of Colombia stated in that connexion that the right of asylum, as was proved by its gradual acceptance in countries outside Latin America, stemmed from the intrinsic nature of the law of nations; the fact that it was not wholly accepted in some countries could never destroy its international character. 178/

165. Several representatives, including those of Cuba 179/ and Peru, 180/ stressed the need to make a distinction between political offenders and common criminals. In that regard, the representatives of Cuba, 181/ Peru 182/ and Mexico 183 raised the question of the definition of a political crime and of who had the right to apply that definition. The representative of Mexico stated as follows:

> "... it was essential to uphold the basic principle underlying diplomatic asylum, as defined in the Caracas Convention of 1954, namely, that the State granting asylum should have the unconditional and unrestricted right to decide whether or not the offence with which the person requesting asylum was charged was political in nature and whether or not asylum should be granted. To deny that right to the State granting asylum would be to endanger the corner-stone of the whole institution. Hence, that discretionary power of the State would have to be replaced by a universally acceptable definition of a political

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172/ Ibid., para. 17.

173/ Ibid., 606th meeting, para. 35.

174/ Ibid., 604th meeting, para. 24, and 612th meeting, para 6.

175/ Ibid., 607th meeting, para. 28.

176/ Ibid., 609th meeting, para. 4.

177/ Ibid., para. 16.

178/ Ibid., 606th meeting, para. 40.

179/ Ibid., 602nd meeting, para. 18.

180/ Ibid., 604th meeting, para. 26.

181/ Ibid., 605th meeting, para. 18.

182/ Ibid., 604th meeting, para. 26.

183/ Ibid., 608th meeting, para. 19.

offence, i.e. of the cases in which a State might grant asylum, which was by no means an easy task; it would also be necessary to establish an international judicial authority to settle disputed cases. In those circumstances, States would probably hesitate to perform what was a purely humanitarian and disinterested act for fear of becoming involved in an international controversy".

166. The Sixth Committee adopted the Salvadorian draft resolution by 63 votes to 1, with 12 abstentions; 184/ this draft became General Assembly resolution 1400 (XIV), by which the Assembly requested the Commission, "as soon as it considers it advisable, to undertake the codification of the principles and rules of international law relating to the right of asylum".

167. Pursuant to that request, the Commission, at its fourteenth session in 1962, included in its future programme of work a topic entitled "Principles and rules of international law relating to the right of asylum", without specifying when it would begin to study the subject. 185/

(c) The question of the right of asylum at the nineteenth session of the International Law Commission

168. At its nineteenth session in 1967, during the consideration of the organization of its future work, the International Law Commission again discussed the question of the right of asylum; however, as its report indicates, 186/ most members doubted whether the time had yet come to proceed actively with the topic. It was of considerable scope and raised some political problems, and to undertake it at that stage might have seriously delayed the completion of work on the important topics already under study. 187/

(2) The question of diplomatic asylum in the context of work relating to diplomatic relations

169. At the seventh session of the General Assembly, when the Sixth Committee considered an item entitled "Giving priority to the codification of the topic

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184/ Ibid., 612th meeting, para. 27.

185/ See Yearbook of the International Law Commission, 1962, vol. II, p. 190, para. 60.

186/ See Yearbook of the International Law Commission, 1967, vol. II, p. 369, para. 45.

187/ It should be noted that the working paper entitled "Survey of International Law" issued by the Secretary-General in 1971 for the use of the International Law Commission (see Yearbook of the International Law Commission, 1971, vol. II, part two, para. 372 et seq.) contains under the general heading "International law relating to individuals" a section on the right of asylum in which the following passage appears:

"The institution of 'diplomatic asylum' owes its customary and conventional evolution to the practice observed chiefly amongst Latin American States. The legal basis for the institution and its consequences have, however, been the subject of discussion and, on two occasions, cases have been placed before the International Court of Justice concerning particular aspects or instances over which disputes have arisen".

'Diplomatic intercourse and immunities' in accordance with article 18 of the statute of the International Law Commission", it had before it an amendment by Colombia (A/C.6/L.251) to a draft resolution submitted by Yugoslavia (A/C.6/L.248). The amendment would have had the International Law Commission give priority to the question of the "right of asylum" in addition to the question of "diplomatic intercourse and immunities". In introducing his amendment, the representative of Colombia stated inter alia:

> "The efforts of the American countries and the many jurists of all nations who had contributed to the defence of the human right of asylum clearly indicated that the time was ripe for the codification of the topic and that present circumstances justified the proposal that the International Law Commission should be asked to place it on its list of priorities". 188/

At the suggestion of the United Kingdom representative, the representative of Colombia subsequently revised his amendment, replacing the words "right of asylum" by the words "diplomatic asylum".

170. The representative of the Dominican Republic echoed several other representatives when he stated 189/ that "his country was constantly sensible of the humanitarian considerations on which the institution of bona fide diplomatic asylum was based. ... The institution of diplomatic asylum was in urgent need of scientifically objective review and ... might lose prestige if used as a means of interference in the domestic affairs of States. ... It was not good codifying practice to tie up the question of diplomatic immunities with the question of regulating the institution of diplomatic asylum, however closely related the two questions might seem".

171. The Sixth Committee rejected the Colombian amendment by 24 votes to 17, with 10 abstentions. 190/

172. The International Law Commission nevertheless came to consider the question of diplomatic asylum in the context of its work on the draft articles relating to diplomatic intercourse and immunities, which ultimately became the Vienna Convention on Diplomatic Relations. At its ninth session, when the Commission considered in first reading the article proposed by the Special Rapporteur on the inviolability of mission premises, 191/ it had before it a proposal by Sir Gerald Fitzmaurice to insert the following paragraph in the article:

> "Except to the extent recognized by any established local usage, or to save life or prevent grave physical injury in the face of an immediate threat

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188/ Official Records of the General Assembly, Seventh Session, Sixth Committee, 315th meeting, para. 28.

189/ Ibid., 316th meeting, para. 16.

190/ Official Records of the General Assembly, Seventh Session, Sixth Committee, 316th meeting, para. 66.

191/ A/CN.4/91.

or emergency, the premises of a mission shall not be used for giving shelter to persons charged with offences under the local law, not being charges preferred on political grounds."

Alternative text:

"Persons taking shelter in mission premises must be expelled upon a demand made in proper form by the competent local authorities showing that the person concerned is charged with an offence under the local law, except in the case of charges preferred on political grounds."

173. The Commission also had before it a proposal by Mr. Tunkin to substitute the following text for the list of exceptions to the principle of inviolability proposed by the Special Rapporteur:

"... such inviolability of the premises of the mission shall not however confer the right forcibly to detain therein any person whomsoever or to grant asylum therein to persons in respect of whom a warrant for arrest or detention has been issued by the competent State authorities".

174. Several members observed that those amendments raised the general question of diplomatic asylum and, although they recognized that the questions of franchise de l'hôtel and of diplomatic asylum were related, the general opinion was that the latter should be the subject of a separate study. One question raised was as to what steps the receiving State could take if mission premises were used for purposes other than those of the mission; several members, including Mr. Bartos and Mr. Amado, contended that the premises remained inviolable even if they were used as a place of asylum. Mr. Ago and Mr. Fitzmaurice pointed out in that connexion that it was dangerous to mention the question of asylum in an article which related to the obligations of the receiving State, because to do so might give the impression that, if the mission premises were being used for improper purposes, the receiving State would have the right to consider itself released from the obligation of respecting the inviolability of the premises; a better course, they said, would be to revert to the question when dealing with the obligations of the sending State.

175. This view prevailed, since the Commission decided by 12 votes to 1, with 8 abstentions, not to allude to the question of asylum in the article on the inviolability of premises; 192/ a few days later, however, when considering the question of the conduct of the mission and of its members towards the receiving State, it decided to include in the relevant article of the draft, which became article 41 of the Vienna Convention, a provision safeguarding the exercise of asylum in accordance with the special agreements in force between the sending and the receiving States. The source of article 41, paragraph 3, was a proposal by Mr. Padilla Nervo and Mr. García Amador, subsequently reworded, which read as follows:

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192/ Yearbook of the International Law Commission, 1957, vol. I, 394th meeting, para. 72.

"3. The premises of the mission shall be used solely for the performance of the functions recognized as normal and legitimate under the provisions herein laid down or other rules of general international law and any special agreements in force between the sending and the receiving States."

176. In introducing the text, 193/ Mr. Padilla Nervo explained the grounds for the clause "special agreements in force between the sending and receiving States"; he said that:

"The Commission had rightly decided not to deal with the question of asylum in the draft, and that decision must be respected. However, in enunciating the rule that the premises of missions should be used solely for normal and legitimate functions, it was impossible not to allude to certain special agreements in which diplomatic asylum was recognized as among the legitimate uses of mission premises. It might, of course, be argued that it was not necessary to mention special agreements at all, since their omission could not affect their validity for the contracting parties. It was, however, necessary, without prejudice to any decision on the question of asylum, to mention the existence of another legitimate use of mission premises, recognized by countries which had subscribed to conventions on diplomatic asylum. Failure to make such mention would be misunderstood in such countries, among which were a large number of Latin American States."

177. In connexion with the adoption of the provisional commentary on the article in question, some members, including Mr. François, Sir Gerald Fitzmaurice and Mr. García Amador, expressed the view that the right to grant asylum was not necessarily dependent upon agreements between States. Mr. Scelle said that the practice of granting asylum was an essential, traditional, and, in his opinion, praiseworthy, function of missions. 194/ Ultimately, it was decided to limit the commentary on the relevant paragraph of the article to the following sentence:

"(4) Paragraph 3 stipulates that the premises of the mission shall only be used for the legitimate purposes for which they are intended. Among the agreements referred to in the paragraph may be mentioned, as example, certain treaties governing the right to grant asylum in mission premises." 195/

178. Among the written comments submitted by Governments on the provisional draft was the following observation of the Government of Luxembourg concerning the sentence of the commentary quoted above:

"Paragraph 4 of the commentary might give rise to erroneous interpretations. The example cited in these explanations might give the impression that the granting of the right of asylum would be a legitimate use

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193/ Ibid., 411th meeting, para. 63.

194/ Ibid., 428th meeting, paras. 81-93.

195/ Ibid., vol. II, p. 143.

of the mission premise only if there was a specific convention regulating such grant. The Government of Luxembourg believes that clarification of the commentary is imperative." 196/

The following statement by the Swiss Government should also be mentioned:

"Switzerland ... does not recognize the right to grant asylum in mission premises." 197/

179. In the final draft articles adopted by the Commission at its tenth session, the article on the conduct of the mission and of its members remained as drafted at the ninth session, but the commentary was modified; the paragraph quoted above was replaced by the following text:

"(4) Paragraph 3 stipulates that the premises of the mission shall be used only for the legitimate purposes for which they are intended. Failure to fulfil the duty laid down in this article does not render article 20 (inviolability of the mission premises) inoperative but, on the other hand, that inviolability does not authorize a use of the premises which is incompatible with the functions of the mission. The question of asylum is not dealt with in the draft but, in order to avoid misunderstanding, it should be pointed out that among the agreements referred to in paragraph 3 there are certain treaties governing the right to grant asylum in mission premises which are valid as between the parties to them." 198/

180. Only passing reference was made to the question of asylum by a number of Latin American delegations 199/ in the Sixth Committee's debates on the provisional draft articles in 1957. It was scarcely mentioned at the United Nations Conference on Diplomatic Intercourse and Immunities, which adopted the 1961 Convention.

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196/ Ibid., 1958, vol. II, p. 123.

197/ Ibid., p. 131.

198/ Ibid., p. 104.

199/ The delegations of Colombia, at the 509th meeting (para. 141), of Uruguay, at the 511th meeting (para. 17), of Honduras, at the 513th meeting (para. 3), and of Bolivia, at the 513th meeting (para. 20).

(3) The question of diplomatic asylum in the context of work relating to consular relations

181. In the draft articles on consular relations and immunities submitted to the International Law Commission at its twelfth session in 1960, 200/ the Special Rapporteur, Mr. Zourek, proposed an article which read as follows:

"Article 46

"Duty to respect the laws and regulations of the receiving State

"Without prejudice to their consular privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State."

182. When the Commission considered that article, 201/ Mr. Erim, who was supported by Mr. Fitzmaurice and Mr. Yokota, among others, said that it was necessary to include some provision which, even in general terms, stipulated the duty of the sending State not to allow the consular premises to be used for any purpose incompatible with consular functions. He considered such a provision necessary because under another draft article, the receiving State was required to grant inviolability to consular premises and to safeguard that inviolability. The Commission might, indeed, consider including a provision requiring the sending State not to permit its consul to use his position to protect fugitives from justice.

183. The article was modified, and the following text was adopted by the Commission as article 53 of its provisional draft articles:

"Article 53

"Respect for the laws and regulations of the receiving State

"1. Without prejudice to the privileges and immunities recognized by the present articles or by other relevant international agreements, it is the duty of all persons enjoying consular privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

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200/ Yearbook of the International Law Commission, 1960, vol. II, p. 38, document A/CN.4/L.86.

201/ Ibid., vol. I, 543rd meeting, para. 80 et seq.

"2. The consular premises shall not be used in any manner incompatible with the consular functions as specified in the present articles or in other rules of international law.

"3. The rule laid down in paragraph 2 of this article shall not exclude the possibility of offices of their institutions or agencies being installed in the consular premises, provided that the premises assigned to such offices are separate from those used by the consulate. In that event, the said offices shall not, for the purposes of the present articles, be deemed to form part of the consular premises."

Paragraph 3 of the commentary read as follows:

"(3) Paragraph 2 reproduces the rule contained in article 40, paragraph 3, of the Draft on Diplomatic Intercourse and Immunities. 202/ This provision means that consular premises may be used only for the exercise of consular functions. A breach of this obligation does not render inoperative the provisionss of article 31 relative to the inviolability of consular premises. But equally, this inviolability does not permit the consular premises to be used for purposes incompatible with these articles or with other rules of international law. For example, consular premises may not be used as an asylum for persons prosecuted or convicted by the local authorities." 203/

184. The provisional draft articles were transmitted to Governments for their observations, and article 53 evoked the following commentary from the Government of Yugoslavia:

"It is indispensable to insert in this article a provision to the effect that consuls have no right to provide asylum."

185. The Special Rapporteur proposed that, should the International Law Commission deem it necessary to expand the text on that point, a second sentence in the following terms might be added in paragraph 2:

"In particular, they may not be used as an asylum for persons prosecuted or convicted by the authorities of the receiving State." 204/

He pointed out, however, that the Vienna Convention on Diplomatic Relations did not contain a specific provision to that effect. 205/

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202/ Later became article 41 of the Vienna Convention on Diplomatic Relations.

203/ Ibid., vol. II, p. 176.

204/ Ibid., 1961, vol. II, p. 171.

205/ Ibid., p. 72, document A/CN.4/137.

186. When the Commission considered article 53, Mr. Verdross pointed out that paragraph 2 of the article, unlike the corresponding provision of the Vienna Convention on Diplomatic Relations (art. 41, para. 3), did not refer to the rules "laid down by any special agreements in force between the sending and the receiving State". He pointed out that the purpose of that reference had been to cover the agreements existing between certain Latin American countries on diplomatic asylum and that it might be useful to add a similar provision to article 53, paragraph 2, to meet the case where there existed any similar agreements or usages relating to asylum in consulates. It was not necessary, in his opinion, to include in the text itself a specific provision denying any general right to asylum in consulates, a right which, he said, was not recognized by general international law. 206/ Mr. Jiménez de Aréchaga expressed the view that, in view of General Assembly resolution 1400 (XIV), 207/ the Commission should not include in the draft articles a provision such as that proposed by Yugoslavia, since if it did so it would be prejudging the question of the existence of asylum, which, in some cases, could extend to consular premises and warships. Mr. Padilla Nervo pointed out that, in general, diplomatic asylum was not held to extend to consular premises. Many bilateral conventions specifically stated that asylum should not be granted in consulates, 208/ and some stipulated that if a consular officer refused to surrender a fugitive from justice, the local authorities might, if necessary, enter the consulate to apprehend the fugitive. 209/ Mr. Padilla Nervo added that if the Commission had decided to include in the draft a provision to the effect that asylum could not be granted in consulates, the provision would have to specify that consular premises must not be used to grant asylum to common criminals sought by the authorities. 210/

187. The Special Rapporteur said, in reply to those observations, that:

> "... the position of consulates was completely different from that of diplomatic missions. There existed among certain Latin American countries agreements relating to asylum in diplomatic missions, but he knew of no such agreement in respect of consulates. The statement in article 53, paragraph 2, that the consular premises must not be used in any manner incompatible with the consular functions as specified "in the present articles or any other rules of international law" was sufficient to disallow asylum in consulates.

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206/ Ibid., vol. I, 604th meeting, paras. 67-69.

207/ See paras. 162-167 above.

208/ For example, the 1942 Convention between the United States and Mexico (United Nations Treaty Series, vol. 125, p. 300 et seq.).

209/ Article 10, paragraph (4), of the Consular Convention of 14 March 1952 between the United Kingdom and Sweden (United Nations Treaty Series, vol. 202, p. 157 et seq.).

210/ Yearbook of the International Law Commission, 1961, vol. I, 604th meeting, paras. 79-85.

...

"There were no longer any doubts regarding /the/ status /of consuls/ - which was totally different from that of diplomats - and it would therefore be pointless to state in the present draft that no right of asylum existed in the case of consulates.

...

"There was another reason for not including a provision such as that proposed by the Yugoslav Government. If the right of asylum were specifically excluded, it would be necessary to state what would happen if the rule were broken by a consulate. A question of that type could be dealt with in a bilateral convention but hardly in a multilateral convention." 211/

188. The Commission adopted the version proposed by the Special Rapporteur (see para. 185 above) in first reading by 8 votes to 5, with 5 abstentions. 212/

189. Mr. Jiménez de Aréchaga explained that he had voted against the provision because it

"... could be held to imply that a consulate should never be used as an extension of a diplomatic mission for the purposes of granting asylum. He recalled the experience of diplomatic asylum during the Spanish Civil War when the representatives of various countries had provided accommodation on consular premises for persons to whom diplomatic asylum had been granted.

"In addition, the adoption of the proposal conflicted with the Commission's decision at its twelfth session to defer consideration of the question of asylum to a future session."

Similar views were expressed by Mr. García Amador. 213/

190. In second reading, most of the Commission's members were of the opinion that the sentence on the granting of asylum in consulates should be deleted; 214/ the discussion on this point is summarized as follows in paragraph 3 of the commentary on the relevant article (article 55 of the final draft articles):

"(3) Paragraph 2 reproduces, mutatis mutandis, the rule contained in article 41, paragraph 3, of the 1961 Vienna Convention on Diplomatic

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211/ Ibid., paras. 88, 89 and 92.

212/ Ibid., paras. 95 and 96.

213/ Ibid., para. 97.

214/ Ibid., 622nd meeting, paras. 34-47.

Relations. This provision means that the consular premises must not be used for purposes incompatible with the consular functions. A breach of this obligation does not render inoperative the provisions of article 30 relative to the inviolability of consular premises. But equally, this inviolability does not permit the consular premises to be used for purposes incompatible with these articles or with other rules of international law. For example, consular premises may not be used as an asylum for persons prosecuted or convicted by the local authorities. Opinions were divided in the Commission on whether the article should state this particular consequence of the rule laid down in its paragraph 2. Some members favoured the insertion of words to this effect; others, however, thought it would be sufficient to mention the matter in the commentary on the article, and pointed out in support of their view that there is no corresponding provision in the 1961 Vienna Convention on Diplomatic Relations. Moreover, certain members would have preferred to replace the text adopted at the previous session by a more restrictive form of words. After an exchange of views, the Commission decided to retain the text adopted at its previous session, which repeats the rule laid down in article 40, paragraph 3, of the draft articles on diplomatic intercourse and immunities, now article 41, paragraph 3, of the Vienna Convention." 215/

191. At the Vienna Conference on Consular Relations, 216/ the Second Committee had before it a United Kingdom amendment to the article on the inviolability of consular premises (A/CONF.25/C.2/L.29) calling for the insertion of the following paragraph in the article:

"Consular premises shall not be used to afford asylum to fugitives from justice."

It also had before it a Greek amendment to the same article (A/CONF.25/C.2/L.59 containing the following paragraph:

"The provisions of the present article shall not be construed as a recognition of the right of asylum."

Although several delegations, including those of Italy and Spain, thought it appropriate to mention the question of the right of asylum in the future Convention on Consular Relations, most delegations disagreed; some, including those of Czechoslovakia, the Ukrainian SSR and Finland, contended that the Conference should refrain from dealing with a question which was before the International Law Commission, while others, including those of France, Belgium

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215/ Ibid., vol. II, pp. 128-129.

216/ See Official Records of the United Nations Conference on Consular Relations, vol. I, Second Committee, 6th and 10th meetings, pp. 314-320 and 331-333, and vol. II, pp. 77 and 80.

and Ireland, held that, in the absence of any provision on asylum in the Vienna Convention on Diplomatic Relations, the inclusion in the Convention on Consular Relations of an express prohibition with regard to asylum in consulates could, by argument a contrario, be taken to imply recognition of the right of asylum by the Convention on Diplomatic Relations. The Second Committee decided, by 46 votes to 19, with 4 abstentions, not to discuss the question of including a provision on the right of asylum in the future convention. It will be noted that the last part of paragraph 2 of the text adopted by the International Law Commission ("as specified in the present articles or in other rules of international law") (see para. 183 above) does not appear in the corresponding provision (article 55, paragraph 2) of the Convention on Consular relations. 217/

(4) The question of diplomatic asylum in the context of work relating to territorial asylum

192. The question of territorial asylum was considered by the United Nations at a very early date and gave rise to a provision in the Universal Declaration of Human Rights, which was adopted by the General Assembly in 1948 (resolution 217 A (III). Article 14 of the Declaration reads as follows:

> "1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
>
> "2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

It should be noted in that connexion that when the Third Committee discussed, at the third session of the General Assembly, article 12 of the draft international

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217/ Two additional chapters of the work of the United Nations on diplomatic law are the Convention on Special Missions, done at New York on 16 December 1969 (General Assembly resolution 2530 (XXIV)) and the Convention on the Representation of States in their Relations with International Organizations of a Universal Character, done at Vienna on 14 March 1975 (A/CONF.67/16). The Convention on Special Missions has, in article 46, paragraph 2, a provision identical with article 41, paragraph 3, of the Convention on Diplomatic Relations. In the International Law Commission's draft articles, on which the Convention on Special Missions was based, the provision in question was the subject of a commentary similar to that accompanying the corresponding provision of the draft articles on diplomatic relations. During the preparation of the former draft articles by the International Law Commission, the question of asylum was discussed only briefly at the 937th meeting, paras. 88-107; see Yearbook of the International Law Commission, 1967, vol. I, pp. 241-242); the question does not appear to have been raised during the drafting of the Convention at the twenty-third (1968) and twenty-fourth (1969) sessions of the General Assembly. The question of diplomatic asylum does not appear to have come up at any stage of the preparation of the Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

declaration of human rights, the amended form of which was later to become article 14 of the Universal Declaration, it had before it an amendment by Bolivia (A/C.3/227) calling for the addition to paragraph 1 of the article of a second sentence reading as follows: "This right shall extend to asylum in embassies or legations." In introducing his amendment, the representative of Bolivia referred to the Havana Convention of 1928, under the terms of which, he pointed out, the right of asylum was restricted to political refugees "in cases of extreme urgency, when their lives were threatened, and then only for a limited period"; it was proper, in his judgement, that a country which gave asylum to a refugee should also open to him the doors of its embassy, as the latter also represented the country of refuge. 218/ The Third Committee also had before it an amendment by Uruguay (A/C.3/268) calling for the addition of the following sentence to paragraph 1: "This right includes diplomatic asylum in embassies and legations." The delegation of India stated that it "could not accept the principle of extending the right of asylum to embassies and legations of foreign Powers as that would give rise to serious disorders in non-American countries". 219/ The representative of Pakistan also expressed reservations about extending the right of asylum to embassies and legations, referring to the history of capitulations in the Ottoman Empire and of concessions in China. 220/ The representative of the Ukrainian SSR felt that the Bolivian and Uruguayian amendments might look like an attempt to intervene in matters within the domestic jurisdiction of States and, if adopted, might provide a pretext for misuse of the principle of extraterritoriality. 221/ The representative of the USSR added that the sole purpose of embassies and legations was to permit Governments to transact business with one another. 222/ The representative of France stated that the amendments in question went far beyond the scope of the Declaration; in his opinion, no attempt should be made to render universal what was a specifically Latin American tradition. 223/ The representatives of Bolivia and Uruguay finally withdrew their amendments, explaining that "an adverse vote taken by the Third Committee might create an unfortunate precedent and weaken the principle involved". The representatives of Uruguay and Mexico nevertheless proposed that the words "in other countries" should be replaced by "witnin the territory of other countries" so that States "which believed that the legal concept of territory extended to their legations and embassies abroad would be free to

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218/ Official Records of the Third Session of the General Assembly, Part I, Third Committee, 121st meeting.

219/ Ibid.

220/ Ibid.

221/ Ibid., 122nd meeting.

222/ Ibid.

223/ Ibid.

interpret /the article/ in that sense". 224/ That proposal was rejected by 19 votes to 12, with 12 abstentions. The representative of Chile expressed regret at the decision taken and voiced the hope that the Latin American tradition in that field would soon be adopted by the rest of the civilized world.

193. At the thirteenth session of the Commission on Human Rights, France introduced a draft declaration on the right of asylum (E/CN.4/L.454/Rev.1), which was submitted to Member States for comments. This draft, which referred specifically to article 14 of the Universal Declaration, dealt with territorial asylum; however, it gave a number of States an opportunity to make known their views on diplomatic asylum. Thus, the following comments were submitted by Spain:

> "It is of course a well-known fact that 'asylum' from the international point of view, may be granted by a State 'outside its territory', which gives rise to the so-called 'diplomatic' asylum, the international form of the old 'right of religious asylum' which can now be granted not only on the premises housing diplomatic missions, but also in consulates, ships of war or vessels of the State used for public services, military aircraft and on premises occupied by organs of a foreign State allowed to exercise authority in the territory of the State granting asylum; in a word any inviolable place where the person to whom asylum is granted cannot be subjected to any measures of coercion ...
>
> "The position of Spain with regard to the right of asylum in general (i.e. 'territorial' and the so-called 'diplomatic' asylum) has been clearly and consistently stated in all the international meetings or organs which have discussed the question. A full explanation of the question can be found in the statements made by Professor Yanguas and Professor Trías de Bes at the meetings of the Institute of International Law in Luxembourg (1937), when the extent and the legal basis for asylum were outlined, or when the question was discussed at the Brussels meeting (1948), and when it was given definitive form at the Bath meeting (1950). The same may be said of the statement made by Professor Barcia Trelles at the first Spanish-Portuguese-American Congress on International Law (October 1951) with the collaboration of his fellow Spanish members of the Commission, Professors Miaja, Sela and Herrero, although that statement was confined to the so-called 'diplomatic asylum'." 225/

194. On the other hand, Honduras stated:

> "... The Honduran Government feels that, in order to spare both embassies and the Governments themselves considerable inconvenience, the most effective regulations governing the right of asylum should be established, including a clause stipulating that, within fifteen days

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224/ Ibid.

225/ E/CN.4/781, pp. 6-7.

after notice has been given by a diplomatic representative that asylum has been granted to an individual who has claimed that right, the appropriate safe-conduct should be issued or refused, as the case may be; in accordance with that principle, the Honduran Government has not approved the Convention on Diplomatic Asylum signed at the Tenth International Conference of American States at Caracas by the Governments of the States members of the Organization of American States, since article II of that Convention, which reads as follows, completely nullifies the right of asylum:

"'Article II. Every State has the right to grant asylum but is under no obligation to grant it or to state the grounds for refusing it.'" 226/

195. At its sixteenth session, the Commission on Human Rights adopted a draft Declaration on the Right of Asylum, 227/ which it transmitted to the Economic and Social Council. Earlier in the session, its attention was drawn to resolution 1400 (XIV), adopted a few months before by the General Assembly, which dealt with codification of the principles and rules of international law relating to the right of asylum. 228/ The note submitted by the Secretary-General to the Commission (E/CN.4/795) summarized the discussion on the subject in the Sixth Committee in the following terms:

"3. Some members felt that it was necessary to clarify the respective functions of the Commission on Human Rights and the Economic and Social Council, on the one hand, and the International Law Commission, on the other hand, regarding the question of the right of asylum ... Another view was that the International Law Commission should deal with diplomatic asylum, inasmuch as the question of territorial asylum was already being studied by the Commission on Human Rights. A number of representatives, however, did not agree to such view and stated that the International Law Commission should study both territorial and diplomatic asylum. It was also pointed out that no duplication would result from the work of the two organs, since the Commission on Human Rights was concerned with the preparation of a draft declaration on the right of asylum, which would be an elaboration of article 14 of the Universal Declaration of Human Rights, while the International Law Commission would be dealing with the codification of the principles and rules of international law in the matter of asylum."

196. Very little was said about diplomatic asylum in the course of the discussion

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226/ E/CN.4/781, p. 4.

227/ Official Records of the Economic and Social Council, Thirtieth Session, Supplement No. 8 (E/3335), para. 147.

228/ See paras. 162-167 above.

in the Commission on Human Rights. The representative of Venezuela observed, 229/ however, that the Fourth Meeting of the Inter-American Council of Jurists in 1959 had not included the right of asylum in the enumeration of human rights in its draft convention on human rights. That attitude, he explained, was largely attributable to the circumstance that the principles of territorial asylum would logically have to be applied also to diplomatic asylum, and "it was clear that the majority of the American States were not prepared to recognize diplomatic asylum as an individual right".

197. The draft Declaration prepared by the Commission was transmitted to the General Assembly by the Economic and Social Council (resolution 772 E (XXX) of the Council) together with the observations received thereon from Governments. Those observations (E/3403 and Add.1-5) included the following comment submitted by Chile (E/3403/Add.3):

> "The Chilean Government considers that the type of asylum to which the draft in question relates should be clearly stated because, although diplomatic asylum and political refuge are alike so far as their humanitarian basis is concerned, the relevant procedures are different, and special rules are required in each case. It is obvious that both the creditable history of this draft and the spirit by which it is informed justify the assertion that the aim is confined to the enunciation of principles of doctrine applicable only to what is called political refuge or territorial asylum, and that the protection granted by the heads of diplomatic missions at embassies or legations, and by the commanders of warships and of military camps or aircraft, to persons persecuted on political grounds or for political offences lies outside the scope of its provisions. The Chilean Government accordingly proposes that, for the sake of greater clarity, the words 'right of asylum' should be replaced by 'territorial asylum' both in the title of the draft and in its articles."

A similar suggestion was made by the Netherlands (E/3403/Add.2).

198. The draft Declaration prepared by the Commission on Human Rights was first discussed in the General Assembly at the seventeenth session by the Third Committee and was subsequently considered at the twentieth, twenty-first and twenty-second sessions by the Sixth Committee.

199. In the Third Committee there was general agreement that the draft Declaration should deal solely with territorial asylum. In that connexion, the representative of Brazil stated:

> "It would not be advisable to apply some of the articles of the draft Declaration to diplomatic asylum; moreover, that form of asylum was primarily a Latin American practice and was not recognized by many countries, notably the European countries." 230/

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229/ E/CN.4/SR.650.

230/ Official Records of the General Assembly, Seventeenth Session, Third Committee, 1193rd meeting, para. 10.

200. A number of representatives pointed out that the International Law Commission had been assigned the task of cofifying the entire body of mandatory international law relating to asylum.

201. The General Assembly decided, at its twentieth session, to refer the item entitled "Draft Declaration on the Right of Asylum" to the Sixth Committee, whose agenda was not as heavy as that of the Third Committee. At that session, the Sixth Committee confined its efforts to solving various procedural questions connected with the item.

202. At the twenty-first session, the Sixth Committee established a working group and instructed it to prepare a preliminary draft declaration on the right of territorial asylum. 231/ As the subject-matter was thus clearly restricted to territorial asylum, few comments were made on diplomatic asylum. The representative of Uruguay, however, stressed the need for a saving clause to prevent the Declaration on territorial asylum from being interpreted in such a way as to detract from the importance of diplomatic asylum. 232/ The representative of Venezuela summarized the characteristics of diplomatic asylum in the following terms:

> "Diplomatic asylum could be granted in certain places that enjoyed immunity from the jurisdiction of the State from whose authority the person seeking asylum sought to remove himself. That privilege of immunity was the modern equivalent of the fictitious status of extraterritoriality formerly granted, for example, to diplomatic missions. Every State had the right to grant asylum, but it was not obligated to do so or to state reasons for refusing it. Only persons prosecuted for political offences could receive asylum, and then only in urgent cases. It rested with the State granting asylum to determine the nature of the offence and also to decide whether a case of urgency was involved. Once diplomatic asylum was granted, the State granting it could request that the refugee should be allowed to depart for foreign territory, and the territorial State was under obligation, except in certain cases to grant a safe-conduct and the necessary guarantees. During the transfer the person concerned was under the protection of the State granting asylum. That State was not bound to settle him in its own territory, but it could not return him to his country of origin unless that was his express wish." 233/

The representative of Colombia, while acknowledging that diplomatic asylum was of

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231/ Ibid., Twenty-first Session, Annexes, agenda item 85, document A/6570, annex II, para. 2.

232/ Ibid., Sixth Committee, 921st meeting, para. 43.

233/ Ibid., 919th meeting, para. 25.

regional origin and had found a privileged setting in Latin America, expressed the view that "diplomatic asylum was also recognized in other regions, although, unfortunately, not to the same extent or with the same effectiveness". 234/ The representative of Sri Lanka* stated in that connexion:

> "Practices observed in one region of the world alone should not be elevated into rules of universal conduct. Neither the practice of States nor international law - whether customary or treaty law - had sanctioned the principle of unrestricted exercise of asylum in foreign legations and consulates. Moreover, there was no independent principle of law which, for humanitarian considerations, made lawful even limited infringements of State sovereignty, such as would obviously be involved in diplomatic asylum, inasmuch as the granting of asylum in a State's territory limited that State's jurisdiction over the individuals on its territory." 235/

The representative of Poland, too, stated that diplomatic asylum was of regional application, and he added:

> "There were fundamental differences also: territorial asylum was only an application of the principle of the sovereignty of the State concerned, whereas diplomatic asylum was a limitation of that principle. In the case of territorial asylum, the refugee was outside the territory of the State in which he had committed the offence for which proceedings had been instituted against him, and the decision to grant him asylum was not a violation of that State's sovereignty. In the case of diplomatic asylum, however, the refugee was in the territory of the State in which he had committed an offence and, according to the judgement of the International Court of Justice, a decision to grant him asylum by withdrawing him from the jurisdiction of the territorial State, constituted an intervention in matters that were exclusively within that State's competence, and such a derogation could not be recognized unless its legal basis was established in each particular case." 236/ 237/

203. At the twenty-second session, the Sixth Committee considered the draft

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* Ceylon at the time.

234/ Ibid., 922nd meeting, para. 16.

235/ Ibid., 953rd meeting, para. 15.

236/ See para. 96 above.

237/ Official Records of the General Assembly, Twenty-first Session, Sixth Committee, 919th meeting, para. 30.

prepared in the previous year by the working group referred to in paragraph 42 above. 238/ This draft was entitled "Draft Declaration on Territorial Asylum". In this connexion, many representatives were gratified that the working group had made it clear that the draft was directed only at territorial asylum, which, in their opinion, was the most important element of asylum and the type most practised by States. On the other hand, some representatives 239/ regretted that it had not been possible to extend the scope of the declaration to diplomatic asylum, in view of the essentially humanitarian nature of the declaration and the wide practice of some countries, particularly in Latin America, in matters of diplomatic asylum.

204. In that connexion, it was explained at the time of the adoption by the Sixth Committee of the draft resolution which became General Assembly resolution 2312 (XXII) entitled "Declaration on Territorial Asylum", that in order to emphasize that the adoption of such a declaration did not complete the work of the United Nations on the codification of standards and principles concerning the institution of asylum, reference had been made in the second preambular paragraph of the draft resolution to the work of codification on the right of asylum to be undertaken by the International Law Commission in accordance with General Assembly resolution 1400 (XIV). 240/

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238/ Ibid., Twenty-first Session, Annexes, agenda item 85, document A/6570, annex.

239/ Including the representatives of Uruguay at the 984th meeting (para. 15), of Colombia at the 987th meeting (para. 28) and of Pakistan, also at the 987th meeting (para. 41).

240/ It should be noted that the United Nations High Commissioner for Refugees submitted to the General Assembly at its twenty-seventh session a draft Convention on Territorial Asylum drawn up by a meeting of experts (Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 12 (A/8712), appendix). At the twenty-ninth session, the Assembly had before it, as a result of a request expressed at its twenty-seventh and twenty-eighth sessions, 91 replies from Governments - of which 76 were favourable - on the question of the preparation of a convention on territorial asylum. See Official Records of the General Assembly, Twenty-eighth Session, Supplement No. 12A (A/9012/Add.1) and ibid., Twenty-ninth Session, Supplement No. 12C (A/9612/Add.3). On the recommendation of the Third Committee, it decided (resolution 3272 (XXIX)) to refer the above-mentioned draft Convention to a Group of Experts, which would meet in May 1975, and to consider at its thirtieth session the question of holding a conference of plenipotentiaries on territorial asylum. The replies from Governments referred to above and the work of the Third Committee are of course limited to the question of territorial asylum. At the twenty-eighth session, however, several delegations in the Third Committee, particularly those of Sweden (A/C.3/SR.2038), France (A/C.3/SR.2038), Mexico (A/C.3/SR.2038), Cuba (A/C.3/SR.2039) and Belgium (A/C.3/SR.2040), referred to specific cases of diplomatic asylum in Chile.

(5) The question of asylum in the context of the work on the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents

205. At the twenty-eighth session of the General Assembly, the Sixth Committee, on the basis of a draft by the International Law Commission, prepared a Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents. 241/ It had before it, in connexion with its work on the subject, an amendment submitted by Colombia, Costa Rica, El Salvador, Ecuador, Honduras, Mexico, Nicaragua, Panama, Peru, Uruguay and Venezuela (A/C.6/L.928), which proposed the addition of an article 11 bis, reading as follows:

> "None of the provisions of this Convention shall be construed as modifying the treaties on asylum."

206. The representative of Venezuela emphasized that the inclusion of such a provision would respect the traditional and generous usages of the States which regarded asylum as a humanitarian institution intended to promote universal justice over and above temporary and local political and social circumstances. 242/ The representative of Colombia stated that the sponsors of the amendment were not prepared, in the context of their mutual relations, to surrender the right embodied in the Latin American conventions on the subject to determine the nature of the act giving rise to a petition for asylum. It was pointed out that none of the sponsors had ever invoked the procedures established in the treaties on asylum to protect persons guilty of the type of crimes to which the draft Convention was directed and that their proposal was designed not to exclude their mutual relations from the scope of the draft but to ensure that they could formally accept the régime which it established. 243/

207. Other delegations, including those of Greece, 244/ Haiti, 244/ Sweden 244/ and Switzerland, 244/ considered the amendment dangerous, in that it might afford a loop-hole for the perpetrators of acts of terrorism and threaten the purposes sought by the General Assembly. In that connexion, it was pointed out that the Hague and Montreal Conventions on a related subject drawn up under ICAO auspices did not contain any escape clause concerning the right of asylum. The representative of Italy added that it would not be desirable to include a provision affecting only one group of countries in a convention having a universal character. 244/ The representative of Austria also stressed the regional nature of the institution of diplomatic asylum. 244/ A number of representatives, particularly those of Italy and Sweden, suggested that the text should be redrafted to make it clear that it related only to States which were linked by a treaty on asylum.

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241/ See General Assembly resolution 3166 (XXVIII).

242/ A/C.6/SR.1421.

243/ Ibid.

244/ Ibid.

208. In view of the foregoing, the representative of Bolivia finally proposed the following wording (A/C.6/L.943):

> "The provisions of this Convention shall not affect the operation of the treaties on asylum, in force at the date of the adoption of this Convention, as between the States which are parties to those treaties; but a State Party to this Convention may not invoke those treaties with respect to another State Party to this Convention which is not a party to those treaties."

209. The delegations of the United Kingdom, 245/ Canada, 245/ Kenya, 245/ Brazil, 246/ France, 246/ Cuba, 246/ Algeria 247/ and the USSR, 247/ while acknowledging that that text called for less serious reservations on their part than the 11-Power amendment, considered that it would be better not to include provisions on diplomatic asylum in the draft Convention. The representative of Brazil in particular emphasized that article 6, which imposed upon States the obligation of either extraditing or prosecuting without any exception whatsoever, accordingly prohibited them from granting asylum to persons guilty of the type of crimes referred to in article 2; thus, a provision on asylum was unnecessary. Moreover, such a provision might defeat the deterrent effect of the Convention and make Latin America a sanctuary for those who committed the crimes covered by the Convention. In addition, it could only be harmful to the persons whom the Convention was supposed to protect, since it would have the effect of establishing a discriminatory régime in favour of perpetrators of acts of violence against internationally protected persons.

210. However, several delegations, including that of Canada, noted that the proposed new text made it clear that it applied only to the treaties on asylum in force at the date of the adoption of the Convention; that the regional institution of asylum applied only as between the States which were parties to the Treaties of Havana, Montevideo and Caracas; and that those Treaties could not be invoked against a State which was not a party to them. They therefore indicated that despite their reservations they would, out of respect for the wishes expressed by the Latin American countries, merely abstain instead of casting a negative vote.

211. The Bolivian text was adopted with minor changes by 50 votes to none, with 52 abstentions, 248/ and became article 12 of the Convention.

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245/ A/C.6/SR.1432.

246/ A/C.6/SR.1439.

247/ A/C.6/SR.1447.

248/ A/C.6/SR.1447.

(6) Work of the Sixth Committee on the question of diplomatic asylum at the twenty-ninth session of the General Assembly 249/ 250/

(a) General comments

212. Many representatives paid tribute to the generous spirit which inspired the Australian initiative and associated themselves with the humanitarian concerns which it reflected.

213. Some delegations, including those of Colombia 251/ and Grenada, 252/ observed that, at a time when almost everywhere in the world political instability endangered many human beings, including persons in high places, the institution of diplomatic asylum greatly deserved to be studied. The representatives of Ghana, 253/ Uruguay 254/ and Sri Lanka 255/ noted that the question involved much uncertainty and obscurity and expressed the view that a study of doctrine and practice in the matter would help to dispel the confusion. The representative of Australia 256/ pointed out in that connexion that it would be desirable, both in the interest of the development of humanitarian law and in the interest of friendly relations among States and co-operation between them in solving international humanitarian problems, to study and resolve the fundamental question of the legality of diplomatic asylum; if the problem of diplomatic asylum were actually to arise in a country which did not recognize the institution, lack of agreement on the applicable principles would surely cause more difficulties than would the existence of at least some generally accepted standards.

214. Other representatives, however, including the representatives of Japan, 257/ the Niger 258/ and Turkey, 259/ expressed doubts with respect to the timeliness

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249/ For information on how the Assembly came to consider the question of diplomatic asylum at its twenty-ninth session, see the introduction to this report.

250/ Many representatives indicated that their views were at present merely preliminary and that their Governments reserved the right to state their final position at a later stage.

251/ A/C.6/SR.1505.

252/ Ibid.

253/ A/C.6/SR.1510.

254/ A/C.6/SR.1506.

255/ A/C.6/SR.1508.

256/ A/C.6/SR.1505.

257/ A/C.6/SR.1506.

258/ A/C.6/SR.1508.

259/ A/C.6/SR.1507.

of studying the question of diplomatic asylum. That question was, in the opinion of the representative of France, 260/ complex and delicate; it had, according to the representatives of Israel, 261/ the Federal Republic of Germany 262/ and Spain, 263/ important political aspects which might cause the greatest differences of opinion between Governments; and an in-depth study of it, in the view of the Soviet Union, 264/ the United States 265/ and the United Kingdom, 266/ could only polarize the differences of opinion and force delegations to adopt rigid positions.

215. Many delegations referred to the work of the General Assembly on territorial asylum, in particular resolution 2312 (XXII) of 14 December 1967.

216. In that connexion, some delegations, including those of Costa Rica 267/ and Uruguay, expressed the view that there was a close link between diplomatic asylum and territorial asylum. The representative of Uruguay pointed out that, should a declaration on diplomatic asylum eventually be adopted, its preamble would not be very different from that of the United Nations Declaration on Territorial Asylum. Diplomatic asylum was merely a temporary situation preceding territorial asylum, which was based on the same humanitarian considerations.

217. Other delegations, including those of Israel, Austria, 268/ the USSR, Afghanistan 269/ and Mongolia, 270/ considered it necessary to make a clear distinction between the two forms of asylum. The representatives of the Byelorussian SSR 271/ observed in that connexion that it was certainly not by mere chance that the General Assembly had limited its substantive work to territorial asylum. The representatives of France, the Ukrainian SSR 272/ and India 273/ recalled that, in the matter of the right to asylum, the International Court of

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260/ A/C.6/SR.1510.

261/ A/C.6/SR.1506.

262/ A/C.6/SR.1509.

263/ Ibid.

264/ Ibid.

265/ A/C.6/SR.1510.

266/ A/C.6/SR.1509.

267/ A/C.6/SR.1505.

268/ A/C.6/SR.1507.

269/ A/C.6/SR.1510.

270/ Ibid.

271/ Ibid.

272/ Ibid.

273/ A/C.6/SR.1505.

Justice had emphasized the element of derogation from the sovereignty of the territorial State, which clearly differentiated diplomatic asylum from territorial asylum.

(b) Degree of recognition of diplomatic asylum in international law

218. Many representatives referred to Latin America's long tradition with regard to diplomatic asylum. In that connexion, reference was made in particular to the Havana Convention (1928), the Montevideo Convention (1933) and the Caracas Convention (1954). The representatives of several Latin American States, particularly Colombia, noted that diplomatic asylum was widely practised in their respective countries. It was stressed that Latin America had proved particularly favourable for the development of diplomatic asylum, owing, as the representative of Colombia indicated, to geographical factors (immense distances and difficulties of communication) and, as the representative of the United States added, to special circumstances resulting from the homogeneous nature of that community of countries, which had a common legal system and heritage.

219. In the view of some representatives, including the representative of Grenada, diplomatic asylum was a generally accepted institution of international law which was not subject to discussion. The representative of Ghana 274/ observed in that regard that that form of asylum had been granted many times by countries outside Latin America. The representative of Australia also emphasized that, among the States which denied the existence of the right to grant asylum, many had themselves granted it.

220. Other delegations, including those of India, Brazil, 275/ Austria, Sri Lanka, Egypt, 276/ the German Democratic Republic 277/ and The Upper Volta 278/, considered that what was involved was an essentially regional rule which had not been recognized as forming part of general international law. The representative of France pointed out in that regard that the Latin American States themselves appeared to view the institution of diplomatic asylum as a regional institution and that, in the asylum case, the request submitted to the International Court of Justice was based on certain agreements and on "American international law". The representative of the United States emphasized that, during the formulation of the regional conventions on the subject, and particularly at the time of the adoption of the 1954 Caracas Convention, his country had stated several times that it did not recognize the doctrine which held that diplomatic asylum was part of international law, and that that position was a traditional one well known to the other countries of the hemisphere.

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274/ A/C.6/SR.1510.

275/ A/C.6/SR.1505.

276/ A/C.6/SR.1509.

277/ Ibid.

278/ Ibid.

(c) The question of the legal basis for diplomatic asylum

221. Some representatives, including those of Sri Lanka, the Soviet Union, France, Hungary 279/ and Afghanistan, held that, historically, the institution of diplomatic asylum had been able to develop on the basis of the notion of the extraterritoriality of diplomatic premises, but that that basis could no longer be invoked because the notion itself had gradually been abandoned.

222. The representative of Australia rejected that argument: diplomatic asylum could doubtless be conceived as an aspect of the inviolability of diplomatic premises, but it was nevertheless not based on any notion of extraterritoriality; a clear implication of the International Court's decision in the asylum case was that asylum was an institution separate from the inviolability of diplomatic premises and that the asylee derived protection from his qualification as an asylee and not from the inviolability of the diplomatic premises. The representative of Uruguay added that there was no ontological identity between the question of diplomatic asylum on the one hand and that of extraterritoriality and the privileges of inviolability on the other. The proof was that the States which practised diplomatic asylum had never invoked the 1961 Vienna Convention.

223. In the view of a number of representatives, including those of Uruguay, Chile, 280/ Costa Rica, Argentina 281/ and Mexico, 282/ diplomatic asylum should be recognized in international law for humanitarian reasons. Developing that idea, the representative of Australia noted that, since the Court's decision in the asylum case - which some had invoked in support of the argument that no right of asylum existed in international law - nearly a quarter of a century had passed and that, apart from the fact that the body of state practice where diplomatic asylum was concerned had considerably increased, there had been a vigorous development of international humanitarian law. In the Corfu Channel case, the International Court itself had pointed to humanitarian considerations as a source of law. The representative of Afghanistan had endorsed that statement. The representative of Israel added that he subscribed to the idea embodied in certain important jurisprudence to the effect that humanitarian considerations were a proper factor to be taken into account in developing and applying the law; that proposition simply reflected what could be called the general colouration of current jurisprudence and the sources of its ideological inspiration.

224. While recognizing that a number of persons had over the years taken refuge in the diplomatic premises of various States which did not always belong to the Latin American region, several representatives, including those of India, Sri Lanka, Spain, the United Kingdom and France, stressed that providing temporary refuge in an embassy to persons threatened by violent and disorderly action on the part of

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279/ A/C.6/SR.1510.

280/ A/C.6/SR.1505.

281/ A/C.6/SR.1507.

282/ A/C.6/SR.1509.

irresponsible sectors of the population was not the same as recognizing the right of diplomatic asylum. The United Kingdom delegation took the view that refuge differed from diplomatic asylum in that, inter alia, the granting of refuge was not necessarily subject to political considerations. The representative of the United States added that even if the two concepts were more similar, the references to practice would have to take account of the requisite mental element - namely, opinio juris sive necessitatis. Examining "custom and usage" as a possible basis for diplomatic asylum, Morgenstern emphasized the distinction between customary rules which created legal rights and obligations, and usage, which created no legal relationship, and concluded that, on the basis of official utterances, the description of the practice of diplomatic asylum as a custom was due to loose phraseology.

225. A number of delegations, including those of Spain, the Ukrainian SSR and Czechoslovakia, 283/ had held that, in the current state of international law, diplomatic asylum had a legal foundation only in those countries which had decided to recognize it either by virtue of custom or by way of an agreement.

(d) Diplomatic asylum in the light of certain principles of international law

226. Several delegations, including those of New Zealand, 284/ Sweden, 285/ Japan and Egypt, stressed that the question of diplomatic asylum was one of those which highlighted the difficulty of reconciling humanitarian considerations with certain recognized standards of international law. Among those standards, reference was made on the one hand to the rules laid down in the 1961 Convention on Diplomatic Relations and, on the other, to the principle of the sovereignty of States and that of non-interference in their internal affairs.

- The rules contained in the Vienna Convention on Diplomatic Relations

227. The representatives of the German Democratic Republic and Japan pointed out that, under the provisions of article 3 of the Vienna Convention, one of the functions of a diplomatic mission was to promote friendly relations between the sending State and the receiving State, and that the development of the practice of diplomatic asylum was perhaps not conducive to the realization of that objective.

228. A number of representatives, including those of India, Sweden, the Federal Republic of Germany, the United Kingdom and The Upper Volta, wondered to what extent the granting of diplomatic asylum was compatible with the rules laid down in article 41, paragraph 3, of the Vienna Convention, which provided that "the premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the ... Convention". The representative

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283/ A/C.6/SR.1510.

284/ A/C.6/SR.1505.

285/ A/C.6/SR.1506.

of the Soviet Union pointed out in that connexion that the granting of asylum was not one of the functions of diplomatic missions as enumerated in article 3 of the Vienna Convention.

229. The representative of Australia stressed, however, that article 3 of the Vienna Convention did not contain an exhaustive enumeration of the functions of a diplomatic mission, one of the reasons being to avoid any prejudice to the position of those States which accepted the right of diplomatic asylum. A similar opinion was expressed by the representative of Uruguay.

230. Reference was also made to article 41, paragraph 1, of the 1961 Vienna Convention, under which it is the duty of all persons enjoying the privileges and immunities provided for in the Convention to respect the laws and regulations of the receiving State, and not to interfere in the internal affairs of States.

- The principle of the sovereignty of States and the principle of non-interference in their internal affairs

231. A number of delegations, including those of Austria and Egypt, emphasized that diplomatic asylum caused a conflict between humanitarian concern and territorial sovereignty. In the view of the representatives of Japan, Algeria, 286/ the USSR and Afghanistan, the granting of asylum by a diplomatic mission constituted a derogation from the territorial sovereignty of the State in which that mission was situated, that State being prevented from exercising its criminal jurisdiction in its own territory. The delegations of India, Sri Lanka and France referred in that connexion to the following paragraph of the judgement rendered by ICJ in the asylum case:

> "In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State."

232. The representative of Hungary declared that the granting of diplomatic asylum to a person under the jurisdiction of the receiving State was clearly intervention in the internal affairs of that State; such interference constituted a violation of general international law and entailed the responsibility of the sending State, and humanitarian considerations, where applicable, could be invoked only as extenuating circumstances. He pointed out that the General Assembly's Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations clearly laid down that no State

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286/ A/C.6/SR.1510.

or group of States had the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.

233. In reply to the argument that diplomatic asylum was a derogation from the sovereignty of the territorial State, the representative of Australia drew attention to the idea arising from the judgement of ICJ in the asylum case, namely that diplomatic asylum would involve no unlawful interference where it had a legal basis. Furthermore, there were many circumstances where diplomatic asylum raised no question of any derogation from sovereignty: for example, asylum might be granted to persons pursued by mobs over whom the territorial authorities had lost control. Asylum in those circumstances could well be most welcome to the territorial authorities, which were not in a position to take the measures necessary to protect the lives of those persons. Furthermore, asylum might be granted to members of the de jure government of the territorial State during an insurrection. Would the insurrectionaries in that situation always be entitled to claim that they had lawful jurisdiction over the asylees?

234. The representative of Uruguay, referring to Latin American practice, added that it was sometimes necessary to be able to override the principle of sovereignty; in his view, it was proof of political maturity to permit another Government to evaluate coldly what those concerned judged with passion, and to acknowledge that such evaluation was not an unfriendly act but rather the exercise of a power deriving from American international law.

(e) Questions to be considered in the formulation of rules for diplomatic asylum

235. Some representatives stressed that the question arose as to whether diplomatic asylum was a right of the State or a right of the individual. The representative of Australia said in that connexion that the discretion of a State to grant or refuse to grant diplomatic asylum must be fully recognized, a view which was supported by the representative of Israel. The representative of Argentina noted that, under the provisions of the Havana, Montevideo, and Caracus Conventions, the right to grant asylum belonged to the State. The representative of Costa Rica indicated, however, that his country considered asylum to be not only a right of the State vis-á-vis other States but also a right of the individual himself as a direct subject of international law, while the representative of Uruguay pointed out that his Government had entered reservations to several articles of the Caracas Convention because it felt that all persons had the right to asylum regardless of sex, nationality, belief or religion. 287/

236. Furthermore, a number of representatives, particularly the representative of the United States, stressed that the question as to who should determine whether or not the grounds for asylum were political - in other words, the question of the right of qualification - had not always been resolved in the same way in the various regional treaties relating to asylum. The representatives of Australia and Brazil considered that the right of qualification belonged to the State which granted the asylum, and the delegations of Argentina and Mexico observed that that had been the solution adopted in the Caracus Convention, among others. The representative of Colombia noted in that connexion that the Latin American countries had exercised the right of qualification cautiously and in accordance with generally accepted principles so as to prevent the institution of diplomatic asylum from being diverted from its objective. Several representatives, including the representatives of Brazil, Turkey, Uruguay and Algeria, stressed that common criminals could not benefit from the right of asylum. The representative of the United States noted that that principle was common to all the regional treaties on the right of asylum. In that connexion, the representative of Colombia stressed that, in any case, no State could logically wish to give shelter to persons belonging to the category of common criminals in other States.

237. The representative of Uruguay added that, among the persons subject to political persecution, only those who defended their ideas courageously and altruistically should benefit from asylum; those who sought to achieve their political aims by recourse to indiscriminate terror could not claim asylum. Similar views were expressed by the representatives of Brazil, Costa Rica, Turkey and Israel. The representative of the United States declared in that connexion that the Organization of American States had agreed that terrorist acts should be regarded as common crimes.

238. The question of the granting of a safe-conduct was mentioned by several representatives, including those of Australia, Japan, the United States and the

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287/ See note 104 above.

Federal Republic of Germany, as one which might give rise in practice to serious difficulties. The representative of Guatemala declared in that connexion that the territorial State had the obligation to furnish the necessary guarantees in order to enable the person enjoying asylum to depart, and to provide him with a safe-conduct. The representative of Mexico noted that that obligation was sanctioned by the Caracas Convention. The same comment was made by the representative of the United States, who emphasized, however, that, as far as the exact nature of the safe-conduct was concerned, the regional conventions offered no uniform solution.

239. Finally, it was stated, particularly by the representative of Mexico, that diplomatic asylum could be granted only under urgent and exceptional circumstances. The representative of Australia observed, however, that there was no agreement on what should be understood by urgent and exceptional circumstances.

(f) The question of measures to be taken by the General Assembly with regard to diplomatic asylum

240. A number of representatives said that they were not opposed to the Secretary-General's being requested to submit a report on the question, but reserved their position with regard to the measures to be taken in the light of that report.

241. Certain delegations, including those of Grenada, Ecuador, Uruguay, El Salvador and Guatemala, took the view that it would be desirable to supplement international law by formulating a universal convention based on the experience acquired in Latin America. The representative of Uruguay suggested that that task should be entrusted to the International Law Commission. In that connexion, several representatives, including those of Chile, Colombia, Venezuela, Mexico, the Upper Volta and Jamaica, declared that any attempt to universalize the institution of diplomatic asylum should be undertaken in such a way as not to be detrimental to the principles of the institution as developed in Latin America.

242. Other delegations, including the delegation of Israel, wondered whether international practice was sufficiently developed for the General Assembly to be able at that stage to undertake to bring together in a convention any existing rules. The representatives of Japan, the Federal Republic of Germany and France considered that it was unrealistic and imprudent to try to extend to the universal level an institution linked to a single civilization. In the view of the representative of Sweden, there was no need to codify the obligation which was clearly incumbent on every human being to give temporary shelter for humanitarian reasons to one of his fellow men. The delegation of the United States added that, rather than seek to have all States adopt the practice of diplomatic asylum, it would be better to invite the members of the international community to reflect seriously upon the humanitarian questions underlying requests for asylum and to do their utmost to eliminate, within their own frontiers, all infringements of human rights. A similar idea was expressed by the representative of Japan.

243. The representative of the Ukrainian SSR took the view that the question of diplomatic asylum was not ripe for discussion in the United Nations, and was clearly not ready for codification in international law. In his view, any effort

in that direction might well do more harm than good. It would therefore be better to delete the item from the agenda and to revert to it at a more appropriate time. Similar views were expressed by the representatives of the Soviet Union, Hungary and the Byelorussian SSR.

### 3. The Organization of American States

244. The work undertaken on the question of diplomatic asylum within the framework of the Pan American Union and the Organization of American States led to the conclusion of the 1928 Havana Convention on Asylum, the 1933 Montevideo Convention on Political Asylum and the 1954 Caracas Convention on Diplomatic Asylum, which were analysed in chapter I above and which will therefore not be referred to again here.

245. It should be pointed out, however, that, at its 1959 meeting held at Santiago, Chile, the Inter-American Council of Jurists approved the following resolution: 288/

"DIPLOMATIC ASYLUM

"The Inter-American Council of Jurists

RESOLVES:

"To submit to the Council of the Organization of American States for presentation, if it considers it appropriate, to the Eleventh Inter-American Conference, for consideration, the following:

"DRAFT OF PROTOCOL TO THE CONVENTIONS ON DIPLOMATIC ASYLUM

"The governments of the member states of the Organization of American States, in their desire to clarify, supplement, and perfect as far as possible the Convention on Asylum signed at Havana in 1928, the Convention on Political Asylum signed at Montevideo in 1933, and the Convention on Diplomatic Asylum signed at Caracas in 1954, have agreed on the following protocol to the afore-mentioned instruments:

"Article I

"It shall not be lawful to grant asylum to persons responsible for genocide, and in general, for offenses against humanity, whether committed in time of peace or in time of war.

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288/ Final Act of the Fourth Meeting of the Inter-American Council of Jurists, document CIJ 43.

"Article II

"For the purposes of diplomatic asylum desertion may include any member of the regular armed forces.

"Article III

"Urgent cases are, among others, those in which political or social instability prevails, or when the individual is being sought by persons or mobs over whom the authorities have lost control, or when the individual is in danger of being deprived of his life or liberty because of political persecution and cannot make use of all the legal means that ensure a fair trial, or when constitutional guarantees have been suspended, either totally or partially.

"Article IV

"It shall rest with the state granting asylum to determine the nature of the offense or the motives for the persecution, as well as to determine whether or not a case of urgency exists. The determination shall be made in writing and will be definitive for the sole purpose of issuing the safe-conduct.

"Article V

"In determining the country of destination, the preference of the asylee and especially his motives for not desiring to be transferred to a specific country shall be taken into account; but it shall be the state granting asylum that will decide on the country of destination.

"Article VI

"The safe-conduct shall be issued within thirty days following the date on which the state granting the asylum notifies the territorial state that it has definitively made the determination referred to in Article IV.

"The territorial state may, simultaneously upon issuing the safe-conduct, and without prejudice to the departure of the asylee for foreign territory, request from the latter the subsequent extradition of the asylee. In that case the local government shall inform beforehand the state granting asylum that it is proposed to request the extradition upon issuing the safe-conduct, and the state granting asylum shall designate a country of destination of which the extradition can be requested because of a convention between the country of destination and the territorial state providing for such a request.

"Article VII

"If the asylee remains in the territory of the state granting asylum such state may offer him a position or employment compatible with his status as a political asylee.

"Article VIII

"The provisions of the conventions on asylum referred to in this Protocol shall have no effect when they are contrary to the provisions herein." 289/

246. At the same meeting, the Inter-American Council of Jurists approved a resolution entitled "New articles on diplomatic asylum", in which it decided, inter alia, to instruct its permanent committee, the Inter-American Juridical Committee, to prepare a draft article or articles to be incorporated in the protocol recommended by the Inter-American Council of Jurists on the subject of the Convention on Asylum signed at Havana in 1928, the Convention on Political Asylum signed at Montevideo in 1933 and the Convention on Diplomatic Asylum signed at Caracas in 1954. The article or articles in question should, without restricting the right of the receiving State to qualify the reasons for diplomatic asylum, make it possible to avoid a situation where asylum was sought or granted in violation of the rules of law in force in America. 290/

247. Pursuant to this recommendation, the Inter-American Juridical Committee, meeting at Rio de Janeiro, submitted an Opinion dated 19 October 1959 291/ in which it first of all inquired into the philosophical, juridical and practical justification of the existing system of unilateral qualification by the State granting asylum. On this point the Committee declared:

"The power of the State granting asylum to determine whether the asylee is a political offender or the victim of political persecution is essential to the continued existence of the institution of asylum, since asylum is granted at times of domestic upheaval and political unrest, when sectarian passions brand as the worst of criminals anyone who endeavors to overthrow the government or change the institutions. During such moments it may be that even persons of high position and culture lack the serenity and calm necessary to judge the activities of the asylee impartially.

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289/ This resolution was the subject of the following reservation by Argentina with regard to Article VII:

"This provision refers to a case of territorial asylum, not diplomatic asylum. It would be more advisable to include it in a convention dealing with territorial asylum."

The resolution was also the subject of the following reservation by the United States of America:

"In view of the traditional position of the United States with respect to asylum, the Delegation of the United States has abstained from voting on the resolutions dealing with this subject, and does not subscribe to them."

290/ Final Act of the Fourth Meeting of the Inter-American Council of Jurists, document CIJ.43, p. 15.

291/ Inter-American Juridical Committee, New Articles on Diplomatic Asylum (document CIJ.49).

"Actually there are only three fitting solutions to the matter of determination; the first is to give the power to the territorial State; the second, to give it jointly to the territorial State and the State granting asylum; and the third, to give it to the State granting asylum. Inasmuch as the first two are unacceptable, since they would put an end to asylum; the only practicable one is the third, and this was expressly authorized in the 1933 Montevideo Convention and the 1954 Convention of Caracas.

"The territorial State should not have the power to make the decision, since it is the one pursuing the asylee, using the term pursuit in its broad, general sense and not in the merely technical sense; that is, the territorial State seeks authority to seize the asylee in order to detain him, to impose a particular punishment, or to apply the death sentence to him; doing any of these things more or less in accordance with legal formalities. To leave the determination in the hands of the territorial State would be to convert asylum into something ridiculous and even grotesque; it would be more frank and honorable to suppress the institution. A system of determination by the territorial State is incompatible with it.

"To grant asylum on the basis of a joint decision by the territorial State and the State granting asylum is also incompatible with the institution for then it would suffice for the territorial State to discuss or oppose the evaluation of the State granting asylum in order to render the determination impossible. A system of that kind would lead to determination by the territorial State or to a paralysis of the institution of asylum.

"In actual practice, the system that recognizes determination as a power of the state granting asylum has produced satisfactory results. Suffice it to point that hundreds, yes, even thousands, of cases of asylum have been settled. On occasion there have been discussions, exchanges of diplomatic notes, and differences of opinion; but the problem has always ended with the departure of the asylee, which puts an end to the discussion and to the polemics.

"The case of Dr. Haya de la Torre, between Colombia and Peru, which lasted for several years, is cited in contradiction of the foregoing. This is not a valid example, since in that case the system of determination itself was not being discussed but only the power to make the decision, in that particular case because Peru had not ratified the Convention of Montevideo. As a result, the legal points debated were the following: first, whether Peru could have international obligations arising from a convention it had signed but not ratified; second, whether any obligatory international custom existed in America with reference to diplomatic asylum; third whether the Havana Convention, in speaking of the laws, treaties, and customs of the country granting asylum, 292/ brought the practices of asylum, including determination, under the laws of that country.

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292/ The Havana Convention actually uses the expression "pais de refugid" (country of refuge). On this point, see note 75 above.

"It is also alleged that common criminals are sometimes qualified as politicians. In the first place, it is observed that the presumption of error should not fall exclusively upon the country granting asylum: it must be supposed that the territorial authorities are equally susceptible of error. Hence in the cases referred to, at least, a doubt may remain. In the second place, even supposing the determination to be manifestly wrong, it does not seem wise to say that a principle or an institution must be destroyed merely because it has not functioned well in a few cases.

"The same thing happens with every legal system: sometimes there are flaws, defects, undesirable applications; what is basic is that, as a general rule, it produces the desired results. It has been rightly said that the exception proves the rule.

"In short, obligatory unilateral determination by the State granting asylum is essential for diplomatic asylum. There is no way to substitute other means or procedures for it to advantage, and its application has been consistently effective."

248. The Committee then posed the question of the desirability of creating a special authority to settle disputes between States in the matter of qualification. It gave a negative answer on the following grounds:

"A jurisdictional system of that kind would hinder the functioning of asylum, since the controversies that arose would finally have to be submitted to arbitration; from this it follows that disputes and conflicts between States would be fomented. Whereas, under the present system every possible dispute ends with the determination, which makes this impossible, under the jurisdictional system the granting of asylum or a safe-conduct would mean only the beginning of an international process, with the consequent difficulties and expenses.

"The appointment of a court of arbitration creates grave problems. If it is composed of diplomats accredited to the government of the territorial state, they run the risk of being considered persons non grata if they deliver and base or explain an award that is unfavorable to the local government. In this way, an act would be performed that might affect the good relations between various states by extending the differences resulting from asylum to include other countries in addition to those directly interested.

"Doctrinally, arbitration does not solve the difficulty implicit in the system of determination, namely, the limiting or restricting of the sovereignty of the State, because the situation is identical when the determination comes from a court of arbitration whose decision, even though adverse, the territorial State must accept. Thus, if there is a division within the court, it is the will of one individual, the third or the fifth judge, that defines the political nature of the asylum. Moreover, under the present system each state maintains its viewpoint: consequently, when the

territorial State gives the safe-conduct it has the right to maintain its judicial position. There is neither victor nor vanquished, as there is in the case of arbitration, where one of the parties is defeated when its thesis are found to be without basis. This undoubtedly affects the prestige of the State for which the award is unfavorable, and may bring about unexpected reactions in the public opinion of that State.

"To recognize the Council of the Organization of American States as the authority to consider differences relating to asylum would be unjustified, not only for the reasons already set forth but for other special reasons such as the following:

a. The character of the Council, whose functions can never be those of a judge, would be completely discredited, whether it worked through itself or a committee.

b. Broad political powers would be granted to the Council of the Organization for that purpose, which is contrary to the traditions of the American republics.

c. A sad precedent would be established in granting to the Council political powers, which could be extended to other matters tomorrow and convert that body into a kind of super-state.

...

"Besides this, there are other specific difficulties that may be commented upon such as:

"First. To exclude the nationals of countries bordering the territorial state from the list of possible arbiters, as has been proposed, would put the countries of the American community on a basis of obvious inequality. Some, such as Brazil and Colombia, which have many neighbors would in fact be placed in a position of inferiority.

"Second. On many occasions there are asylees in more than one embassy, and this would necessitate the organization of different courts.

"Third. The Council of the OAS would have to spend precious time that is needed for the exercise of its own powers and the proper performance of its regular functions in order to try cases of asylum."

249. The Committee finally considered the advisability of providing an avenue of appeal which, without affecting the principle of qualification by the State granting exile, would permit rectification of any error by the diplomatic agent or the chancellery concerned. It noted that within that framework two solutions had been proposed:

"a. The establishment within the Supreme Court of Justice, or the

highest court of the country granting asylum, of a means of appealing or reviewing the decisions made by the diplomatic agent;

"b. The settlement of the asylee for a certain period of time in the state granting asylum, in order to enable the territorial state to request extradition, during the period of time agreed upon, if in its opinion the asylee is a common offender and it can prove that this is so."

250. The Committee stated as follows in this regard:

"The first of these solutions does not fail to recognize but, on the contrary, strengthens and consolidates, the right of determination by the State granting asylum. This is so because it guarantees a new and more careful study of the problem, a second examination to which more time can be given, greater reflection, and consideration of the problem away from the place in which the events transpired.

"But it offers the disadvantage of not being applicable in several countries of America, because of constitutional standards according to which the competence of the Supreme Court or of the corresponding tribunal is determined in the Constitution itself. And as provision for the above appeal is lacking at present, the agreement to be entered into will not be applicable in those countries until a constitutional amendment, which is a difficult thing to obtain, is adopted on the subject.

"On the other hand, by relating asylum to extradition the desired end is brought about, namely, that the highest tribunal or court of justice of the State granting asylum examines the nature of the acts of which the asylee is accused. For in our countries, as a general rule, it is the function of that court or tribunal to decide upon extradition. Thus the problem of competence is completely eliminated.

"In that way a procedure is authorized and regulated before the supreme authority of the State granting asylum, after the safe-conduct is granted.

"This has a dual advantage:

"First. That authority, by virtue of its own organization, its functions which include the trying of very important cases, the capability of its members, who are required to be of outstanding moral and professional caliber, and its independence of the executive branch of the government and activities of political parties, is best qualified to perform this delicate task.

"Second. After the issuance of the safe-conduct and the departure of the asylee, the remaining question diminishes in importance, tension is lessened or disappears, and passions lose much of their violence. These factors tend to create a favorable atmosphere for studying the problem calmly and dispassionately, and it is settled justly.

"It is true that in the 1954 Caracas Convention on Diplomatic Asylum the case of extradition is contemplated. 293/ However, it seems to us that a new provision is necessary, first, because the Convention has received very few ratifications and, second, because the prevailing precept should be modified, in our view, in several ways, namely: (1) by lengthening the period within which the request for extradition should be presented, since 30 days is too little time for the territorial State to study the various aspects of the case and the evidence on both sides; (2) by providing that it is unnecessary for the territorial State to declare at the very outset that it is going to request extradition, and binds itself to do so, since at the time of granting the safe-conduct that government could not yet have all the necessary facts on which to make a definitive decision. What should be required is that there be a serious difference of opinion over the determination that prompted the government in question to ask that the asylee be kept in the territory of the State granting asylum for a certain period, in order that within such time that government might reconsider the problem or hold the necessary hearings. That is, the territorial State may or may not request extradition; but it is obvious that if the term fixed should end without a request having been presented, the state granting asylum should not continue under the obligation to prevent the asylee from leaving its territory.

"By drafting the legal provisions in that way, a real balance will be established between the rights of the two interested States and the institution of asylum will undoubtedly be perfected and improved."

251. On the basis of the foregoing, the Inter-American Juridical Committee decided to recommend that the following provision should be included in the additional protocol to the convention on asylum to replace article 17 of the Caracas Convention:

"If there should be any disagreement over the determination, the territorial State, in granting the safe-conduct and authorizing the departure of the asylee, may demand the settlement of the latter in the territory of the State granting asylum for a period of 60 days with a view to the possible presentation of a request for extradition.

"The State granting asylum should agree to the aforesaid settlement and should not permit the asylee to leave for another country.

"The request for extradition may be made even when there is no treaty on the subject between the two countries, and it shall be handled in accordance with the legal standards applying to that institution in the state granting asylum.

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293/ Art. 17 of the Convention; see para. 81 above.

"If extradition is not requested during the period indicated, the State granting asylum ceases to be under obligation to retain the asylee in its territory.

252. The question of diplomatic asylum does not appear to have been taken up again by the Organization of American States since the formulation of the Opinion analysed above.

253. It should, however, be pointed out that the Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance, prepared in the context of the third special session of the General Assembly of the Organization of American States (25 January to 2 February 1971) and adopted on 2 February 1971, contains the following article 6 on asylum in general:

"None of the provisions of this Convention shall be interpreted so as to impair the right of asylum." 294/

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294/ The text of the Convention is reproduced in the study prepared by the United Nations Secretariat for the twenty-seventh session of the General Assembly on the question of international terrorism (A/C.6/418 and Corr.1-2 and A/C.6/418/Add.1).

# CHAPTER IV

## STUDIES BY NON-GOVERNMENTAL ORGANIZATIONS CONCERNED WITH INTERNATIONAL LAW

### 1. The Institute of International Law

254. The Institute of International Law considered the entire question of asylum at its 1948 and 1950 sessions. It had previously had occasion to deal with some aspects of the question in relation to other subjects.

#### (1) The Regulations concerning the legal régime of ships and their crews in foreign ports

255. These Regulations, adopted at The Hague in 1898 and revised in Stockholm in 1928, contain provisions relating to asylum on board warships and merchant ships.

256. With regard to warships, articles 18, 19 and 20 of the text provisionally adopted at the 1897 Copenhagen session 295/ provided as follows:

> "Art. 18. The commander must not grant asylum to persons who have been prosecuted for or convicted of offences or crimes under ordinary law or to deserters from the land or sea forces of the territory or from another ship.
>
> "If he takes political refugees on board, their status as such must have been clearly established and he must admit them under conditions such that in so doing he does not give aid to one of the contending parties to the detriment of the other.
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> "He may not disembark such refugees in another part of the territory in which he took them on board or so close to the said territory that they can return thereto without difficulty. 296/
>
> "Art. 19. Anyone taking refuge on board ship without the knowledge of the commander and falling in the category of persons whom the commander should not accept must be surrendered or expelled, at his own risk and peril, wherever the ship puts in after his presence is discovered. It is, however, desirable in such cases that this duty should be tempered by humanitarian considerations.

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295/ Annuaire de l'Institut de droit international, Copenhagen session, 1897, p. 186 et seq.

296/ In the draft submitted by the Rapporteurs, Férand-Giraud and Kleen, article 18 had a fourth paragraph which read as follows:

> "He must, in so far as possible, grant asylum to those of his compatriots whose life or property is threatened during civil disturbances or by reason of other danger."

That paragraph was regarded as not forming part of international law and as containing "mere advice based on political morality", and it was therefore deleted.

"Art. 20. Whatever the status of persons on board a warship and even where they have been taken on board in error, there can be no recourse to force, in the event of the commander's refusal to surrender them, in order to secure their surrender or to make visits or searches to that end.

"The same shall apply where there is a claim for the delivery of any articles on board ship.

"In the cases envisaged by this article, the local authority wishing to obtain the extradition of persons or the delivery of articles should apply to the central authority of the State so that the necessary diplomatic steps may be taken to that end."

257. At the Hague session, 297/ articles 18 and 20 were retained virtually without change and became articles 19 and 21 of the final text. However, article 19 gave rise to some discussion. The first sentence was regarded by some members as relating to the question of extradition and as having no place in the draft. It was argued that it should at least be formulated in optional rather than binding terms. It was asserted in that connexion that the article concerned not extradition but expulsion - an area in which, under private law, the legislator often enacted optional provisions. The ship, by virtue of the fiction of extraterritoriality, was a piece of territory over which the commander had executive authority. As the government of the territory, he should have the right to expel intruders but should not be under an obligation to do so. The second sentence of the article was felt to be lacking in any specific legal content and therefore superfluous. A revised version of article 19 was adopted and became article 20 of the Regulations; the text is as follows:

"Anyone taking refuge on board ship without the knowledge of the commander may be surrendered or expelled."

258. With regard to merchant ships, the draft submitted by the Rapporteurs contained an article worded as follows: 298/

"Art. 36. The master of a merchant ship lying in a foreign port may refuse to receive on board any person who fails to furnish sufficient proof of identity to cover any liability and whose presence might give rise to measures likely to impede the freedom of the ship and its movements.

"He shall not take on board any person, even one of his own nationals, who, in order to evade the laws to which he is subject by reason of his residence, seeks refuge on board ship.

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297/ Annuaire de l'Institut de droit international, Hague session, 1898, p. 231 et seq.

298/ Annuaire de l'Institut de droit international, Copenhagen session, 1897, p. 223.

"Where a person on board ship under such conditions is sought by the territorial authority, he should be surrendered to it; failing that, the authority in question would be entitled, upon prior notification of the consul, to instruct its agents to arrest the said person on the ship.

"In such a case, the master might even incur criminal liability if harbouring the fugitive was punishable under the law of the territory in question.

"An arrest could be made if, after the person in question had been received on board, the ship put out to sea proceeded to another port of the State in which the boarding had taken place.

"The master of a ship may not be held to be at fault for granting asylum to exclusively political refugees, provided that he does not in so doing take sides as between the contending parties or promote insurrection against properly functioning authority.

"He must, in so far as possible, receive unfortunate persons who are caught up in political disturbances with which they have no connexion or are threatened by any other danger, particularly if they are of his nationality."

259. At the Copenhagen session, it was felt that the article dealt with a highly delicate subject and that its very length showed clearly that it was primarily theoretical and doctrinal in nature. A decision was therefore made to delete it.

260. At the Hague session, however, one of the Rapporteurs, Férand-Giraud, pointed out 299/ that the reason for the article's length was that the circumstances in which a person could seek to board a ship were most varied and that special rules were required to deal with completely different situations. He added that, far from being theoretical and doctrinal, the article related to a subject which was regarded by many writers (including Calvo, Pradier-Fodéré, Fiore, Despagnet, Dudley Field, Sorel and Brentano, Ortolan, de Cussy, etc.) as highly practical - one which was dealt with by many treaties and whose topical nature was demonstrated by many contemporary events. He therefore proposed that the article should be reinstated in an amended version, which differed from the first text, inter alia, in that it set aside the question of refugees who were being prosecuted for political offences. The new article read as follows:

"The master of a merchant ship lying in a foreign port must not receive on board any person, even one of his own nationals, who, in order to escape the consequences of a violation of the laws to which he was subject by reason of his residence, seeks refuge on such ship.

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299/ Ibid., Hague session, 1898, p. 42 et seq.

"Where a person on board ship under such conditions is sought by the territorial authority, he should be surrendered to it; failing that, the authority in question would be entitled, upon prior notification of the consul, to instruct its agents to arrest the said person on the ship."

261. The new text was adopted without discussion and became article 34 of the Regulations. 300/

262. At its 1928 session at Stockholm, the Institute reviewed the Regulations adopted in 1898. 301/ It retained articles 19, 20 and 21 (which were renumbered 21, 22 and 23) virtually without change, deleting, however, the final paragraph of article 21 (new article 23). It also retained article 36 (renumbered 40), although with certain drafting changes; the words "The master of a merchant ship ... must not receive on board" were replaced by "The master of a merchant ship shall not be permitted"; the words "Where a person ... is sought by the territorial authority, he should be surrendered to it" were replaced by "Any person ... sought by the territorial authority must be surrendered to it"; and the words "the authority in question would be entitled" were replaced by "the authority in question shall be entitled".

(2) The Regulations on diplomatic immunities and the Regulations on consular immunities

263. The Institute of International Law also had occasion to raise the question of diplomatic asylum within the context of its work on diplomatic immunities. The draft submitted to the Institute at its Hamburg session (1891), consideration of which was continued at the Cambridge session (1895), 302/ included an article 9, the third paragraph of which read as follows:

"Where ... a person who is being prosecuted for a common crime takes refuge in the private residence and the minister does not voluntarily surrender him, the territorial Government shall not be entitled to have him arrested there; it may only have the residence surrounded so as to prevent the said person's escape and call upon the Government of the minister to warn him against abuse of privilege."

In connexion with this text, it was suggested that a distinction should be made regarding the obligations and responsibility of the minister, depending on whether the refugee was being prosecuted for a political or common crime. Two views emerged in that regard; some felt that humanitarian considerations dictated that the minister should not accede to the demands of the local government in the case of political refugees, while others were of the opinion that the minister could not set himself up as the protector of individuals against the local authorities. It was finally decided to delete the paragraph, which accordingly

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300/ Ibid., p. 248.

301/ Ibid., Stockholm session, 1928, p. 516 et seq.

302/ Ibid., Cambridge session, 1895, p. 214 et seq.

does not appear in the final text of the Regulations on diplomatic immunities adopted by the Institute on 13 August 1895. 303/

264. The Regulations were revised in 1929 (New York session), but on the point in question the 1895 decision was not called into question.

265. As regards consular immunities, the Institute of International Law, at its Venice session (1896), adopted without discussion as article 9 of its Regulations on consular immunities 304/ an article concerning the inviolability of the official residence of consuls and the premises occupied by their chancery and archives, the third paragraph of which reads as follows:

> "Where a person who is being prosecuted by the local judicial authorities takes refuge in the consulate, the consul must surrender him upon a simple request being made by the competent authority."

(3) The Bath resolutions on asylum in public international law (excluding neutral asylum)

266. The question of "asylum in public international law (excluding neutral asylum)" was included in the agenda of the session which was to have been held at Neuchâtel in 1939.

267. A report on the subject was prepared by Arnold Raestad on the basis of the replies received from members of the competent commission (Seventh Commission). This report was not published until after the war had ended and its author had died. 305/ After reviewing certain questions of terminology, it analysed the observations of the members of the Commission on the nature of "internal" asylum. In the view of some, internal asylum was not recognized by general public international law; it could not be considered as deriving from either the notion of immunity or that of extraterritoriality. Diplomatic immunity did not imply a right to grant asylum; it merely served as a means of obstructing action undertaken by the territorial State. In the view of others, asylum derived in part from custom and in part from general principles and was morally justified by humanitarian considerations. The Rapporteur summed up the position of the majority of members of the Commission in the following terms:

> "The power to grant internal asylum should not constitute a competence of the sending State etc., deriving from rules of international law." 306/

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303/ Ibid., p. 240.

304/ Ibid., Venice session, 1896, p. 306.

305/ Ibid., Bath session, 1950, vol. I, p. 133.

306/ Ibid., p. 139.

268. After summarizing the positions of the individual members, the Rapporteur commented on the various provisions of the proposed draft, 307/ which consisted of a preamble, an article on definitions, five articles on diplomatic asylum and one on territorial asylum and three articles on procedures. With reference to the preamble, the report noted the absence of any reference to the resolutions of the Institute relating to diplomatic immunities (Cambridge, 1895, and New York, 1929), which showed that "whatever the legal justification for asylum, its source was not in the immunities enjoyed by diplomatic agents". The report also stressed the importance of the sixth paragraph, which defined the Institute's purpose as follows:

> "They /the resolutions/ shall contain a statement of the rules of law considered as constituting the law currently in force; but within this framework the provisions by which the Institute invites States to be constantly guided in their practice shall be introduced."

The commentary on article 2 noted that the article dealt in three successive paragraphs with three hypotheses entailing the disruption of the power of the constituted authorities (riot, armed struggle between opposed factions, disruption entailing the total absence of the public powers) in which asylum could be granted by "an organ of the State exercising authority on its behalf outside the territory", a term which, according to the commentary, included inter alia "consuls, commanders of military aircraft and commanders of official vessels, warships and other vessels but not captains of merchant marine vessels". Article 3, according to the commentary, constituted an escape clause for local usages prevailing in certain Latin American countries, where they had the effect of broadening the rules of ordinary international law concerning asylum. These local usages constituted a directive by which the diplomatic agent could be guided but which he was by no means obliged to follow. Article 4 envisaged a situation of prolonged armed civil strife, in the case of which it gave the diplomatic agent or commander of a warship who had admitted refugees to the premises of the mission or taken them on board the power to keep those among them who had cause for fear for political reasons, and defined the obligations of the diplomatic agent and the commander of the vessel, as also those of the territorial State. It was noted in the commentary that it was extremely difficult, if not impossible, to give a satisfactory definition of the term "political refugees" and that, since the article set forth a power and an obligation, it had seemed preferable not to limit it to political refugees but to adopt the criterion of "refugee having cause for fear for political reasons". The draft contained two more substantive provisions on diplomatic asylum, one of which, article 5, stipulated that "the right of a State to protect its nationals is in no way affected by the provisions of the present Resolutions", the other, article 6, providing that if the granting of asylum was contested, the territorial State should present its claim to the State to which the body granting asylum belonged and could not terminate the asylum by violence or other coercive measures.

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307/ Ibid., p. 146 et seq.

269. As noted above, the Institute resumed consideration of the question after the war. Draft resolutions which had been prepared in 1939 were submitted to the session at Brussels in 1948 as drafted by Tomaso Perassi, the Rapporteur appointed to replace the original Rapporteur, who had died.

270. During the discussion of those draft resolutions, 308/ some members stated that the question of asylum was part of a broader question, namely, the protection of human rights, and that when those rights had been effectively and definitively guaranteed in international law the rules concerning the granting of asylum would become unnecessary.

271. It was pointed out that the problem of asylum now presented itself more in terms of collective asylum than of individual asylum. In that connexion, some participants pointed out that during the Spanish Civil War the right of asylum, which had up to that time been exercised only in exceptional circumstances, had rendered immense service to mankind by enabling thousands of persons who had taken refuge in diplomatic buildings to be saved. The concept of asylum, conceived originally in traditional international law as a simple de facto consequence, had thus evolved and become a humanitarian duty of diplomatic missions. It had been in order to take note of that evolution that the Institute had included the question in its programme of work.

272. Some members took the view that the scope of the work undertaken should be limited to extraterritorial asylum since, in granting asylum in its own territory, a State was purely and simply exercising its sovereignty. Others, however, felt that asylum granted by a State in its own territory posed problems of much greater urgency and scope than asylum granted by a State outside its territory.

273. Since deep differences of opinion were apparent, in particular concerning the article dealing with asylum granted in the premises of diplomatic missions and on warships, it was decided to defer the question until the following session.

274. At the Bath session in 1950, the Rapporteur, on behalf of the competent Commission (Fifth Commission), placed before the Institute a supplementary report and a final draft of the resolutions. 309/ On the basis of that draft, the Institute, on 11 September 1950, adopted the "Resolutions on asylum in public international law (with the exception of neutral asylum)", the general outlines of which are described below. 310/

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308/ Ibid., Brussels session, 1948, p. 192 et seq.

309/ Ibid., Bath session, 1950, vol. I, p. 162 et seq.

310/ Given the purpose of this report, the provisions of the resolutions relating to asylum granted by States in their own territory are not analysed here.

275. The preamble, after recalling the previous resolutions of the Institute (in particular the resolutions adopted at Stockholm analysed above) 311/ and the Universal Declaration of Human Rights, states, inter alia, that international recognition of the rights of the human person requires new and wider development of asylum, and emphasized the advantage of formulating certain rules suitable for future observance by States in the matter of asylum. Chapter I comprises one article which defines asylum as "the protection which a State grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it". Chapter II (article 2) is devoted to asylum granted by States on their own territory. Chapter III (articles 3-8) deals with asylum granted by States outside their territory, 312/ the basic principles of which are defined in articles 3 and 4. After listing the places in which the granting of asylum is permitted (para. 1), article 3 lays down the basic prerequisite for the granting of asylum - namely, the existence of a threat to the life, liberty or person of an individual arising from violence emanating from the local authorities or beyond their control, or from civil strife (para. 2) - and provides that the organ granting asylum may keep the person to whom asylum is granted as long as the threat in question continues (para. 4). The article also authorizes diplomatic agents and commanders of warships or military aircraft, in the event of the functioning of the public powers of a country being manifestly disorganized or under the control of any faction, to grant or to maintain the asylum even against prosecutions instituted by the local authorities (para. 3). Article 4 deals with the case of armed civil strife, in other words, with a situation which is likely to be prolonged: it authorizes diplomatic agents and the commanders of warships or military aircraft to keep persons whose safety is threatened for political reasons until they can be evacuated outside the territory, and lays down rules governing the obligations which are incumbent in such cases both on the authorities granting asylum and on the territorial State. Chapter IV (Final Provisions) includes an article, article 9, which reads as follows:

> "The foregoing provisions in no way prejudice asylum on the premises of international organisations."

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311/ It should be noted that the preamble does not refer to the resolutions relating to diplomatic immunities (Cambridge, 1895, and New York, 1929) referred to in paragraphs 7 and 8 above; thus it is implicitly confirmed that in the view of the Institute of International Law the basis of asylum does not lie in the inviolability of diplomatic premises.

312/ In the draft resolutions submitted at the Brussels session, the provisions relating to asylum granted by a State outside its own territory preceded the provisions relating to territorial asylum. In the final text, the order of the two series of provisions was reversed.

276. During the discussion which preceded the adoption of the resolutions, 313/ it was explained by the Rapporteur that the text did not deal with the right of asylum of the individual, but dealt with the question from the standpoint of the rights and obligations of States in the matter. Some members expressed reservations regarding the granting of asylum outside the territory or questioned its practical importance. Others, however, felt that the advantage that there might be in granting asylum in a foreign country was great enough for foreign States to be allowed to grant it in national territory. It should be noted that in the case of territorial asylum, which is dealt with in article 2, some members, while recognizing that existing international law did not oblige States to guarantee asylum, suggested that the possibility of a State being subject to an obligation to grant asylum should be examined de lege ferenda. That question was not raised in connexion with diplomatic asylum. In connexion with the enumeration of the places of asylum mentioned in article 3, the question arose as to what the expression "premises within the jurisdiction of another organ of a foreign State authorised to exercise authority over that territory" covered. The Rapporteur mentioned in that regard the military camps and customs offices of a State established in the territory of another State. With regard to ships, it was explained that the phrase "government ships used for public services" did not cover State trading vessels, which were assimilated to privately owned vessels. Lastly, it was observed that the inclusion of consulates in the list of places where asylum might be granted was a very controversial innovation, since many consular conventions expressly excluded the possibility of asylum in consular premises. It was pointed out, in that regard, that in the draft resolutions the right of asylum in consulates was clearly more limited than that of diplomatic agents and commanders of warships since only diplomatic agents and commanders of warships could give asylum even in the face of prosecutions by the local authorities (article 2, para. 3) or take measures to evacuate the persons concerned (article 4, para. 1). In that connexion, the general question of the basis of the right of asylum was raised: while some stated that the differences which have been cited arose from the fact that consulates did not enjoy inviolability, others expressed reservations concerning that explanation: in their view, asylum was based on considerations of humanity and not of territoriality. The following questions were also raised: the question of whether a distinction should be made according to whether the person requesting asylum was or was not a national of the State to which the organ granting asylum belonged; the question of the right of qualification; and the question of the measures which the territorial State could take in the event of the right of the organ concerned to grant asylum being disputed.

277. The text of the Bath resolutions (with the exception of chap. II relating to asylum granted by States in their own territory) is reproduced below:

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313/ Annuaire de l'Institut de droit international, Bath session, 1950, vol. II, p. 198 et seq.

"Asylum in public international law
(EXCLUDING NEUTRAL ASYLUM)

(5th Commission)

"The Institute of International Law,

"Recalling its Resolutions of New York (1929) on the international rights of man, of Brussels (1936) on the juridical status of stateless persons and refugees, and of Lausanne (1947) on the fundamental rights of man, the basis of a restoration of international law,

"Recalling its Resolutions of Stockholm (1928) on the legal status of ships and their crews in foreign ports, Article 21 of which refers to a case of asylum,

"Recalling, moreover, Article 2 of its Resolutions of Neuchâtel (1900) on the rights and duties of foreign powers, in case of insurrectionary movements against established and recognized governments,

"Having regard to the Universal Declaration of the Rights of Man adopted by the General Assembly of the United Nations (1948),

"Noting that international recognition of the rights of the human person requires new and wider developments of asylum,

"Considering in particular that the mass exodus of people, compelled for political reasons to leave their countries, lays upon States the duty to unite their efforts with a view to providing for the demands of such situations,

"Considering the advantage of formulating now certain rules suitable for future observance by States in the matter of asylum,

"Adopts the following Resolutions:

"CHAPTER I

"Definition

"Article 1

"In the present Resolutions, the term 'asylum' means the protection which a State grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it.

"CHAPTER II

"Asylum granted by States on their own territory

"Article 2

/Not reproduced/

"CHAPTER III

"Asylum granted by States outside their territory

"Article 3

"1. Asylum may be granted on the premises of diplomatic missions, consulates, warships, government ships used for public services, military aircraft and premises within the jurisdiction of another organ of a foreign State authorised to exercise authority over that territory.

"2. Asylum may be granted to any person whose life, liberty or person is threatened by violence emanating from the local authorities or against which they are obviously powerless to protect him, or even which they tolerate or provoke. These provisions shall apply in the same conditions when such threat is the result of civil strife.

"3. In cases where the powers of government in the country are manifestly disorganised or under the control of any faction to such an extent that private individuals no longer have sufficient guarantees for their safety, diplomatic agents and commanders of warships or military aircraft may grant or continue to afford asylum even against prosecutions instituted by bodies exercising authority on the spot (autorités locales).

"4. Whatever the organ may be which has granted asylum, it must inform the competent local authority, unless such communication would jeopardise the security of the refugee. It may keep the latter as long as the situation which justified asylum continues.

"Article 4

"1. In case of armed civil strife, the diplomatic agent commander of a warship or of a military aircraft who has granted asylum, may keep the persons whose safety is threatened for political reasons until he has the opportunity of evacuating them outside the territory. Such evacuation shall take place according to the conditions and circumstances agreed upon with the competent authority, whenever the safety of the refugee allows it.

"2. The diplomatic agent or the commander shall make sure of the identity of all the refugees.

"3. The diplomatic agent or the commander must make sure that the refugee shall not participate in political activities or be able to communicate with the outside world to the prejudice of the local government and, generally, that the refugee shall not employ any means of supporting one of the parties to the conflict.

"4. In cases where the local government delays in prescribing the conditions and circumstances in which the refugees may be evacuated, or if circumstances beyond the power of that government or of the diplomatic agent temporarily prevent their evacuation, it shall agree that the diplomatic agent may add to the premises of his mission to the extent that may be necessary in order to harbour the refugees.

"5. When, as a result of civil strife, large numbers of persons seek asylum on the premises of diplomatic missions, the heads of those missions shall consult with one another with a view to co-ordinating their action in the matter of asylum.

"Article 5

"In cases where the local government contests the right of the organ of another State to grant asylum, or admits it only under certain conditions, it shall present its claim to the State to which the organ in question belongs and may not put an end to the asylum by coercive measures.

"Article 6

"Questions relating to asylum shall be discussed by the diplomatic agent with the Minister for Foreign Affairs. The commander of a warship shall discuss these questions with the competent higher naval authorities.

"Article 7

"Nothing in the present Resolutions shall affect local usages sanctioning more favourable conditions of asylum.

"Article 8

"The right of a State to protect its nationals is in no way affected by the provisions of the present Resolutions.

"CHAPTER IV

"Final Provisions

"Article 9

"The foregoing provisions in no way prejudice asylum on the premises of international organisations.

"Article 10

"Any difference arising from the interpretation or the application of the foregoing rules which is not settled either through diplomatic channels or arbitration or some other procedure, shall fall within the compulsory jurisdiction of the International Court of Justice in accordance with its Statute."

## 2. The International Law Association

278. Until 1964 the question of diplomatic asylum had been raised in the Association only incidentally, principally in connexion with the question of codification of international law and with the draft International Bill of the Rights of Man.

### (1) Work on the codification of international law

279. In connexion with the Association's work on the codification of international law, the question of diplomatic asylum has been dealt with in three draft codes; one, submitted by Lord Phillimore, dealt with the representation of States, another, submitted by Karl Strupp, with international immunity, and the third, submitted by the Japanese Branch of the Association and the Kokusaiho Gakkwai was entitled "Draft code of international law". Paragraph 24 of Lord Phillimore's draft code read as follows:

> "The house in which the diplomatic agent resides is inviolable, but he may not convert his house into an asylum for subjects of the State, whether permanent or temporary, whose delivery is required by the police or other public authority of the State. If he does so, he may be required to leave the country, and his house may be guarded so that the persons wanted do not escape, and if he tries to include them in his suite, they may be taken out of it." 314/

Article XV of Karl Strupp's draft code read:

> "The granting of asylum is prohibited, in the absence of a special convention, to persons against whom the authorities of the country of residence have instituted legal proceedings, even if the offences are political.
>
> "The diplomatic agent shall be obliged to surrender to the competent local authority any individual against whom proceedings have been instituted in accordance with the laws of the country of residence and who has taken refuge within an immune precinct." 315/

The third paragraph of article XXVI of the same draft code entitled "The immunity of warships and other State vessels", stated that:

> "There shall be no asylum on board the vessels of foreign States." 316/

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314/ International Law Association, Report of the thirty-fourth Conference, Vienna, 1926, p. 402.

315/ Ibid., p. 430.

316/ Ibid., p. 433.

Finally, the Japanese draft code contained a section VI entitled "Rules concerning the Privileges and Immunities of Diplomatic Agents", article 1, paragraph 2, of which read as follows:

> "2. No public or private person in the country to which the diplomatic agent is accredited has any right to enter his official residence or office, except at the request of the agent or by his consent." 317/

(2) Work on the draft International Bill of the Rights of Man

280. The draft International Bill of the Rights of Man prepared by Sir Hersch Lauterpacht and reproduced in the appendix to the report transmitted by the Committee on human rights to the forty-third Conference of the Association, held at Brussels in 1948, dealt with asylum in general in article 7, which read:

> "There shall be full and effective recognition of the right of asylum for political offences and from persecution." 318/

(3) Draft convention on diplomatic asylum

281. The fifty-first Conference, held at Tokyo in 1964, had before it a report prepared by the Association's Committee on Asylum on both territorial and diplomatic asylum. After considering the report, the Conference adopted a resolution in which it declared that it was desirous of establishing the right of asylum of the individual in international law, in the light of the current inadequate protection of human rights, and called upon the Committee, in light of the propositions embodied in the report and of the matters raised in the debate, to prepare some draft rules on territorial and diplomatic asylum to be laid before the following Conference. 319/

282. The fifty-second Conference, held at Helsinki in 1966, briefly considered a progress report from the Committee on Asylum; 320/ it consisted largely of a summary of the information supplied by a number of members in reply to a questionnaire on the position in their countries. The progress report stated in its conclusion that there appeared, from the answers given, to be a certain uniformity of practice in respect of territorial asylum, but that that was far from being true for diplomatic asylum.

283. The fifty-third Conference, held at Buenos Aires in 1968, received, through the Committee on Asylum, a draft convention on diplomatic asylum and a draft

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317/ Ibid., p. 391.

318/ Ibid., report of the forty-third Conference, Brussels, 1948, p. 132.

319/ Ibid., report of the fifty-first Conference, Tokyo, 1964, p. 243 et seq.

320/ Ibid., report of the fifty-second Conference, Helsinki, 1966, p. 730.

convention on territorial asylum prepared by the Asylum Committee of the Argentine Branch of the Association. 321/ The basic question raised in connexion with the draft convention on diplomatic asylum was whether the grant of asylum should be mandatory for States or whether it should depend on their goodwill; in that connexion, some participants rejected the view that the right of any person to seek asylum had to have as its corollary the obligation of States to grant it. Others felt that the draft text under consideration would be no improvement on the existing situation if the granting of asylum by the State were optional. One further question raised was whether asylum should be confined to persons persecuted for political offences or whether it should also apply to those persecuted for reasons that were not purely political, and whether the criterion of "inhuman persecution" should serve as the decisive criterion for securing asylum. Reference was also made to the problems arising from non-recognition of the territorial State by the State granting asylum, the principle of non-refoulement (in other words, whether the State granting asylum may return the person to whom asylum was granted against his will to the State from which he fled), the question of the definition of a political offence, the question of restricting the activities of the asylee within the embassy in which he took refuge, and the problem of the obligations of the territorial State with regard to the grant of a safe-conduct.

284. The fifty-third Conference adopted a declaration entitled "Declaration of Buenos Aires on Territorial and Diplomatic Asylum" which reproduced the text of the two draft conventions mentioned above and instructed the Committee on Asylum to prepare draft conventions on asylum. The section of the Declaration of Buenos Aires pertaining to diplomatic asylum reads as follows: 322/

"DRAFT CONVENTION ON DIPLOMATIC ASYLUM

"Article 1. The High Contracting Parties may grant asylum in accordance with the terms of this Convention. Asylum shall also be granted to all those who are in danger of persecution for reasons of race, religion, nationality or membership of a particular social group or political opinion. 323/

"Article 2. Asylum will be granted to those whose prosecution is sought for political offences, or for offences of a mixed character in which the political aspect suffices to deny extradition. Asylum will likewise be granted to those who, though not charged with political offences, would be subjected to persecution on political grounds if they were returned to the country from which they had fled.

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321/ Ibid., report of the fifty-third Conference, Buenos Aires, 1968, p. 248 et seq.

322/ The commentaries which accompany each article are omitted, as are the final clauses (articles 22-28).

323/ The Conference decided that the first sentence should, if possible, be couched in binding rather than optional language in the text of any future draft convention on the subject.

"Homicide or an attempt against the life of the head of State of any High Contracting Party shall not be considered as a political offence, nor as a motive to change a mixed offence from its status as a common law offence into a political offence. The High Contracting Parties undertake not to grant asylum to any person charged with such an offence. Asylum shall not be granted to persons charged with genocide or crimes against humanity, whether committed in time of peace or war.

"Article 3. Deserters from the armed services shall not be granted asylum, unless the facts underlying the request for asylum are clearly political.

"Article 4. No High Contracting Party shall be allowed to absolve itself of any liability incurred under this Convention on the ground that any other State is not a party to the Convention or has not ratified it. The right of asylum shall be enjoyed by all, without distinction as to sex, race, colour, religion, nationality, language or political opinion.

"Article 5. The qualification of the alleged offence or persecution as political appertains to the State which grants asylum.

"Article 6. Asylum may not only be granted in embassies, legations, warships, military bases and military aircraft.

"For the purposes of this Convention, legation includes every building belonging to the diplomatic mission, the residence of the head of mission and buildings designated as reception areas for asylees, when the number of asylees is such as not to permit their being accommodated in the ordinary buildings of the mission.

"Article 7. Asylum may not be granted in warships or military aircraft that are in the State only for purposes of repair.

"Article 8. As soon after asylum has been granted as is possible, the head of the diplomatic mission, of the commanding officer of the warship, military base or aircraft involved, shall inform the Ministry of Foreign Affairs of the territorial State of this fact. Should such communication be likely to endanger the safety of the asylee, it may be delayed until the danger has passed.

"Article 9. For the duration of the asylum, the asylee shall not be permitted to take any action likely to disturb the public peace, nor shall he be permitted to indulge in any activity of a political character or that is likely to influence political activities. The officer granting asylum shall record the asylee's personal details and shall secure a written undertaking that the asylee shall have no communication with persons outside the asylum establishment, without the express permission of the officer concerned. Refusal to give such undertaking, or infringement of one already given, shall authorise the officer concerned to terminate the asylum forthwith. Asylees shall be restricted to carrying with them articles for their personal use, personal papers, and such money as may be necessary for their living expenses.

"Article 10. The Government of the territorial State may, at any time, demand the removal of the asylee from its territory, and must grant a safe-conduct and give such guarantees as may be necessary for this removal to be effected. The asylee shall be permitted to take with him out of the country such documents as belonged to him and were in his possession at the time that he was accorded the asylum, together with such material resources as are necessary to support him for a reasonable time after his departure. If such guarantees of his person and property are not granted, his departure may be delayed until the local authorities afford them.

"Article 11. Once asylum has been granted, the territorial State may demand the asylee's departure from the territory and must, in such circumstances, grant the necessary safe-conduct and guarantees of inviolability.

"Article 12. The authorities granting asylum may request that the safe-conduct and guarantees provided for in Articles 10 and 11 be supplied in writing.

"Article 13. The State granting asylum has the right to convey the asylee to a third State. While the territorial State may lay down the route for the asylee's departure, it has no right to determine his ultimate destination. The final decision as to destination rests with the asylum-granting State, which shall take the preferences of the asylee into full consideration, paying particular attention to any objection he may have to going to any named State. If asylum has been granted on board a warship or military aircraft, this warship or aircraft may be used as the means of departure and is entitled to demand the necessary safe-conduct.

"Article 14. Once the asylee has left the territorial State the authorities transporting him therefrom may not land him again within that territory or sufficiently close thereto as to endanger him, unless the safety of the vessel in which he is travelling requires this. In such circumstances he shall remain under the protection of the asylum-granting State.

"Article 15. While the asylum-granting State cannot be compelled to grant the right of immigration into its own territory, it cannot return him to the State from which he has fled other than at his own express request.

"Article 16. An intention on the part of the territorial State to seek the extradition of the asylee shall not prevent the operation of the present Convention. In such circumstances, the asylee will be detained in the territory of the asylum-granting State until receipt of the request for extradition and completion of the local proceedings concerning extradition. The detention of the asylee for such purposes shall not last more than thirty days.

"All expenses involved in such cases shall be borne by the State seeking extradition.

"Article 17 (a). In the event of a breach of diplomatic relations resulting in the withdrawal of the asylum-granting diplomat, the latter shall be permitted to depart from the territory with any asylees within his protection. If this should prove impossible for reasons beyond the control of the asylees or the diplomatic agent, the asylees shall be transferred to the care of a third State, provided it undertakes to observe the obligations of this Convention.

"(b) The fact that the Government of the territorial State is not recognized by the State granting asylum shall not prejudice the application of the present Convention, and no act carried out by virture of the Convention shall imply recognition.

"Article 18. In every case of removal of an asylee from the territorial State, the asylum-granting State shall, regardless of the mode of transportation, be responsible for the protection and security of the asylee until such protection is no longer necessary because of the arrival of the asylee on the territory of the asylum-granting State or of some third State.

"Article 19. The High Contracting Parties undertake to grant asylum in the event of emergency or overwhelming urgency, for such time as is necessary to enable the asylee to leave the territory with guarantees from the territorial State concerning his life, liberty and personal integrity.

"Article 20. Cases of emergency or overwhelming urgency arise when there is political or social instability resulting in a breakdown in law and order, or when the asylee is persecuted by persons or mobs over whom the territorial authority is unable or unwilling to exercise control, or when organs of the local authorities themselves threaten the immediate safety of the asylee; or when the asylee is in imminent danger of losing his life or liberty because of political persecution and is unable to make use of the normal legal or judicial processes, or when constitutional guarantees or the rights secured by the International Covenants on Human Rights are totally or partially suspended.

"Article 21. Any dispute arising as to interpretation or application of this Convention shall be settled, in the first instance, by diplomatic process or, should this prove impossible, by submission to arbitration, or to the International Court of Justice, or to some other judicial tribunal, the competence of which is recognised by both parties to the dispute."

285. In pursuance of the decision mentioned in the foregoing paragraph, the fifty-fourth Conference, held at The Hague in 1970, had before it draft conventions on diplomatic and territorial asylum submitted by the Committee on Asylum. 324/

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324/ Ibid., report of the fifty-fourth Conference, The Hague, 1970.

286. The draft convention on diplomatic asylum reproduced the provisions of the text quoted above, but also contained a number of proposed additions based on comments made by members and by Governments. In particular, the following suggestions were made:

(a) To add after the first sentence of article 1 the following provision:

"In no circumstances shall the grant of asylum be considered as an unfriendly act by the State whose ambassador has granted asylum as against the territorial State concerned."

(b) To add, after the words "asylum shall also be granted", in the second sentence of article 1, the words "at least until the danger has passed or until some other arrangement for their safety has been made".

(c) To add at the end of article 2 (b) the following sentence:

"Where the assassinated head of State is also the de facto head of Government or ruler, the assassin shall be entitled to asylum if he can show to the satisfaction of the embassy that the assassination was in fact politically motivated and a real political offence;".

(d) To add at the end of article 2 two additional paragraphs denying the status of political offender to, and excluding from entitlement to diplomatic asylum (i) any person charged with a violent offence against the person of a member of the diplomatic corps of a country other than his own, provided there was prima facie evidence that he had been involved in such an offence and (ii) any person against whom there was prima facie evidence that he had been involved in an attempt at aerial piracy against any commercial aircraft or in a violent assault upon such an aircraft, whether on the ground or in the air, provided that if the assault was made on a military or other aircraft of the State of which the fugitive was a national, he should be entitled to prove that the offence was politically motivated.

287. During the discussion of the draft convention, the question of whether the granting of asylum should be mandatory or discretionary was again raised. It was also contended that the draft convention should provide some guidelines concerning the concept of a political offence and the kinds of evidence to be accepted in that connexion. The suggestion that the words "at least until the danger has passed or until some other arrangement for their safety has been made" should be added to the second sentence of article 1 was criticized because of the uncertainty to which it might give rise regarding the scope of the obligations of the asylum-granting State; it was asserted that the total practical and legal experience showed that asylum might be granted only in cases of urgency or danger; consequently no restriction should be placed on the asylum-granting State with respect to the duration or circumstances of asylum, provided that asylum had been properly accorded at the outset. It was said that article 2 (c) and the two additional paragraphs which it was proposed to add at the end of that article should be replaced by a provision denying asylum to persons charged with or convicted of international crimes such as genocide, terrorism, kidnapping,

extortion and aerial hijacking (which assumed, it was remarked, that a reference to hijacking was justified in a convention on diplomatic asylum). In that connexion, it was contended that there were no grounds for differentiating between commercial and public aircraft. The proposed addition to the end of article 2 (b) was criticized on the grounds that the distinction between "head of State" and "head of State /who/ is also the de facto head of Government" might create practical problems and that it was unlikely that any State would sign a convention authorizing asylum in the case of homicide or an attempt against the life of the head of State, whatever his status. Finally, the opinion was expressed that, while general international law did not recognize diplomatic asylum, absolute rejection of that institution was probably unjustified in the existing state of international law, which attached increasing importance to the individual and the protection of the human person; it was recommended, therefore, that the Conference should confine itself to adopting a resolution based on articles 19 and 20 of the draft convention.

288. At the close of the discussion, the conference recommended that all members of the Committee on asylum and Branches of the Association should be invited to submit their comments on the Declaration of Buenos Aires and that the Committee should study those comments with a view to preparing a fully agreed text for submission to the following Conference.

In pursuance of that recommendation, the fifty-fifth Conference, held in New York in 1972, had before it a draft convention on diplomatic asylum and a draft convention on territorial asylum prepared by the Committee. In its report the Committee on asylum explained that, while many of its members would have preferred to affirm the existence of an obligation to grant asylum, it had been thought best to retain the discretionary formula. In any event, the provision in question was a step forward in that it recognized the existence of an absolute right to grant asylum. Moreover, to choose the mandatory formula might have compelled parties to grant asylum only in accordance with the provisions of the convention even if they were prepared to go beyond the convention on a bilateral basis. The report added that if the International Law Association intended to go on record as believing that international law recognized - or should recognize - a legally acknowledged right to asylum, it was sufficient to include in each convention an introductory paragraph asserting that there was such a right and to leave it to the High Contracting Parties to acknowledge that right in accordance with the terms of the convention.

During the debate it was emphasized that the concern of the two draft conventions was to protect, to the fullest extent possible, the fundamental rights of individuals persecuted for political reasons, without disregarding, however, the general interest of the international community. In connexion with the draft convention on diplomatic asylum, in particular, the opinion was expressed that, on the whole, it seemed to meet the demands posed by that rather exceptional form of protection and should be adopted, since the basic facts to be taken into consideration were the real danger to the individual, the urgency of the situation and the temporary nature of diplomatic asylum. Nevertheless, a general reservation was made with regard to the principle of diplomatic asylum, which was said to be

at variance with the basic idea of the Convention on Diplomatic Relations, which was that diplomatic immunities were granted only for the performance of diplomatic functions.

289. In addition, the text gave rise to reservations on a number of points, chief among them the following. 325/ It was felt that, in view of the threat of hijacking, military aircraft should be removed from the list of places where asylum may be granted (articles 1 (b) and (c), 5 and 8). The inclusion in that list of military bases was criticized on the grounds that permitting asylum to be granted in such bases was contrary to the principle of the equality of States, since only certain great Powers could exercise that right, and that, since the peoples of the world were against the establishment of such military bases in their territories, allowing them to be places of asylum could only add to the problems. With regard to paragraph 1 (b), one question asked was how it could be proved that a warship was in a State only for purposes of repair, since calling for repair was often at the same time an occasion for taking on provisions or for relaxation for the crew, and conversely, a routine call in a foreign State presented the opportunity to have minor repairs done; in addition, there seemed to be no reason for prohibiting the granting of asylum on board a warship which was calling only for purposes of repair, in view of the fact that a general power to grant asylum on warships was recognized. Another question was whether prohibiting the granting of asylum on board a warship calling only for purposes of repairs meant that it would be lawful for a ship on a goodwill mission, for example, to grant asylum. It was asserted that the exercise of the right of asylum in such circumstances would constitute a violation of the principle of non-interference in the domestic affairs of States and of the principle of sovereignty. Similar arguments were advanced against article 1 (d). The issue of defining a political crime was raised in connexion with article 2 (a), and on the subject of article 2 (b), it was pointed out that to require discrimination could only jeopardize the granting of asylum in specific cases.

290. Special attention was given to the problem of aircraft hijacking. In that connexion, it was suggested that the last two sentences of article 3 (c) should be deleted, since, it was said, they were out of place in a convention on diplomatic asylum. The commentary accompanying article 3 suggested that the following provision should be added at the end of article 3:

> "If a fugitive has hijacked an aircraft merely for the purpose of escaping from a country in which he is liable to suffer persecution and no physical injury has been inflicted on any other person, he may be entitled to receive asylum provided he has not hijacked a civil aircraft carrying passengers and provided he is tried and punished by the asylum-granting State for any offence he may have committed against air traffic regulations, and the like."

This provision was considered a retrograde step in relation to the Hague Convention for the Suppression of Unlawful Seizure of Aircraft and, it was said,

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325/ References are to the text of the draft convention as approved and as reproduced in paragraph 284 above.

went diametrically against the principle of ensuring punishment of all hijackers for the offence of aerial hijacking, since it required the State granting asylum to punish the hijacker merely for "any offence he may have committed against air traffic regulations". The proposed provision, it was added, would be almost an open invitation to hijackers to choose as their targets non-passenger aircraft, i.e., not only military or government aircraft, but also cargo aircraft and those used in aerial work. Moreover, it ignored the fact that aircraft hijacking not only endangered the lives of passengers and crews, but also increased the risk of aircraft failure, collision, and damage to persons and property on the ground.

291. The text proposed by the Committee on asylum was approved without change by the Conference, which requested the Executive Council of the Association to transmit it, together with the text of the Draft Convention on Territorial Asylum, to the Secretary-General of the United Nations, to the United Nations High Commissioner for Refugees and to the Governments of Member States of the United Nations in the hope that it might be possible to convene a diplomatic conference for the purpose of concluding international conventions on diplomatic and territorial asylum in the light of the work of the International Law Association. The substantive provisions of the text read as follows: 326/

"DRAFT CONVENTION ON DIPLOMATIC ASYLUM

"Article 1. (a) The High Contracting Parties may grant diplomatic asylum in accordance with the terms of this Convention.

(b) Asylum may be granted in embassies, legations, warships, military bases and military aircraft. For the purposes of this Convention, legation includes, besides every building belonging to the diplomatic mission, the residence of the head of mission and also buildings designated as reception areas for asylees, when the number of asylees is such as not to permit their being accommodated in the ordinary buildings of the mission.

Asylum may not, however, be granted in warships or military aircraft that are in the State only for purposes of repair.

(c) The immunity that extends by international law to embassies, legations, warships, military bases and military aircraft extends to any person granted asylum in accordance with the terms of this Convention.

(d) In no circumstances shall the grant of asylum constitute an unfriendly act by the State granting asylum as against the territorial State concerned.

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326/ The commentaries accompanying the articles are not reproduced, nor are the final clauses (articles 16-22) and article 15, on the settlement of disputes, which is identical to article 21 of the Declaration of Buenos Aires (see para. 284 above), apart from the fact that it includes a second subparagraph reading as follows:

"(b) The parties agree that any violation of this Convention creates for each of them, individually and collectively, a legal interest sufficient to confer a right of suit under this Article."

"Article 2. (a) Asylum will be granted to those whose prosecution is sought for political offences or for offences of a mixed character in which the political aspect suffices to deny extradition. Asylum will likewise be granted to those who, though not charged with political offences, would be subjected to persecution on political grounds or for reasons of race, religion, nationality or membership of a particular social group, which shall be understood to include any regional or linguistic group, or adherence to a particular political opinion.

(b) Asylum shall be granted without distinction as to sex, race, colour, religion, nationality, language or political opinion.

"Article 3. (a) The qualification of the alleged offences as political and the decision whether persecution is likely, appertain to the State which grants asylum.

(b) Homicide or an attempt against the life of the head of State or government of any High Contracting Party shall not constitute a ground for asylum.

(c) Persons in the case of whom there are serious reasons for considering that they have committed crimes against international order such as genocide, war crimes, crimes against humanity, aerial hijacking, or kidnapping, murder or other assault against a person to whom a High Contracting Party has the duty according to international law to give special protection, or any attempt to commit such an offence with regard to such a person, whether such offences are committed during times of peace or armed conflict, shall not be entitled to asylum. States from whom asylum has been sought in such instances may, instead of surrendering the offender, proceed against him in accordance with their own criminal law. In such cases, the offender need not be surrendered after he has completed his sentence.

"Article 4. No High Contracting Party shall be allowed to absolve itself of any liability incurred under this Convention on the ground that another State is not a party thereto or has not ratified it.

"Article 5. The head of the diplomatic mission, or the acting head in his absence, or the commanding officer of the warship, aircraft, or military base shall, as soon after asylum has been granted as is possible, inform the Ministry of Foreign Affairs of the territorial State of this fact. Should such communication be likely to endanger the safety of the asylee, it may be delayed until the danger has passed.

"Article 6. (a) For the duration of the asylum, the asylee shall not be permitted to act in any way that is likely to disturb the public peace, nor shall he be permitted to indulge in any activity of a political character or that is likely to influence political activities within the territorial State.

(b) The officer granting asylum shall record the asylee's personal details and shall secure a written undertaking that the asylee shall have no communication with persons outside the asylum establishment without the express permission of the officer concerned. Refusal to give such undertaking or infringement of one already given, shall authorize the officer concerned to terminate the asylum forthwith.

(c) Asylees shall be restricted to carrying with them articles for their personal use, personal papers and such money as may be necessary for their living expenses.

"Article 7. The Government of the territorial State may, at any time, demand the removal of the asylee from its territory and must grant in writing a safe-conduct and give such guarantees as may be necessary for this removal to be effected. The asylee shall be permitted to take with him out of the country such documents and other articles as he had with him at the time that he was accorded the asylum.

"Article 8. The State granting asylum has the right to transfer the asylee to a third State. While the territorial State may lay down the route for the asylee's departure, it has no right to determine his ultimate destination. The final decision as to destination rests with the asylum-granting State, which shall take the preferences of the asylee into consideration, paying full attention to any reasons or objections he may have to going to any named State. If asylum has been granted on board a warship or military aircraft, this warship or aircraft may be used as the means of departure and is entitled to demand the necessary safe-conduct, which shall be in writing.

"Article 9. Once the asylee has left the territorial State the authorities transporting him therefrom may not land him again within that territory or sufficiently close thereto as to endanger him, or expose the territorial State to political ferment unless the safety of the vessel in which he is travelling requires this. In such circumstances, he shall remain under the protection of the asylum-granting State.

"Article 10. While the asylum-granting State cannot be compelled to grant the right of immigration to its own territory, it shall not return him to the State from which he has fled or other State in which he may be in danger of persecution on account of political grounds or for reasons of race, religion, nationality or membership of a particular social group, which shall be understood to include any regional or linguistic group or adherence to a particular political opinion.

"Article 11. The asylum-granting State shall, regardless of the mode of transportation, be responsible for the protection and security of the asylee until such protection is no longer necessary because of the arrival of the asylee on the territory of the asylum-granting State or of some third State.

"Article 12. (a) An intention on the part of the territorial State or some third State to seek the extradition of the asylee shall not prevent the operation of the present Convention. In such circumstances, the asylee will be held in accordance with the local law applicable in cases where an intention to apply for extradition has been intimated.

(b) All expenses involved in such cases shall be borne by the State seeking extradition.

"Article 13. (a) In the event of a breach of diplomatic relations resulting in the withdrawal of the asylum-granting diplomat, the asylees under his protection shall be permitted to depart from the territory with the diplomatic envoy who is giving them asylum. If this should prove impossible for any reason beyond the control of the asylees or the diplomatic agent, the asylees shall be transferred to the care of a third State, provided it undertakes to observe the obligations of this Convention. If no such third State exists, the territorial State shall be bound to recognize the immunity of the asylees until arrangements can be made for them to transfer to the territory of the asylum-granting State.

(b) The fact that the Government of the territorial State is not recognized by the State granting asylum shall not prejudice the application of the present Convention, and no act carried out by virtue of the Convention shall imply recognition.

"Article 14. (a) The High Contracting Parties undertake to grant asylum, in the event of emergency or overwhelming urgency, for such time as is necessary to enable the asylee to leave the territory with guarantees from the territorial State concerning his life, liberty and personal integrity.

(b) Cases of emergency or overwhelming urgency arise when there is a breakdown in law and order; or when the asylee is persecuted by persons or mobs over whom the territorial authority is unable or unwilling to exercise control; or when organs of the local authorities threaten the immediate safety of the asylee; or when the asylee is in imminent danger of losing his life or liberty because of political persecution and is unable to make use of the normal legal or judicial processes; or when constitutional guarantees or the rights secured by the International Covenants on Human Rights are totally or partially suspended."

# CHAPTER V 327/

## QUALIFIED AUTHORITIES ON INTERNATIONAL LAW 328/

### 1. Asylum in diplomatic premises

#### (1) General comments on the existence and nature of diplomatic asylum

292. Diplomatic asylum occupies a much larger place in the writings of Latin American jurists than in those of authors from other regions. The position of principle of many of the latter is that diplomatic asylum does not form part of general international law. The Soviet authors who have written on the question, for example, seem to be in agreement in thinking that "there is no generally recognized rule concerning diplomatic asylum in contemporary international law". 329/ Similar statements are found in the works of several European 330/ and North American 331/ authorities. Raestad writes in the following terms:

> "... it must be considered to be thoroughly established that one cannot defend the opinion ... that the State should have the faculty, based on international law, to exercise the right of asylum in Legations, warships, aircraft, and so on, in such a way that the territorial State would be obliged to respect

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327/ See also the section of chapter II entitled "Summary of dissenting opinions appended to the judgement of 20 November 1950", the section of chapter III entitled "The question of the right of asylum in the programme of work of the International Law Commission" and the whole of chapter IV.

328/ In view of the general nature of this report, consideration of diplomatic asylum will be limited to those aspects which have attracted the attention of authorities from various parts of the world - that is to say, essentially, the question of the existence of the institution and that of its basis - leaving aside the technical aspects which are regulated by the treaties analysed in chapter I.

329/ L. N. Galenskaya, Pravo Ubezhishcha (1968), pp. 94-113. See also D. Levin, Diplomaticheski immunitet (1949), p. 380.

330/ See, for example, F. Déak, "Organs of States in their External Relations: Immunities and Privileges of State Organs and of the State", in M. Sørensen, Manual of Public International Law (1968), p. 409, L. Delbez, Les principes généraux du droit international public, 3rd ed. (1964), p. 204, P. Fauchille, Traité de droit international public, vol. 1, third part (1926), pp. 78 and 79, R. Genet, Traité de diplomatie et de droit diplomatique (1931), p. 554, P. Guggenheim, Lehrbuch des Völkerrechts (1948), vol. I, pp. 466-479, A. P. Sereni, Diritto Internazionale, II (1958), pp. 538-539, Oppenheim-Lauterpacht, International Law, vol. I, 8th ed. (1955), p. 797, E. Sauer, Grundlehre des Völkerrechts, 3rd ed. (1955), p. 144, J. Spiropoulos, Traité théorique et pratique du droit international public (1933), p. 214, E. Suy, Leerboek van het Volkenrecht (1972), vol. I, p. 78, and A. Verdross, Völkerrecht, 5th ed. (1964), p. 335.

331/ See for example Harvard Law School, Research in International Law (1932), pp. 62-65 and G. H. Hackworth, Digest of International Law, vol. II (1941), p. 622.

that faculty as a privilege which Legations, and so on, enjoy in its territory." 332/

De Visscher sees diplomatic asylum as an extra-legal institution and justifies his position in the following terms:

"The asylum granted to political refugees in the buildings of diplomatic missions is an institution which has fallen into disuse in most countries. It continues to exist in the countries of Latin America, where extreme governmental instability and the violence of political passions still justify it and account for its frequent use. However, even there, except for the temporary protection which an overriding humanitarian duty may make necessary, diplomatic asylum has remained what it was everywhere: an institution which, in its basic aspects, owes more to considerations of expediency, convenience and courtesy than to principles of law. The argumentation used in an effort to give it a legal basis in two cases brought before the International Court of Justice resulted only in further emphasizing that point. Neither the number of precedents, which were too ill defined or too dissimilar to constitute a custom, nor the low level of participation in international conventions, whose provisions and rapid succession revealed a wealth of viewpoints rather than unity of thought, have changed, even in this continent, the traditional character of the institution." 333/

293. The negative positions reflected above are, however, tempered, in several of the authors, by a number of modifications. We have seen that De Visscher allows an exception in the case of "the temporary protection which an overriding humanitarian duty may make necessary". Verdross, after having asserted that "international law recognizes no general right of asylum in diplomatic premises", concedes that "by way of exception such a right is recognized to a limited extent in the case of political refugees for humanitarian reasons". 334/ Balladore Pallieri states that "there are many precedents which prove that this alleged right does not exist" but adds: "However, I submit that albeit within very restricted limits, this right does exist". 335/ Finally Lauterpacht, while stating that "there is no right to refuse to surrender to the territorial State persons who have been granted asylum

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332/ A. Raestad, "Le droit d'asile", Revue de droit international et de législation comparée, p. 124. See also J. Brownlie, Principles of Public International Law (1973), p. 341, and G. Geamănu, Dreptul International Contemporan (1965), p. 440.

333/ C. De Visscher, Théories et réalités en droit international public, 3rd ed. (1960), pp. 233-234. See also A. E. Evans, "The Colombian-Peruvian Asylum Case: Termination of the Judicial Phase", American Journal of International Law. 1951, vol. 45, p. 761.

334/ A. Verdross, op. cit., p. 335. A similar approach is found in E. Suy, op. cit., p. 78, and G. Vidal y Saura, Tratado de Derecho Diplomático (1925), pp. 267-269.

335/ G. Balladore Pallieri, Diritto Internazionale Pubblico (1956), pp. 471-472.

within diplomatic premises", recognizes "the possible exception of the most compelling consideration of humanity", "an exception", he adds, "which defies legal definition." 336/

294. The negative tendency analysed above is also found in some Latin American authors such as Wiesse, who writes:

> "Civilized States do not recognize a special right of diplomatic agents to grant asylum. On the contrary, such agents are under an obligation to respect the laws of the country to which they are accredited and to refrain from obstructing the course of local justice in any way. If an individual sought by the local authority takes refuge in the residence of an ambassador or of the head of any delegation, they are under an obligation to hand him over to the authority." 337/

295. However, a great majority of Latin American authors recognize the existence of diplomatic asylum. 338/

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336/ Oppenheim-Lauterpacht, op. cit., p. 797.

337/ C. Wiesse, Le droit international appliqué aux guerres civiles (1898), p. 202. See also A. Bello, Principios de Derecho Internacional (1883), p. 311, S. Plana Suarez, El Asilo Diplomático (1951), and C. M. Tobar y Borgoño, L'asile interne devant le droit international (1911), p. 178.

338/ See, inter alia, H. Accioly, Tratado de direito internacional público (1945-46), Q. Alfonsín, "Asilo diplomático", Revista de la Facultad de Derecho y Ciencias Sociales (Montevideo), vol. XII (1961), A. Alvarez, Le droit international américain (1910), D. Antokoletz, Tratado de derecho internacional público en tiempo de paz (1924-25), C. Bollini Shaw, Derecho de asilo (1937), J. J. Caicedo Castilla, "El derecho de asilo", Revista española de derecho internacional, vol. X (1957), B. Castillo, "Asilo diplomático", Revista Jurídica Dominicana, vol. III, J. Castro, "Consideraciones sobre o direito de asilo diplomático", Boletím da Sociedade brasileira de Direito Internacional, vol. VI (1950), A. Deustua, "Derecho de asilo", Revista Peruana de Derecho Internacional, vol. VII (1947) and VIII (1948), F. Fernández, "El asilo diplomático", Revista de Derecho Internacional (La Habana), vol. 49 (1946), C. García-Bauer, "El Caso de Raúl V. Haya de la Torre", Revista de la Asociación Guatemalteca de Derecho Internacional, vol. II (1955), L. García Ortiz, "El asilo político", Revista del Instituto Ecuatoriano de Derecho Internacional, vol. I, H. Gobbi, "Ensayo de una crítica del asilo diplomático", Revista española de derecho internacional, 1962, vol. 15, p. 413 et seq, M. Guzmán, El asilo diplomático, derecho esencial del hombre americano (1951), J. Luelmo, "Teoría del derecho de asilo", Revista de la Escuela nacional de jurisprudencia (Mexico), vol. IX (1947), D. A. Luna, El asilo político (1962), A. Molina Orantes, "Aspectos históricos del derecho de asilo en Guatemala", Revista de la Asociación Guatemalteca de Derecho Internacional, vol. I (1954), E. Pessoa, Projecto de código de direito internacional público (1911), L. A. Podestá Costa, Manual de Derecho Internacional Público, 2nd. ed. (1947), I. Ruiz Moreno, Lecciones de derecho internacional, vols. II and III (1935), C. Torres Gigena, Asilo diplomático (1960), C. Urrutia-Aparicio, Diplomatic Asylum in Latin America (1960), F. A. Ursua, El asilo diplomático (1952), M. A. Vieira, Derecho de asilo diplomático (1961), F. Villagrán Kramer, L'asile diplomatique d'après la pratique des Etats latino-américains (1958), L. C. Zarate, El asilo en el derecho internacional americano, con un apéndice de la Corte Internacional de Justicia y de anexos de la Cancillería de Colombia (1957).

Some even regard it as a reflection of mankind's highest aspirations. Luelmo, for example, writes:

> "The contemporary form of diplomatic asylum, which extends protection to political offenders or dissidents, ... is granted by virtue of the prerogatives of individual freedom ... and is the highest homage which can be paid to individual freedom. It is, in fact, the corollary of an explicit or implicit covenant among all civilized States ... The explicit statement of what is implicit in the institution of asylum, namely that international co-operation for the purpose of prosecuting political offences is unlawful, shows that the basis of such offences has a universal and eternal value which is lacking in the case of common offences. It is this factor of clear positive significance which justifies the right of asylum in its contemporary form of diplomatic or territorial asylum, and authorizes whoever grants asylum to invoke the extraterritoriality of the place of refuge and international courtesy as justification for the tolerance of the exercise of that right.
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> "The foundations of the right of asylum should be sought in areas other than those where the pure conceptions of law are formulated. None of the institutions governed by law can be established on a solid base unless their roots are sought in the common source from which all forms of culture originate ...
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> "That is why the right of asylum, viewed in its historical, economic and social context reflects a struggle between the progressive institutions which embody and symbolize the cultural progress of the era and the manifestations of another socio-economic reality, which, at the same time, bear upon the principles underpinning those institutions.
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> "In short, the right of asylum, in its various historical forms, constitutes the defensive reaction of the supreme postulates of culture to social phenomena which, in one way or another, in one historical form or another, are a negation of culture. It represents, in a word, the eternal conflict between the future and the past, between the two antithetical forces whose synthesis has engendered the whole historical process of civilization." 339/

Similarly, Nervo writes:

> "It can be stated that at the present time /the right of asylum/ continues to be, in its various forms, a demonstration of culture on the part of the countries which acknowledge or respect it as an expression of profound humanity." 340/

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339/ J. Luelmo, op. cit., pp. 169-170.

340/ R. Nervo, op. cit., p. 206.

296. This agreement among Latin American writers on the existence and merits of diplomatic asylum is, however, accompanied by disagreement as to whether diplomatic asylum is a right or a duty of States. Most of these authors are of the opinion that asylum is an option of the State, which the latter is free to exercise or not to exercise when a person seeks refuge in one of its overseas diplomatic missions. On this point Ulloa writes:

> "Diplomatic agents and commanders of warships anchored in foreign ports are under no obligation to grant asylum, since this is a discretionary action depending on their assessment of the circumstances and their instructions." 341/

The same position was taken by the Inter-American Juridical Committee, whose "Statement of reasons" in connexion with the 1952 draft Convention on Diplomatic Asylum contains the following paragraph:

> "Stricto sensu, no individual has a right to asylum in any diplomatic mission, warship or military encampment or aircraft, and the officials in charge of them may, at any time, refuse asylum without explanation." 342/

For other authors, however, diplomatic asylum is a duty; in other words, a State is bound to grant asylum when a political offender seeks refuge in one of its diplomatic missions. According to Urquidi, for example:

> "A State may not deny this right /of asylum/ and has an inescapable duty to shelter those who seek refuge within the limits of its dominium and jurisdiction." 343/

297. Some authors go even further and contend that diplomatic asylum is a human right. In this regard, Yepes makes the following comments:

> "The right of asylum is not an artificial and capricious product of the political whims of the Latin American republics. It is a right of the State

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341/ A. Ulloa, Derecho Internacional Público (1929), vol. II, p. 16. See also, by the same author, "Derecho de Asilo", Anuario Jurídico Interamericano, 1949, pp. 40-42; A. Deustua, op. cit., p. 178; L. M. Moreno Quintana, Tratado de Derecho Internacional (1963), vol. I, p. 486; M. A. Vieira, "Normas Vigentes sobre el Derecho Diplomático en América Latina", Anuario Uruguayo de Derecho Internacional, 1962, p. 84; F. Villagrán Kramer, op. cit., p. 24.

342/ Inter-American Juridical Committee, Recomendaciones e Informes, Documentos oficiales 1949-1953, pp. 347-348.

343/ J. M. Urquidi, Lecciones sintéticas de Derecho Interracional Público (1948), p. 136. See also in this connexion Q. Alfonsín, "Naturaleza del Derecho de Asilo Diplomático", Revista Jurídica Argentina "La Ley", vol. 83, p. 911, Amalia Javola Alvarez, La Corte Internacional de Justicia y el Asilo Diplomático (thesis) (1952), p. 81, and C. Partocarrero Mutis, El Derecho de Asilo (thesis) (1945), p. 14.

and of the individual. The State, by virtue of its own legal personality, has the power to grant asylum to such persons as it may deem unjustly prosecuted. The individual, for his part, by virtue of the right of self-defence, which is one of his basic attributes, has the right to seek refuge from prosecution. The Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in Paris on 10 December 1948, and the American Declaration of the Rights and Duties of Man, adopted in Bogotá in April 1948 by the Ninth Pan American Conference, refer to the right of asylum as a basic universal human right. These two Declarations, and in particular the Bogotá Declaration, are very explicit on this point. Article XXVII of the latter reads: 'Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.' The relevant article of the Universal Declaration of Human Rights adopted by the United Nations reads:

'Article 14. (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.'

"It will be noted that these two great Declarations are infused with Latin American concepts concerning the nature of asylum. By mentioning that 'everyone' is entitled to the right of asylum, they have both expressly adhered to Latin American philosophy which allows no discrimination of any kind with regard to those enjoying asylum. Both Declarations also deny asylum to common criminals. Asylum is reserved for the victims of prosecutions undertaken for political motives." 344/

However, the opposing argument is supported by other authors, including Urrutia-Aparicio, who writes:

"In the case of the latter /the individual/ it may suffice to assert that the ius gentium does not yet recognize the individual as the subject of international law, although such international documents as the Universal Declaration of Human Rights and the American Declaration of the Rights and Duties of Man consistently refer to the rights of the individual. Stricto sensu, therefore, the right of diplomatic asylum is not a legal right of the individual seeking protection, even if the individual fulfils the conditions required for the State granting asylum to extend its protection. The individual does not have a right to diplomatic asylum nor does the State

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344/ J. M. Yepes, "El Derecho de Asilo", Universitas, No. 15, 1958, pp. 20-21. See also in this connexion C. Torres Gigena, op. cit., p. 100, and M. A. Vieira, op. cit., loc. cit., pp. 206-219.

granting asylum have the corresponding duty to extend its protection to a political offender ...". 345/

(2) Diplomatic asylum and customary international law

298. A number of writers deny that any international custom has emerged which would allow the right of asylum. Raestad, for example, writes as follows:

"... such a political tradition /of the granting of asylum/ simply shows that the same situation can occur more than once, but tradition alone cannot transform this into the exercise of a right if at a given time a Government decides not to tolerate it any longer and adopts a similar attitude towards all States. A rule of customary law, which a given State can no longer abolish, has not really been formed: the matter remains at the level of a temporary custom which can disappear just as it emerged. Moreover, this consideration is not in fact sufficient: it simply leads to the consequence that in some circumstances the territorial State, because of the attitude it has itself adopted, cannot protest when the legation, etc., of a foreign State grants asylum". 346/

Similarly, Morgenstern clarifies the distinction between custom and usage in the following terms:

"Customary law comes into being only when practice is accompanied by a conviction on the part of States that their action is in accordance with international law. Usage is the result of practice unaccompanied by such conviction. Customary rules are rules of law, and produce legal rights and obligations. Usage does not create legal relationships." 347/

She adds:

"Official utterances fully bear out the view that no customary law on the subject of asylum has come into being ... There is also evidence that the grant of asylum, even when it takes place, is not regarded as a right. Neither is it to be considered to be in accord with the general principles of international law. But it is necessary for the development of customary law that action should be regarded as legal." 348/

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345/ C. Urrutia-Aparicio, op. cit., p. 197. See in this connexion L. M. Moreno Quintana, Tratado de Derecho Internacional, op. cit., p. 486, and F. Villagrán Kramer, op. cit., p. 28.

346/ A. Raestad, op. cit., loc. cit., pp. 125-126. See also G. Balladore Pallieri, op. cit., p. 472 and P. Guggenheim, Lehrbuch des Völkerrechts, vol. I (1948), pp. 466-467.

347/ F. Morgenstern, "Extra-territorial Asylum", British Yearbook of International Law, 1948, p. 241.

348/ Ibid., p. 242. See also H. Cabral de Moncada, O Asilo Interno em Dereito Internacional Público (1946), p. 158, F. Francioni, Asilo Diplomatico (1973), pp. 42-43 and C. Neale Ronning, op. cit., pp. 214-215.

and concludes:

"Diplomatic asylum is thus based on mere local usage. Such usage requires the acquiescence of the State where it is exercised." 349/

299. There are, however, many Latin American writers who consider that diplomatic asylum forms part of customary international law as it exists in that region. 350/ Yepes, for example, writes as follows:

"/The/ three golden rules of the American institution of diplomatic asylum - asylum for all those who are persecuted for political reasons, without any discrimination; unilateral qualification of the offence by the territorial State; and the obligation of the territorial State to grant the necessary guarantees to enable the asylee to leave the country freely - have been formulated gradually in a slow process extending over years and decades. Their formulation did not require the action of any parliament or the clauses of any public treaty. They have been created by the chivalrous instinct of the Latin American peoples, their humanitarian and Christian sentiments, their faith in the dignity of the human person and a profound conviction that in politics there can be no crimes, only errors. This institution is a typical example of the creation of law by custom. It is well known that custom is one of the most important sources of international law. The principles created by custom are as strictly binding as the norms of legislation or the most carefully drafted clauses of a public treaty. The Statute of the International Court of Justice itself provides in Article 38 that the Court should apply 'international custom, as evidence of a general practice accepted as law'. Nevertheless that very Court, when it decided on the case of the asylum of Mr. Haya de la Torre submitted to it by Colombia and Peru, did not recognize the American custom which Colombia demonstrated in an irrefutable manner. This deficiency of the Court of The Hague suffices to demonstrate the inability of universal tribunals to apply the principles of regional law. It also demonstrates the need to establish a Pan-American court of justice to apply the norms of American international law, one of the most important of which is the institution of diplomatic asylum.

"The point is that these three golden rules which we have enunciated constitute for the republics of Latin America a veritable corpus juris which is absolutely binding because of its status as customary law. Although these rules had not been codified - as they were later at various Pan-American conferences - they were binding on all the States of the Latin American group. That binding character has been reinforced, however, by the fact that some of them at least have been incorporated in one or other of the conventions

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349/ Ibid., p. 243. For a similar analysis see S. Prakash Sinha, Asylum and International Law (1971), p. 238.

350/ See inter alia A. Deustua, op. cit., pp. 176-179, J. Luelmo, op. cit., p. 170, M. J. Sierra, Tratado de Derecho Internacional Público (1947), pp. 280 and 308, C. Torres Gigena, op. cit., p. 100, and M. A. Vieira, op. cit., p. 84.

approved by the Pan-American conferences at Havana (1928), Montevideo (1933) and Caracas (1954)." 351/

Similarly, the "Statement of reasons" which the Inter-American Juridical Committee attached to the 1952 draft Convention on Diplomatic Asylum, contains the following passage:

"The conventions and treaties on asylum, by the nature of the subject with which they are concerned, should be considered as instruments enunciating operative customary international law, except where they state, or it can be deduced from their texts, that they are concerned with bringing about the entry into force of new principles, rights and obligations." 352/

300. A less extreme position is taken by some other writers, including Villagrán Kramer, who writes in the following terms:

"It cannot be said that a custom existed when the States of Latin America began to practise diplomatic asylum; it was more a matter of usage, because usage in international law is not binding and the exercise of asylum was not mandatory. Some States wished to release themselves and abandon the practice, although later they engaged in it again: such was the case of Peru in 1867, of Haiti in 1908 and of Venezuela for many years. After the States of Latin America adopted the various conventions, the rules concerning asylum were no longer limited solely to its concession by a diplomatic mission and to respect for it by the territorial State, but also included many other aspects, such as the qualification of the offence, the periods during which asylum could be granted, the conduct of asylees towards the legation granting them refuge and the methods of terminating asylum. We believe that the real problem lies there. The question of whether or not asylum in general, that is the practice of granting asylum, constitutes a custom at the present time need no longer be discussed because all the States of Latin America are bound by one or other of the treaties which exist on the subject. Thus, stricto sensu, diplomatic asylum should be described not as an inter-American custom, but rather as a set of rules which for the most part are embodied in conventions and some of which are of a customary nature." 353/

### (3) Diplomatic asylum and the principle of the inviolability of diplomatic premises

#### (i) The concept of extraterritoriality

301. In the nineteenth century, European jurists found a legal basis for diplomatic

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351/ J. M. Yepes, op. cit., pp. 19-20.

352/ Inter-American Juridical Committee, op. cit., pp. 347-348.

353/ F. Villagrán Kramer, op. cit., p. 28. See also L. M. Moreno Quintana, Tratado de derecho internacional, op. cit., pp. 486-487, and A. Ulloa, op. cit., pp. 40 and 46.

asylum 354/ in the concept of extraterritoriality, according to which diplomatic premises are considered to constitute part of the territory of the sending State, and Latin American jurists also used this legal fiction to justify the granting of diplomatic asylum. Thus at the South American Congress of Private International Law, held at Montevideo in 1888, Saenz Pena of Argentina stated:

> "The granting of asylum to political offenders in the premises of legations has the same significance and character as the asylum which we have recognized in the national territory of which such legations form part; extraterritoriality, as we have said when dealing with the subject of jurisdiction, extends the territory of the State concerned to include the premises of the public ministries which represent it. By virtue of this legal fiction, rights of asylum have emerged which legations exercise to a greater or lesser extent." 355/

302. More recent writers, while recognizing that historically diplomatic asylum has been able to develop on the basis of the theory of extraterritoriality, stress that this theory has now been abandoned and therefore can no longer serve as a basis for diplomatic asylum. 356/ In that connexion, Ulloa writes as follows:

> "It was easy to find a theoretical basis for asylum in the principle of the extraterritoriality of the premises of diplomatic missions during the time when that principle was in vogue and accepted. If the premises of missions were considered as the territory of the foreign State, it is clear that anyone on those premises had to be considered as a person who was, in fact, absent and over whom the local jurisdiction could only resume its imperium through an extradition process. However, after the principle of extraterritoriality fell into disuse and was not considered necessary in order to guarantee the independence of diplomatic agents, since that was ensured by the specific but limited duty of the territorial State to guarantee their independence, asylum could no longer be based on the concept of extraterritoriality." 357/

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354/ See, for example, M. Bourquin, "Crimes et délits contre la sûreté des Etats étrangers", Recueil des Cours de l'Académie de Droit International de La Haye, 1927, vol. 16, pp. 144-145, E. Reale, Recueil des Cours, 1938, vol. 63, p. 517 and E. Satow, A Guide to Diplomatic Practice (1932), p. 199.

355/ E. Restelli, editor, Actos y Tratados del Congreso Sudamericano de Derecho Internacional Privado (Montevideo) (1928), pp. 544-545. See also R. Domenech, Las Guerras Civiles Americanas ante el Derecho Internacional (1915), p. 289.

356/ See, for example, H. Cabral de Moncada, op. cit., p. 64, G. Dahm, Völkerrecht, vol. 1 (1958), p. 349, A. Deustua, op. cit., pp. 44-56, R. Genet, op. cit., p. 550, G. Luelmo, op. cit., pp. 166-167, F. Morgenstern, op. cit., p. 237 et seq., G. Morelli, Nozioni di Diritto Internazionale, 4th ed. (1955), p. 244, C. Neale Ronning, Diplomatic Asylum (1965), p. 7, D. P. O'Connell, International Law (1970), p. 734, S. Prankash Sinha, op. cit., p. 209, E. Suy, op. cit., p. 78, C. Torres Gigena, op. cit., p. 100, and F. J. Urrutia, Le continent américain et le droit international (1928), p. 331.

357/ A. Ulloa, op. cit., p. 45.

Fauchille observes:

> "... the fiction of extraterritoriality which places the buildings of the legation on the same footing as foreign territory has now been almost unanimously rejected. Diplomatic asylum can therefore no longer be based on law ..." 358/

(ii) The principle of the inviolability of diplomatic premises as a basis for diplomatic asylum

303. Some Latin American writers who recognize that the concept of extraterritoriality can no longer serve as legal justification for diplomatic asylum find such justification in the recognized privileges and immunities of a State and its diplomatic mission. 359/ Moreno Quintana, for example, writes that while the exercise of the right of asylum "used previously to be based ... on the fiction of extraterritoriality ... it is now justified by the criterion of immunity from jurisdiction". 360/ Elsewhere he points out

> "... this right acknowledges an irrefutable legal basis: real immunity. Had that been lacking, it would have been difficult for an institution to emerge, even though it was only used exceptionally". 361/

304. Other Latin American writers find the legal foundation for diplomatic asylum in the combination of two concepts: that of the privileges and immunities of diplomatic missions and that of humanitarian protection. Deustua, for example, writes as follows:

> "... the two basic elements which are found at the explanatory basis of this clear ... right ... /are/ humanitarian concern and diplomatic immunity.
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> ...
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> "... as is easy to verify, diplomatic immunity is not sufficient in itself to explain respect for the refugee, because it would be difficult to see how a person who had contravened the existing political order could be associated in any way with one or more of the facilities which the diplomat needs in order to carry out his mission ...
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> "... thus the other concept arises which, as has been stated, is found

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358/ P. Fauchille, op. cit., p. 78.

359/ See inter alia A. M. Paredes, Manual de Derecho Internacional Público (1951), p. 356, and C. Torres Gigena, op. cit., pp. 103-105.

360/ L. M. Moreno Quintana, Tratado de Derecho Internacional, op. cit., p. 486.

361/ L. M. Moreno Quintana, Derecho de Asilo (1952), p. 31.

together with diplomatic immunity at the explanatory basis of the right of asylum. I refer to humanitarian concern.

...

"... political asylum is granted exclusively by diplomatic missions, which grant it on the basis of a privilege which exists for another reason and which thus becomes the means which facilitates the adoption of humanitarian measures ...

"Thus the justification for diplomatic asylum is found in the harmonious balance of these two concepts ...". 362/

Accioly expresses a related idea in the following terms:

"With regard to the legal basis of diplomatic asylum, it seems to us to lie not, as has long been claimed, in the fiction of extraterritoriality but in the need for the protection and respect for human rights and, above all, in humanitarian considerations which have a legal basis ... It can moreover be affirmed that respect for asylum is ensured by a universally recognized legal norm, that is the inviolability of diplomatic premises." 363/

(iii) The rejection of the principle of the inviolability of diplomatic premises as a basis for diplomatic asylum

305. Some writers consider that the principle of the inviolability of diplomatic premises cannot serve as a basis for diplomatic asylum. Thus, in Ulloa's view:

"since diplomatic immunities are based solely on this need to guarantee the agent of a foreign Government sufficient independence for the fulfilment of his mission, it is not easy to maintain that this independence, although it extends to the inviolability of the premises occupied by the mission, should be extended to subjects of the territorial State who take refuge in it". 364/

Similarly, Fauchille writes:

"The inviolability of the buildings should only really exist to the extent necessary to enable the minister to carry out his tasks in full independence; it is clear that it does not fall within his functions to help criminals escape from the penalty which must be inflicted on them by the State which is competent to punish them."

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362/ A. Deustua, op. cit., pp. 181-184. See also, in International Commission of American Jurists, meeting of 1927, vol. II, p. 372, the statement made by Léger, from Haiti; see also C. Torres-Gigena, op. cit., p. 100, and F. Villagrán Kramer, op. cit., p. 23.

363/ H. Accioly, op. cit., vol. 5, pp. 487-488.

364/ A. Ulloa, op. cit., p. 45.

He adds that diplomatic asylum should be rejected because

> "... such a solution ... is in accordance with the true mission of the diplomatic agent". 365/

Morgenstern observes:

> "The ordinary diplomatic immunities cannot alone justify claims to a right which has no connexion with the essential purposes of the diplomatic mission." 366/

306. Some writers go even further and dissociate diplomatic asylum from the principle of the inviolability of diplomatic premises. For example, O'Connell, referring to the judgement of the International Court of Justice in the asylum case, writes:

> "Until the Court's analysis of the question it was generally assumed that asylum, if allowable at all, was to be regarded as an aspect of the inviolability of legations; in other words, it had to be proved specifically that this inviolability was an umbrella that covered asylum as well as other matters. The effect of the Court's decision seems to be that asylum must stand upon its own feet and not be linked with inviolability of premises." 367/

On this point, Sir Gerald Fitzmaurice makes the following comment:

> "The importance of the view adopted by the Court ... lies in this, that its consequence is to deny to the receiving mission the possibility of maintaining that it is not extending protection, as such, to the refugee, but merely permitting him to remain on the premises, and that it is solely from the inviolability of the premises that he derives his protection. The grant of asylum is, in fact, a continuing act, placing the refugee in a state of protection, for which the mission is responsible. The mission is 'protecting' him in the formal or diplomatic sense of the term, not merely sheltering him physically. It is an active not a passive process." 368/

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365/ P. Fauchille, op. cit., pp. 76 and 79; also E. Ustor, A diplomáciai Kapcsolatok joga (1965), p. 461, for whom diplomatic asylum, in the absence of treaty provisions which authorize it, constitutes a typical example of the abuse of the inviolability of diplomatic premises.

366/ F. Morgenstern, op. cit., loc. cit., p. 239. See also S. Prakash Sinha, op. cit., p. 209.

367/ D. P. O'Connell, op. cit., p. 736.

368/ Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice", British Yearbook of International Law, 1950, p. 32.

(4) Diplomatic asylum and the principle of the sovereignty of the territorial State

(i) Cases in which the granting of diplomatic asylum does not involve any impediment to the normal exercise of jurisdiction by the territorial State

307. Several writers who are not from the region of Latin America place in a separate category those cases in which the granting of diplomatic asylum does not involve any impediment to the normal exercise of jurisdiction by the territorial State. In this connexion, Lauterpacht 369/ and Sen 370/ observe that international law does not seem to impose on the head of mission an obligation to deny entrance to persons desiring to take refuge in the embassy.

Thus, the granting of asylum is not contrary to international law where it does not place any obstacle in the way of the normal exercise of jurisdiction by the territorial State. This condition is satisfied where, for instance, asylum is granted either with the consent of the local authorities who are temporarily unable to protect individuals from mob violence or in circumstances in which the State machinery itself has collapsed. Balladore Pallieri notes in this connexion:

> "... asylum may, however, be granted in cases where within the territory the effective power of the State has disintegrated, whether because the territory is in the hands of an as yet unorganized rebel band, or because the State has lost control over its own agents who are engaging in acts of violence, or because at a given time there is no government and no constituted or effective authority. In such cases it is lawful to grant asylum in the premises of diplomatic missions or on warships to individuals who would otherwise be exposed to all manner of violence and to the consequences of the anarchy into which the country has temporarily lapsed." 371/

Hackworth also concedes that protection by the embassy may be granted "when the local Government has become unable to ensure tne safety of the refugee and his life is consequently endangered through mob violence and other lawlessness". 372/

308. It is situations of this kind that account for the distinction drawn by some writers between diplomatic asylum and temporary refuge. On this point, Lauterpacht, on the basis of the judgement of the Court in the asylum case, states:

> "It must also be noted that the grant of temporary asylum 'against the violent and disorderly action of irresponsible sections of the

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369/ Oppenheim-Lauterpacht, op. cit., p. 797.

370/ B. Sen, op. cit., p. 358.

371/ G. Balladore Pallieri, op. cit., pp. 473-474. Similarly G. Dahm, op. cit., p. 350.

372/ G. H. Hackworth, op. cit., p. 622.

populations'* is a legal right which, on grounds of humanity may be exercised irrespective of treaty, and that the authorities of the territorial State are bound to grant full protection to the foreign diplomatic missions providing shelter for refugees in such circumstances." 373/

Likewise, Sen writes:

"The practice of States ... seems to show that although the right of diplomatic asylum is not recognised in law, a distinction is drawn between asylum and cases of temporary refuge in times of grave political emergency. The latter has often been permitted. In many cases asylum in embassies is permitted and acquiesced in by local authorities. ...".

...

... the head of a mission is not obliged to prevent a refugee from entering and taking shelter within the premises of the mission. Temporary refuge or shelter can be granted to refugees if they are in imminent peril of their lives or to save them from mob violence or hostilities." 374/

309. Sir Gerald Fitzmaurice notes that in such situations there are no grounds for distinguishing between common criminals and political offenders. He writes as follows:

"It would seem preferable, therefore, not to set up any special rule of asylum for political offenders as such, but to keep the matter on the purely general basis suggested by the Court, i.e. that there is a general right to grant asylum on humanitarian grounds irrespective of the nature of the offence." 375/

(ii) The element of derogation from the sovereignty of the territorial State generally entailed by the granting of diplomatic asylum

310. Many writers observe that diplomatic asylum is generally in derogation of the sovereignty of the territorial State, in that it tends to remove from its jurisdiction a person who would normally be subject to it. Nervo develops this idea in the following terms:

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* Asylum case between Colombia and Peru, I.C.J. Reports 1950, p. 187 /and this report, para. 105 supra/. See also the resolution adopted in 1950 by the International Law Institute at Bath /article 3 (2), reproduced in this report, para. 277 supra/.

373/ Oppenheim-Lauterpacht, op. cit., p. 797. See also C. Neale Ronning, op. cit., p. 8.

374/ B. Sen, op. cit., pp. 358 and 360. Similarly A. Seidl-Hohenveldern, Völkerrecht, 3rd ed. (1975), p. 172.

375/ Sir Gerald Fitzmaurice, op. cit., loc. cit., p. 35. A similar idea is expressed by R. Genet, op. cit., pp. 553-554.

"Political asylum is, from any point of view, adverse to the sovereignty of the State where it takes place. It creates a conflict between two jurisdictions, two authorities, two rights: between territorial jurisdiction, where a sovereign State has absolute dominion, and the extraterritorial jurisdiction of a diplomatic mission, which interrupts it; between the authority of a Government which requests the surrender of a person subject to legal penalties and the authority of the diplomatic agent which saves him from such penalties; between the right of the State to punish and the right of the diplomatic envoy to protect. On the one hand we have facts, on the other hand fiction; the former are realities, the latter is an abstraction; the former are legitimate, the latter is benevolent." 376/

O'Connell proposes the following definition:

"Asylum is a term used to indicate refuge in foreign legations or consulates or on board foreign ships in order to escape the jurisdictional processes of the local authorities. It is thus, if allowed by international law, an exception to the rule that the local jurisdiction covers persons, events and things, whether foreign or national, within the territory of the acting State." 377/

Likewise, Morgenstern writes:

"Extra-territorial asylum takes place in derogation of the territorial sovereignty of the State when it is granted. For it limits the latter's jurisdiction over all individuals on its territory, a jurisdiction which is by international law an essential attribute of State sovereignty." 378/

311. This aspect of diplomatic asylum is seen by many writers as one of the most serious problems posed by diplomatic asylum. In this connexion, Fauchille comments:

"It is important for the security of the State that crimes should not go unpunished. A diplomatic agent can have no legitimate motive for removing from the operation of local justice a person over whom he himself has no jurisdiction." 379/

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376/ R. Nervo, op. cit. Similarly H. Accioly, op. cit., pp. 480-481, A. Deustua, op. cit., pp. 179-180, R. Domenech, op. cit., p. 289, L. M. Moreno-Quintana, Tratado de Derecho Internacional, op. cit., p. 31, and A. Ulloa, "El Asilo Diplomático", Anuario Jurídico Interamericano, 1949, pp. 40-42.

377/ D. P. O'Connell, op. cit., p. 734.

378/ F. Morgenstern, op. cit., loc. cit., p. 236. See also F. Francioni, op. cit., p. 13.

379/ Fauchille, op. cit., p. 76.

The same idea is to be found in the comment on article 6 of the draft convention on diplomatic privileges and immunities prepared by the Harvard Law School, where it is stated as follows:

> "/Article 6/[380] lays down as a general rule that the exemption of the premises of a foreign mission from the jurisdiction of the receiving State should not defeat the operation of the criminal law of the receiving State as to all fugitives from justice who do not have diplomatic immunities." 381/

Balladore Pallieri also writes:

> "... the right of asylum should not be used to remove an individual from local sovereignty: the State may under such circumstances... demand the surrender of the person concerned and, if its request is not complied with, may take the appropriate action". 382/

Lyra takes the view that:

> "In fact diplomatic asylum is nothing more or less than interference by the foreign agent in the internal affairs of the country where he resides, which can often lead to deliberate and vexatious meddling by a foreign Power in the policy of others. The present-day nature of diplomatic immunities does not allow of such abuse." 383/

Raestad adds that, in the view of many jurists, "the State has the duty to intervene when its diplomatic envoy has given asylum without justification and does not himself intend to surrender the refugee. That is the obligation imposed by international law... since in this case the sovereignty of the territorial State prevails over the right of legation and the privileges which derive from it." 384/

(iii) Cases in which the granting of diplomatic asylum is considered in the literature to be legitimate, notwithstanding the principle of the sovereignty of the territorial State

The case of nationals of the State granting asylum

312. Some writers consider that, by virtue of the right of the State to protect its nationals abroad, a diplomatic mission may legitimately grant asylum to political offenders who are nationals of the State which it represents. On this point, Fauchille expresses the following view:

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380/ Article 6 reads as follows:

> "A sending State shall not permit the premises occupied or used by its mission or by a member of its mission to be used as a place of asylum for fugitives from justice."

381/ Harvard Law School, op. cit., p. 65.

382/ G. Balladore Pallieri, op. cit., p. 473.

383/ H. Lyra, "O Asilo diplomatico", Journal de Comercio, 30 de marzo de 1930.

384/ A. Raestad, op. cit., loc. cit., p. 124.

"While it is true that as a rule a State should refrain from intervening in the affairs of another State, this does not mean... that it must always do so; it may intervene when its own rights... are infringed. Accordingly, we believe that political asylum, which is a form of intervention, could be authorized by a minister for political offenders when they are nationals of his State." 385/

The case of political offenders

313. On this point, Ulloa writes as follows:

"... in the case of asylum, the beneficiary is a subject of the territorial State and, consequently, not a national of the protecting State... the person granted asylum is free from trial, or at least from conviction. In this respect the exemption is absolute... /but/ that is an argument in favour of the system of asylum, if one considers that the latter operates only in respect of persons accused or prosecuted for political offences, where the presumption is that the traditional impartiality of judges may be influenced by circumstances or by imponderable pressures of time or of emotional climate, or may be replaced by emergency courts or special jurisdictions which are subject, if not to influence, then to institutional or hierarchical prejudices... /In the case of asylum/ exemption from jurisdiction applies only to offences which are in a special category, such as political offences... The continued practice of asylum and its widespread acceptance show that States have not felt that it might infringe their sovereignty. In any case, it is clear that an exception to or limitation of sovereignty such as asylum, which is not imposed by force and is not simply a matter of inequality in international relations since it is exercised and accepted without distinction by States great and small, strong and weak, cannot affect sovereignty except in a special analytical and theoretical way ..." 386/

Sir Gerald Fitzmaurice, referring to the judgement of the International Court of Justice in the asylum case, writes:

"After stating that, in principle, 'asylum cannot be opposed to the operation of justice', the Court made the following observation: 'An exception to this rule can only occur if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a government might take or attempt to take against its political opponents.' (Emphasis supplied.)

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385/ P. Fauchille, op. cit., p. 79. Similarly C. A. Alcorta, in Principios de Derecho Penal Internacional (1931), vol. I, p. 280, E. Borchard, in Diplomatic Protection of Citizens Abroad (1922), p. 435, and H. Cabral de Moncada, op. cit., p. 81; for an opposing view, see G. Dahm, op. cit., p. 350.

386/ A. Ulloa, op. cit., pp. 40-42. For an opposing view, see A. Bahramy, Le droit d'asile (1938), p. 38 et seq.

> The importance of this pronouncement needs no emphasis in view of the fact that the danger run by those accused of political offences often arises much less from mob violence than from the threat of extra-legal action by the local authorities or from the subordination of the local courts to political direction; and that a political offence may consist of nothing more than political opposition to the local government."

Sir Gerald stresses, however, that the doctrine expounded by the Court has its limits. He quotes the following paragraphs of the Court's judgement:

> "On the other hand, the safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals. Protection thus understood would authorize the diplomatic agent to obstruct the application of the laws of the country whereas it is his duty to respect them; it would in fact become the equivalent of an immunity...".
>
> "... either in the course of revoluntionary events, or in the more or less troubled times that follow... that such events interfere with the administration of justice. It is clear that the adoption of such a criterion would lead to foreign interference of a particularly offensive nature in the domestic affairs of states...".

and he concludes:

> "While the basis of distinction is thus clear, it is evident that its application in particular cases may be very difficult, especially where action of an essentially arbitrary character is carried out with an apparent observance of all the forms of justice, and ostensibly through the medium of the ordinary processes of the law.
>
> "As to what constitutes arbitrary action, it has already been noticed that the Court considered this must be confined to extra-legal steps, or measures involving a corruption of the administration of justice for political reasons. It is of course possible to take the view (which, however, was clearly not the Court's) that in political cases there is an inherent tendency to, or probability of, arbitrary action on the part of the local authorities and courts, justifying the grant of asylum automatically to all political refugees." 387/

(iv) The idea that the granting of diplomatic asylum does not, of itself, imply improper intervention in the internal affairs of the territorial State

314. This idea seems to be shared by a number of authors, although they arrive at it by different routes. For example, Scelle's oral argument in the asylum case included the following paragraphs:

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387/ Sir Gerald Fitzmaurice, op. cit., loc. cit., p. 34. For a similar analysis, see D. P. O'Connell, op. cit., p. 737.

"... in the present state of international solidarity, the internal public order and the international public order are one. Any disturbance in the internal public order can immediately generate distrubances in the international public order. Consequently, the prevention and punishment of crimes and offences must cease to be a purely internal or territorial affair and become a matter for mutual assistance among all States.

...

... /According to the theory of functional duality/ each State has, in the absence of a supranational organization (in this case, a supervisory organization), the right and the duty to exercise supervision over all other States in order to satisfy itself that the rules of the international legal order are being properly applied. It is a substitute, in many ways inferior and awkward, for what a supranational or collective supervision system would be. In the absence of such a system, there must certainly be some supervision over States, and to whom should it be given if not to those who have the power to exercise it - in other words, to each State? ...

...

... the legal basis of asylum is competence on the part of States to exercise mutual supervision over each other." 388/

A related idea is expressed by Luelmo in the following terms:

"An intrinsic value must be ascribed to diplomatic asylum, through which the international community, as represented by the legations and embassies of all civilized peoples, goes beyond respect for individual personality at a time of most serious crisis for it. When the juridical security of a State is threatened by the conduct of a political offender, the reaction of the authority affected by that conduct is inevitably based more on its own instinct of self-preservation than on the essential values of its own civilization." 389/

Urrutia Aparicio considers that one basis of diplomatic asylum in international law

"... is the theory of 'free consent', by which States freely consent to limit their sovereign rights. The Latin American States have consented freely to practise diplomatic asylum and they have expressed their sovereign will by signing - and, in several cases, ratifying - three Pan American conventions on the matter. Humanitarian motives and free consent are closely related to each other. The States of Latin America have freely consented to practise

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388/ ICJ, Pleadings, Oral Arguments, Documents, Asylum Case, vol. II, p. 124 et seq.

389/ J. Luelmo, op. cit., p. 169.

and to regulate diplomatic asylum simply because of political expediency and because they are aware of the social and political obstacles that Latin America faces in achieving representative democracy." 390/

(5) The humanitarian aspect of diplomatic asylum

315. Many authors consider that diplomatic asylum finds its justification in humanitarian considerations. Long before the Court rendered its judgement in the asylum case, some European publicists had acknowledged that the granting of diplomatic asylum could be legitimate in certain cases as a matter of "humanitarian intervention". For example, the writings of Fauchille include the following paragraph:

"We believe... that political asylum, a form of intervention, could be authorized by a minister for political offenders when... injury is found to have been done to humanity in their person. To that extent only, it is, in our opinion, possible to recognize a right of asylum as attaching to diplomatic premises." 391/

Similarly, Raestad observes:

"... the exercise of the right of 'internal' asylum is a particular form of the category of humanitarian interventions which international law acknowledges, and cannot but acknowledge, as 'legitimate'". 392/

Stowell, while noting that

"... political asylum in legations and warships is a form of humanitarian intervention which easily opens the door to interference in the political affairs of the state... ",

observes that the most powerful States are reluctant to abolish this form of intervention in view of the executions and cruelties which accompany revolutions and which "constitute a reproach not only to the participants but also to those who refuse to intervene to help the victims". 393/

316. As was seen above, the Court considered that, in the words of Sir Gerald Fitzmaurice, "the dictates of humanity were the true legal basis of diplomatic asylum". 394/

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390/ C. Urrutia Aparicio, op. cit., p. 196. See also, for a criticism of the Court's assertion that diplomatic asylum derogates from the sovereignty of the territorial State (judgement in the asylum case), C. Barcia Trelles, "El Derecho de Asilo y el Caso Haya de la Torre", Revista Española de Derecho Internacional, 1950, p. 775 et seq.

391/ P. Fauchille, op. cit., p. 79.

392/ A. Raestad, op. cit., pp. 126-127.

393/ E. C. Stowell, Intervention in International Law (1921), pp. 256-257.

394/ Sir Gerald Fitzmaurice, op. cit., loc. cit., p. 33.

317. This finding by the Court is repeatedly echoed in the literature. 395/ For instance, Ulloa states that

> "... asylum ... is a humanitarian practice applicable by all States in their relations with each other, irrespective of their size or territorial category ... It involves the protection of human life against systems which do not adequately guarantee it ...". 396/

In the view of Podestá Costa

> "... it may be said that the granting of political asylum, whether or not provided for in a treaty, is nowadays decided upon solely for humanitarian reasons, in view of the need to save persons who plead for their lives at times when subversion of the public order does not afford guarantees for personal safety and may indeed be conducive to irreparable acts of violence; in extending protection only to individuals who are wanted for political reasons or for political offences and not for common crimes, it is based on the concept that they, unlike common criminals, are not dangerous except to the State in which they are charged with the offence". 397/

O'Connell and Verdross also stress the humanitarian aspect of diplomatic asylum. In this connexion, O'Connell refers to the judgement of the Court and "its references, following on those in the Corfu Channel Case, 398/ to the 'elementary considerations of humanity' as a source of law", 399/ and Verdross notes that "the

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395/ It should be recalled at this point that, as was seen in section 1 (3) (ii) of this chapter, some Latin American authors find the legal basis for diplomatic asylum in a combination of two concepts: that of the privileges and immunities of diplomatic missions and that of humanitarian protection.

396/ A. Ulloa, op. cit., pp. 42 and 45. See also A. Alvarez, op. cit., p. 73, D. Antokoletz, Derecho Internacional Público (1944), vol. II, p. 299, C. Bollini Shaw, op. cit., p. 33, F. Francioni, op. cit., p. 43 et seq., G. Dahm, op. cit., p. 351, R. Pederneiras, Direito Internacional Compendiado (1931), p. 166, L. Rodriguez Pereira, Principios de Direito Internacional (1902), vol. I, p. 419, I. Ruiz Moreno, op. cit., p. 501, I. Seild-Hohenveldern, op. cit., p. 173, M. A. Vieira, op. cit., p. 84, J. M. Yepes, El Panamericanismo y el Derecho Internacional (1930), pp. 321 and 328, and H. Cabral de Moncada (op. cit., pp. 74-75), who points that "not all authors who defend the right of asylum for humanitarian reasons recognize it as a true right, in the strict sense of the term, under positive international law; many of them defend it as being simply a humanitarian or natural-law institution". See, however, L. Moreno Quintana, Tratado de Derecho Internacional, op. cit., p. 486.

397/ L. A. Podestá Costa, Manual de Derecho Internacional Público, 2nd ed. (1947), p. 502. Similarly D. Antokoletz, Derecho Internacional Público, op. cit., p. 299.

398/ ICJ, Reports, 1949, p. 4.

399/ D. P. O'Connell, op. cit., p. 737.

principle of humanity is a governing principle of all modern international law, including the law of war". 400/

318. De Visscher concludes his observations on the question of diplomatic asylum with the following statement:

> "It is certainly not ruled out - the memories of the Spanish Civil War are there as evidence - that asylum may be destined for a revival in some parts of the world where nineteenth-century habits of order and tolerance had caused its lapse. It is likely, however, that such a revival would be based not so much on concern for politicians suffering from the vicissitudes of public life as on the nobler and truly universal concern for defending the human person against unjustifiable acts of violence." 401/

(6) The question of the measures which the territorial State may take if it considers the granting of asylum to be unlawful

319. Because of their general attitude regarding diplomatic asylum, Latin American publicists for the most part - the exceptions being a few authors of an earlier age 402/ - are silent on this question. The same cannot be said of authors in other regions, among whom two main schools of thought may be discerned.

320. Some authors, as noted by Spiropoulos, consider that "any refusal by the sending State, or even a simple refusal by the envoy, to extradite the person in

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400/ A. Verdross, op. cit., p. 335. Similarly E. Suy (op. cit., p. 78), who writes:

> "It is questionable whether a refusal to recognize diplomatic asylum in current international law, where the emphasis is on protection of the individual, is always justified. Inasmuch as it involves political refugees who are in direct peril of their lives, diplomatic asylum should be recognized for humanitarian reasons."

401/ C. De Visscher, op. cit., p. 235. Similarly P. F. Gonidec, "L'affaire du droit d'asile", Revue générale de droit international public, 1951, p. 592. See also L. Bolesta-Koziebrodzki, Le droit d'asile (1962), p. 342 et seq.; this author, who considers that the right of asylum can be linked to the principle of universal and effective respect for human rights called for by the United Nations Charter, goes into the question how a dispute regarding asylum would appear from the standpoint of the protection of human rights and in the framework of the machinery provided by the Charter, and identifies the guidelines which should, in his view, provide the basis for a general convention on diplomatic asylum.

402/ For example, C. Calvo, Derecho Internacional Teórico y Práctico de Europa y de América (1896), p. 354, R. F. Seijas, El Derecho International Hispano-Americano (1884), vol. II, p. 78, and S. Vaca-Guzman, Reglas de Derecho internacional Penal (1888), p. 111 et seq.

question would justify ... violation of the immunity of the premises". 403/ Similarly, Lauterpacht writes:

> "Apart from any treaty or established usage to the contrary, he /the envoy/ must surrender them /criminals or accused persons desiring to take refuge in the embassy/ to the prosecuting Government at its request; and if he refuses, any measures may be taken to induce him to do so, short of such as would involve an attack on his person. Thus, the embassy may be surrounded by soldiers, and eventually the criminal may even forcibly be taken out of the embassy. But such measures of force are justifiable only if the case is an urgent one, and after the envoy has in vain been requested to surrender the criminal." 404/

Fauchille describes the method which he believes would show the greatest respect for human rights as follows:

> "The diplomatic agent is asked by the Minister for Foreign Affairs to surrender to the local authorities a person accused of a crime who has taken refuge in his premises; such a request is, of itself, indicative of the desire to respect the inviolability of the premises. If the diplomatic agent refuses, the premises may be surrounded with police to prevent any escape, and the Minister for Foreign Affairs requests the foreign Government to order its agent to surrender the putative or proven criminal. If the foreign Government also denies the request for extradition, the local authorities may then forcibly enter the premises and take away the accused person ... The State is no longer obliged to respect an immunity that would give impunity to the violators of laws the enforcement of which cannot be waived." 405/

Lastly, Morgenstern, while stating that "as a rule the receiving State cannot recover a refugee by force if the envoy refuses to surrender him" and that "the State has the ultimate remedy of dismissing the envoy", notes that

> "... the view is gaining ground that, after persistent refusal of delivery, fugitive criminals may even be recovered by force from legation buildings. In some cases this power has been justified by reference to the right of self-preservation which 'is recognized by the most learned publicists as superior ... even to the immunities that are enjoyed by diplomatic agents'. On the whole, however, it has been justified by the principle that the inviolability of the legation is meant to facilitate the performance of the functions of the envoy and does not extend to actions extraneous to this purpose. Most writers, indeed, have only discussed the problem with reference to common criminals, and have not specially touched on the more controversial question of the protection of political refugees." 406/

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403/ J. Spiropoulos, op. cit., p. 214.

404/ Oppenheim-Lauterpacht, op. cit., pp. 796-797.

405/ P. Fauchille, op. cit., pp. 76-77.

406/ F. Morgenstern, op. cit., loc. cit., p. 239.

Morgenstern nevertheless refers to a passage by Woolsey - "recognizing the right of the local State to recover a fugitive by force from a foreign legation" 407/ - which in one particular case has been recognized as being applicable to the problem of political refugees, and he adds:

> "In fact, a distinction between ordinary criminals and political refugees in this respect is not logical unless a right of asylum for the latter is established on another ground. For then a violation of asylum would constitute a breach of the rule of international law permitting its exercise. The mere inviolability of the legation premises which is granted only in so far as it is necessary for the independence and inviolability of envoys, and the inviolability of their official archives, cannot alone prevent the recovery of political fugitives any more than of common criminals." 408/

321. Other authors, however, take the view that the territorial State is bound to respect the inviolability of the mission even where it considers the granting of asylum to be unlawful and where only diplomatic recourse is open to it. Raestad, for example, writes:

> "... if agents of the territorial State, on the pretext of seeking a fugitive, were to enter the premises of a legation, etc., and take possession there of documents, etc., this might be the beginning of the abolition of such inviolability, which is an essential principle of international law ... the territorial State can, if the head of the legation has already granted asylum, turn to the Government represented by that diplomatic mission and request it to settle the matter by giving orders to the head of the mission. In the meantime, the legation buildings can be surrounded." 409/

And the commentary on article 6 of the draft convention on diplomatic immunities prepared by the Harvard Law School ends with the following passage:

> "The sending State is in all cases responsible for an abuse of a privilege not in itself recognized by international law, but growing out of the recognized immunity and right to protection of the premises of the diplomatic mission. In event of the abuse of diplomatic privilege through the granting of asylum, the authorities of the receiving State are nevertheless obliged to respect the immunity of the mission. The sanction of the present article can be made effective only through the diplomatic channel." 410/

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407/ Woolsey, International Law, 4th ed. (1874), p. 153.

408/ F. Morgenstern, op. cit., loc. cit., p. 240.

409/ A. Raestad, op. cit., loc. cit., p. 126.

410/ Harvard Law Research, op. cit., p. 65. Similarly W. Wengler, Völkerrecht (1964), vol. II, p. 1034, note 5.

2. Asylum in consulates

322. Most Latin American jurists who have written on the subject agree that the right of asylum must not be exercised in consulates. 411/ Guerrero is very categorical in this respect:

> "This right is a prerogative which must be rejected out of hand. No State can allow such a privilege, which should, at present, not exist even for diplomatic agents or even in such a limited form." 412/

Similarly, Bollini Shaw, who stresses that "with regard to asylum in consulates, there is nearly unanimous agreement that it should be absolutely denied as a right", also states that:

> "The right of asylum which is recognized in the case of diplomatic envoys is exceptional. It may not be extended to consuls since it would infringe upon the sovereignty of the State by constantly giving rise to conflicts of territorial jurisdiction." 413/

Torres Gigena notes, however, with regard to Latin American practice:

> "In practice, although it is true that asylum has on occasion been granted in consulates in Latin America, whenever the local authorities objected to such an action, the Governments granting asylum never contended that they were relying on any particular law. Nearly all these cases of asylum in consulates occurred in the past century and, in none of them, in fact, did the circumstances suggest that a right was being exercised. What occurred was that many nations had accredited only consular agents, not diplomatic missions, in our countries. The humanitarian desire to save lives was stronger than the rules of law. In reality, what consulates granted in the last century and the first few years of this century was not asylum, but temporary refuge." 414/

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411/ See, for example, H. Accioly, op. cit., vol. II, p. 405; D. Antokoletz, op. cit., vol. III, p. 373; M. Cruchaga Tocornal, Nociones de Derecho Internacional (1923), vol. I, p. 496; L. M. Moreno Quintana and C. Bollini Shaw, Derecho Internacional Público (1950), p. 288; L. A. Podestá Costa, op. cit., p. 174; L. Ruiz Moreno, op. cit., vol. III, p. 491; C. Torres Gigena, op. cit., p. 183; and A. Ulloa, op. cit., vol. II, p. 98.

412/ J. G. Guerrero, "Consuls", Dictionnaire diplomatique de l'Académie diplomatique internationale, vol. I, p. 555.

413/ C. Bollini Shaw, op. cit., p. 288.

414/ C. Torres Gigena, op. cit., p. 184. The practice described by this author was also referred to early in the century by some Latin American writers and, in particular, R. Domenech, op. cit., p. 295, J. S. Garcia, "El Derecho de Asilo", Revista Diplomática y Consular, 1916, p. 377, and J. L. Suarez, "Critica del libro de R. Domenech 'Las Guerras Civiles Americanas'", Revista Diplomática y Consular, 1916, p. 105.

323. Outside Latin America, the problem of asylum in consulates hardly seems to have been raised at all in recent literature on international law. The North American and European authors who have written on the subject seem to agree in this connexion with the conclusions stated by the Institute of International Law in its Bath resolutions and to accept, to a limited extent, asylum in consulates. 415/ Typical in this respect is the view of Morgenstern, who states that "the difference between legations and consulates is not as great with respect to asylum as it is in many other respects". 416/ After giving a list of treaty and legislative provisions expressly prohibiting the use of consular premises as places of asylum, the commentary on article 32 of the draft Convention on Legal Position and Functions of Consuls prepared by the Harvard Law School 417/ states that the article in question prohibits such use only in the case of "fugitives from justice".

The commentary also states that:

> "A person seeking to escape from a mob clearly would not have that character. Not until it is clear that the person is wanted by the constituted authorities does he become a fugitive from justice. On the other hand, this paragraph does not require the consul to deliver the person to the local authorities even if he is a fugitive from justice, as does the Havana Convention. The consul should put the fugitive outside the consular office, leaving the local authorities to take their own measures." 418/

324. As we have seen, a similar idea has been set forth by certain writers on asylum in diplomatic premises. This is one of the first signs of the recent tendency in European and North American legal thinking to place the two types of situation on the same footing.

325. This tendency is also reflected in the humanitarian approach adopted by certain writers, such as Morgenstern, who states that:

> "The humanitarian theory ... can ... play an important part in producing a basis for asylum in consulates." 419/

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415/ See above, para. 277. See, however, P. Guggenheim, op. cit., p. 475, L. T. Lee, Vienna Convention on Consular Relations (1966), pp. 95-96, and S. Prakash Sinha, op. cit., p. 263.

416/ F. Morgenstern, op. cit., loc. cit., p. 250. See also in this connexion J. C. Starke, An Introduction to International Law (1972), p. 357.

417/ Harvard Law Research, op. cit., pp. 365-366. Article 32 (a) states that:

"A sending State shall not permit its consul

(a) To allow the consular office to be used as a place of asylum by fugitives from justice.

...".

418/ Ibid., p. 366.

419/ F. Morgenstern, op. cit., loc. cit., p. 252.

326. This tendency is apparent as well in the determination of the means available to the State if it considers that asylum has been granted irregularly by a consul. In this connexion, Kiss states:

> "With regard to refuge which might be granted in specific circumstances by a consul or a consular agent to a person in danger, the situation seems to be comparable to that in the previous case /asylum in a diplomatic mission/, if the host State does not intend to recognize such refuge. Of course, some recent consular conventions do, in certain conditions, accept the arrest of fugitives in consular premises.
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> ...
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> However, the Vienna Convention on Consular Relations, opened for signature on 22 April 1963, withdraws such concessions granted to the host State. It remains silent on the question of asylum or even of refuge, but it prohibits agents of the receiving State from entering the part of the consular premises used exclusively for the purposes of the consular post, except with the consent of the head of the post, his designee or the head of the diplomatic mission of the sending State. Such consent may be assumed in case of fire or other disaster requiring prompt protective action, but has to be granted expressly in all other cases. The Conference which prepared the text of the Convention rejected a draft amendment which provided that, if such consent had not been granted, the authorities of the receiving State could enter the consular premises by virtue of a legal order or judicial decision and with the authorization of the Minister for Foreign Affairs of the receiving State. In this case, as in that of refuge granted by a diplomatic representative, it may be concluded that, in the last resort, the host State has at its disposal only the procedures and sanctions provided for by international law for consuls who disregard their obligations to the host State." 420/

A similar opinion is expressed in the commentary on article 32 of the above-mentioned Harvard Law School draft, one paragraph of which states that:

> "In view of the immunity of the /consular/ office, the local authorities can do no more than inform the consul that a fugitive from justice is suspected of being there. If the consul's behaviour does not satisfy them, the matter may be taken up through the diplomatic channel, or the consul's exequatur may even be revoked." 421/

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420/ A. C. Kiss in Dalloz, Répertoire de droit international, vol. I (1968), p. 171.

421/ Harvard Law Research, op. cit., p. 367.

3. Asylum on board ships 422/

(1) Merchant ships

327. According to O'Connell: 423/

> "There can be little doubt that a person who commits a crime on shore and then seeks asylum on board a foreign merchant ship may be arrested by the local police, either before the ship leaves the port or when it comes into another port of the same State. This rule is no more than an elaboration of the ordinary rules of criminal jurisdiction."

Similarly, Morgenstern states: 424/

> "Merchant vessels enjoy no exemption from local jurisdiction. Accordingly they cannot shelter refugees fleeing from the local authority."

The same view is held by Bollini Shaw, 425/ Kiss, 426/ Colombos 427 and Fedozzi (at least as far as ordinary offenders are concerned). 428/ They nevertheless recognize the fact that certain States have sometimes taken the opposite view, particularly in the case of political offenders.

(2) Warships

328. The question of asylum on board warships in the territorial waters of a foreign State is related to that of the status of such ships under international law. Some writers are in favour of the theory of the extraterritoriality of warships. For example, Nervo states that:

> "The majority of writers agree that warships are not subject to the jurisdiction of the foreign ports in which they may be situated." 429/

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422/ For the sake of brevity, account has been taken only of merchant ships and warships, leaving aside the case of State vessels used for public services (coastal lighting and piloting, inspection of traffic and fisheries, police and customs inspection, construction work, scientific research, etc.) and that of State vessels used for trade.

423/ D. P. O'Connell, op. cit., p. 739.

424/ F. Morgenstern, op. cit., p. 256.

425/ C. Bollini Shaw, Derecho de Asilo, op. cit., p. 103.

426/ A. C. Kiss, op. cit., p. 172.

427/ C. John Colombos, The International Law of the Sea, 5th ed. (1962), p. 302.

428/ P. Fedozzi, "La condition juridique des navires de commerce", Recueil des cours de l'Académie de droit international, 1925, vol. 10, pp. 172-175.

429/ R. Nervo, "Le droit d'asile", Dictionnaire diplomatique de l'Académie diplomatique internationale, vol. I, p. 210. See also in this connexion C. Bollini Shaw, Derecho de Asilo, op. cit., p. 103.

Similarly, Lauterpacht states:

> "The position of men-of-war in foreign waters is characterized by the fact that, in a sense, they are 'floating portions of the flag-State'. The State owning the waters into which foreign men-of-war enter must treat them, in general, as though they were floating portions of their flag-State." 430/

For these writers, asylum on board warships is a logical consequence of the theory of extraterritoriality. Nervo states that:

> "The right of asylum on board /warships/ is, in principle, inviolable ... The ship is considered to be floating territory of the State whose flag it flies." 431/

Lauterpacht also states that:

> "Even individuals who do not belong to the crew but who, after having committed a crime on the territory of the littoral State, have taken refuge on board, cannot forcibly be taken off the vessel; if the commander refuses their surrender, it can be obtained only by diplomatic means from his home State." 432/

Fauchille agrees that, if one accepts - as he himself does not - the theory of extraterritoriality of warships, "a right of asylum does not appear to be impossible for those who wish to avail themselves of it, because the nationals of one State can always, of course, present themselves at the frontiers of another State". 433/ Turning to the question whether this theory makes the granting of asylum obligatory for the commander of a warship or whether it is simply an option left to his discretion, he observes that even in the former case the commander must be given the right to turn away, if he wishes, anyone who tries to come on board his vessel, in accordance with the right, if not the obligation, of every State to preserve its own existence and hence to exclude from its territory aliens whom it deems undesirable, especially common criminals. 434/

329. Other writers, however, reject the theory of extraterritoriality of warships. Fauchille himself refuses "to regard a warship as part of the territory of its

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430/ Oppenheim-Lauterpacht, op. cit., p. 853. See also in this connexion A. Verdross, op. cit., p. 283, and R. Laun, "Le régime international des ports", Recueil des cours de l'Académie de droit international de la Haye, 1926, vol. II, p. 65.

431/ R. Nervo, op. cit., loc. cit., p. 110.

432/ Oppenheim-Lauterpacht, op. cit., p. 853. See also in this connexion R. Saenz Peña in E. Restelli, Compil., op. cit., p. 547, R. Domenech, op. cit., p. 293, and C. Torres Gigena, op. cit., p. 180.

433/ P. Fauchille, op. cit., vol. I, part II, p. 973.

434/ Ibid., p. 974.

State" and attributes its immunities to "its special character, making it an extension of the State to which it belongs". 435/

330. What consequences does rejection of the doctrine of extraterritoriality have for asylum on board warships? On this point, Fauchille writes:

> "Firstly ... the very foundation of the right of asylum is destroyed, because there is no longer any foreign territory in which it can be exercised. And, secondly, the fact that a warship represents the sovereignty of a State creates for it, vis-à-vis the State in whose port it is lying, rights and obligations which preclude the granting of asylum. States must respect each other, and mutual respect between States as juridical persons, while requiring that the authorities of one State should not interfere on board a warship of another, where the sovereignty of that other State is asserted by the military authority which represents it, also requires that the commander of the vessel, as the representative of his State, should not, by granting refuge, hinder the operation of the justice of the territorial State in respect of persons normally under its jurisdiction. One final consideration operates in the same direction. The ultimate purpose of the immunities granted to warships is to simplify the performance of their duties, which are essentially a service of the State, and the duties of a warship most certainly do not include receiving criminals on board. No ships of any State are meant to provide asylum to felons." 436/

331. Despite the differences reflected above regarding the legal status of warships and the existence of a legal basis for naval asylum, writers tend, on the basis of the many concordant precedents revealing by State practice, 437/ to favour the recognition of asylum on board such vessels.

332. First of all, it should be noted that some publicists acknowledge a right of asylum for nationals of the flag State. Gidel, for example, writes:

> "If they /the refugees/ are nationals of the flag State, refuge on board will always seem to be more easily admissible than if they are not;

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435/ Ibid., p. 975. Similarly D. Antokoletz, Derecho Internacional Público, op. cit., p. 289, C. Baldoni, "Les navires de guerre dans les eaux territoriales étrangères", Recueil des cours de l'Académie de droit international de la Haye, 1938, vol. 65, p. 285, G. Gidel, Le droit international public de la mer, vol. II (1932), p. 255 et seq., D. P. O'Connell, op. cit., p. 738, and L. Ruiz Moreno, op. cit., vol. II, p. 67.

436/ P. Fauchille, op. cit., p. 975. Similarly C. Baldoni, op. cit., loc. cit., p. 265, H. Cabral de Moncada, op. cit., p. 86, and P. Fedozzi, op. cit., loc. cit., p. 170.

437/ See, for example, G. Gidel, op. cit., loc. cit., p. 273 et seq., C. Baldoni, op. cit., loc. cit., pp. 284-300, J. C. Kiss, op. cit., p. 172, Sir Arnold McNair, "Extradition and Exterritorial Asylum", British Yearbook of International Law, 1951, pp. 172-203, and F. Morgenstern, op. cit., loc. cit., p. 254.

protection of their nationals is one of the rights, and indeed one of the most unquestionable duties, of States. On the face of it, therefore, a principle of competence on the part of the flag State applies here, as it does not in the case of non-nationals. Of course the competence of the flag State is not necessarily superior to that of the coastal State; but at least the question presents itself as a conflict between two rights which may be unequal, but both of which have some justification." 438/

333. Secondly, a number of writers acknowledge the right of asylum on warships for persons accused of political offences. Baldoni, for example, states:

"... the existence of the right of asylum on military vessels must certainly be recognized as regards individuals sought for acts of a political nature ... The practice of States is too consistent to admit of any doubt regarding the legitimacy of asylum for refugees accused of purely political offences." 439/

Similarly, Fauchille observes:

"The right of asylum on warships for political refugees is unquestionably legitimate from the humanitarian point of view, because giving fugitives a respite makes it possible to save them from the cruel fate which threatens them." 440/

He goes on to say:

"Actually the views of writers on this question have been influenced much more by humanitarian than by legal considerations. Most of them come to the conclusion that, whatever the basis for the immunities which must be granted to a warship, the commander has the right to grant refuge to political offenders in order to save their lives. But they concede that he must, in this respect, act with the greatest circumspection so as to avoid any appearance of interference in the political affairs of the State whose fugitives he receives. He must be hospitable without being partisan." 441/

According to Cruchaga Tocornal,

"The right of asylum on warships anchored in the territorial waters of a foreign State may be exercised only with respect to persons who have committed or are accused of political offences.

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438/ G. Gidel, op. cit., pp. 274-275. For an opposing view, see P. Fauchille, op. cit., vol. I, part II, pp. 975 and 987, and C. Baldoni, op. cit., loc. cit., pp. 291-292.

439/ C. Baldoni, op. cit., loc. cit., pp. 285-286.

440/ P. Fauchille, op. cit., vol. I, part II, p. 982.

441/ Ibid., pp. 983-984. Similarly C. John Colombos, op. cit., pp. 253-254. and F. Morgenstern, op. cit., loc. cit., p. 255.

"Commanders must notify the authorities of instances in which asylum has been granted, and will do whatever is possible to enable the beneficiaries to leave the territory in complete safety." 442/

334. Bollini Shaw and Domenech, while stressing that if asylum on board warships is based on the theory of extraterritoriality there should logically be no distinction, as regards the granting of naval asylum, between political and non-political offenders, also observe that it is generally conceded that only political offenders may receive naval asylum. Domenech expresses this as follows:

"The law of nations and, even more clearly, international theory have nevertheless decided that asylum may be granted by a warship only to victims of political persecution and never to common criminals." 443/

And Bollini Shaw concludes:

"Most students of the subject feel that asylum is only applicable to political offenders ... If the basis for asylum is essentially humanitarian, as we have maintained with regard to diplomatic asylum, there is no reason to adopt a different criterion now; it is right that those who have committed nothing more than what is termed a political offence should be able to find refuge on foreign warships, when finding it in an embassy is impossible. The same argument cannot be used for common criminals, who must take their punishment for the crime they have committed." 444/

335. A number of writers ask why both States and legal theoreticians should be more favourably disposed to asylum on board warships than to diplomatic asylum as such. One of the reasons, according to Kiss, is that:

"... a warship, as a unit of the State's security forces, and indeed the material expression of its power, is a place where the flag State may within certain limits exercise acts of sovereignty, far more than is the case for diplomatic premises. In short, asylum on board warships is closer to territorial asylum than is diplomatic asylum, and this difference may have had some influence on the practice of States." 445/

It is noteworthy that, whatever their position regarding the legal status of warships and the right of asylum on board them, the writers whose works have been consulted feel on the whole that "the territorial authorities cannot themselves

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442/ M. Cruchaga Tocornal, op. cit., vol. I, p. 367.

443/ J. R. Domenech, op. cit., p. 293.

444/ C. Bollini Shaw, op. cit., pp. 104-105.

445/ A. C. Kiss, op. cit., p. 172. However, it should be noted that a number of Latin American writers regard naval asylum as being comparable to diplomatic rather than territorial asylum; for this view, see H. Accioly, op. cit., pp. 371-373, L. Moreno Quintana, op. cit., vol. I, p. 432, and vol. II, p. 768 et seq., and C. Torres Gigena, op. cit., p. 181.

board the ship for the purpose of taking criminals into custody" and "can only make representations to the commander". 446/

336. Among the other reasons advanced to explain the relatively positive attitude of writers and States toward asylum on board warships, Kiss mentions "grounds of expediency"; he observes: 447/

> "Firstly, under normal circumstances, the presence of warships in foreign waters is always temporary, and thus does not represent the same danger to the authorities of the territorial sovereign as does the permanent presence of an embassy. Secondly, it is obvious that the main practical problem of asylum, namely, the evacuation of persons taking advantage of it, is infinitely simpler to resolve in the case of warships than in the case of an embassy. Leaving the waters of the State with fugitives on board merely requires forbearance, whereas persons who have sought refuge in an embassy can be taken out of the country only with the express consent of the territorial State." 448/

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446/ P. Fauchille, op. cit., vol. I, part II, p. 976. Similarly G. Gidel, op. cit., pp. 285-286, C. John Colombos, op. cit., pp. 253-254, F. Morgenstern, op. cit., loc. cit., p. 254, Oppenheim-Lauterpacht, op. cit., p. 854, and C. Rousseau, Droit international public, 6th ed. (1971), p. 247.

447/ A. C. Kiss, op. cit., p. 172.

448/ For the sake of brevity, no presentation has been made in this chapter of the views of writers concerning certain special categories of refugees. The no longer relevant question of fugitive slaves is discussed, for instance, by P. Fauchille, op. cit., loc. cit., vol. I, part II, p. 995 et seq., G. Gidel, op. cit., p. 278 et seq., and F. Morgenstern, op. cit., p. 254. The question of deserters is studied in detail by a number of writers, including P. Fauchille, op. cit., loc. cit., vol. I, part II, p. 991 et seq.