THE RIGHT OF ASYLUM IN INTERNATIONAL LAW*

by

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" Most codes extend their definition of treason to acts not really against one's country. They do not distinguish between acts against the government and acts against the oppressions of the government. The latter are virtues, yet have furnished more victims to the executioner than the former . . . The unsuccessful strugglers against tyranny have been the chief martyrs of treason laws in all countries . . . Treasons, often, taking the simulated with the real, are sufficiently punished by exile".[1]

Such was the view of Secretary of State Jefferson in 1792. In the 150 years that have elapsed since then, however, governments have tended to become less rather than more liberal. They have sought therefore to punish those guilty of 'simulated' or 'real' treason and, far from sending them into exile, have endeavoured to prevent them from going into voluntary exile, and to recover them from the country concerned when they have succeeded in so doing. The increase in the number of dictatorial States governed by a monolithic party denying all political rights to its opponents, accompanied by an intensification of the 'cold war', has led to a desire to temper tyranny with mercy, at least where the enemies of one's political opponents are concerned.

This 'humanitarian' sentiment finds perhaps its loftiest expression in Article 14, paragraph 1, of the Universal Declaration of Human Rights : "Everyone has the right to seek and to enjoy in other countries asylum from persecution". Nowhere in this Declaration does there appear any obligation upon any State to grant asylum to the refuge seeker, and it is the purpose of this paper to examine how far international law recognises or imposes any duty upon the States which are its subjects to grant such asylum.

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1 Moore, *Digest of International Law,* vol. 4, p. 332.

Before analysing this matter, it is as well that we define our terms. International law may be defined as that system of laws and regulations which those who operate on the international scene recognise as being necessary for their orderly conduct, and which they regard as being binding upon themselves in order to achieve that orderly conduct. It is obvious that it would certainly not be conducive to orderly conduct if a State's law enforcing officers could, at their pleasure, invade the territorial limits of another State to bring back for trial or punishment one who was seeking 'asylum from persecution', but 'persecution' must not be confused with 'prosecution'. The second paragraph of Article 14 clearly states that "this right [of asylum] 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". This proviso is intended to enable a State to recover, or another to deny hospitality as an 'undesirable' to a fugitive who is nothing but a common criminal. Such individuals are dealt with in accordance with the ordinary law of extradition, which itself, generally speaking, recognises the immunity of the political offender.[2]

'ASYLUM' AND 'POLITICAL OFFENDER'

What has been said so far leads us to consider both the problem of asylum and that of the political offender. Although the Universal Declaration of Human Rights recognises asylum 'in other countries', there are in fact two forms of asylum, the one within the country seeking the fugitive and the other outside its territorial limits.

The former is described as diplomatic asylum and the latter as territorial, and it is only when territorial asylum is involved that questions of extradition arise. The difference between the two forms of asylum has been well brought out by the International Court of Justice in its first judgment in the *Asylum Case* between Colombia and Peru :[3] "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 the State. In the case of diplomatic asylum, [that is to say asylum within the buildings of an embassy,] the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum derogates 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 essentially within the competence of that State. Such a derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case".

2. Green, 'Recent Practice in the Law of Extradition', 6 *Current Legal Problems,* 1953, p. 274 at p. 281.

3. *I.C.J. Reports 1950,* p. 263, at pp. 274-5.

As regards political fugitives, a distinction must be drawn between the offence and the offender. Reference to the leading books on international law indicates that political offences are, normally, regarded as non-extraditable. The concept of political offences which appears to have gained popular acceptance is that propounded by Denman J. in 1891.[4] The learned judge expressly rejected the view of John Staurt Mill[5] that a political offence was *"any* offence committed in the course of or furthering of civil war, insurrection, or political commotion". Instead, he propounded the view that "to exclude extradition for such an act as murder, which is one of the extradition offences, it must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in the course of acting in a political matter, a political rising, or a dispute between two parties in the State as to which is to have the government in its hands. . . . The question really is, whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part".

This definition clearly reflects the era of general liberal democracy, based on rival organised political parties, in which it was enunciated. So much was this so that three years later, in 1894[6] Cave J. refused to concede that a terroristic act by an anarchist could ever be a political offence, for "there are not two parties in the State, each seeking to impose the Government of their own choice on the other for the party with whom the accused is identified, namely, the party of anarchy, is the enemy of all Governments".

In a world in which anarchism as a political creed is dead, and in which there are many countries where there is no organised political movement capable of indulging in acts directed against the government, it becomes increasingly common for the fugitive offender to act on his own or together with a small group of other 'non-party' individuals, or to commit his offence while outside the national territory and directed against the national property or interests. For this reason, it may well be considered that the classical view, tied as it is to the character of the offence, has outlived its usefulness. It is now time to revise the definition and to apply the test not to the act committed, but to the individual committing it. While such an approach might in fact solve nothing, it would result in shifting the burden of proof from the fugitive, who now has to prove that his offence was political, to the demanding State which would have to prove that he was not a political offender but a common criminal.[7]

4. *In re Castioni* [1891] 1 Q.B. 149, 157, 159. See also *Re Ezeta* (U.S.) (1894) 62 F. 972, 999, and *Re Giovanni Gatti* (France) (1947) *Annual Digest 1947*, p. 145.
5. House of Commons, Aug. 6, 1866, 184 *Parliamentary Debates* 3rd series, col. 2115.
6. *In re Meunier* [1894] 2 Q.B. 415, 419.
7. See Green, *loc. cit.* n. 2 above, p. 287.

Such a functional approach has in fact been adopted by Lord Goddard C.J.[8] In 1955 he was faced with a group of Polish sailors who had mutinied and sought asylum in the United Kingdom. There was no suggestion that these seamen were part of an organised political movement seeking to overthrow the established Polish government. Instead, they feared that they would be subjected to political persecution when the ship reached Poland and they sought to evade this fate. The evidence showed that "a political officer was . . . recording their conversations and keeping observation upon them for the purpose of preparing a case against them on account of their political opinions, presumably in order that they might be punished for holding or at least expressing them. A resultant prosecution would thus have been a political prosecution. The revolt of the crew was to prevent themselves being prosecuted for a political offence and . . . therefore the offence had a political character". Lord Goddard explained his deviation from the classical view by pointing out that in *Castioni's* case the Court had emphasised " that they were not giving an exhaustive definition of the words 'of a political character'." In view of this Lord Goddard found no difficulty in holding that "the evidence about the law prevalent in the Republic of Poland today shows that it is necessary, if only for reasons of humanity, to give a wider and more generous meaning to the words we are now construing, which we can do without in any way encouraging the idea that ordinary crimes which have no political significance will be thereby excused". Prima facie, the learned Lord Chief Justice preserved the fiction that it was the nature of the offence that qualified the fugitive for political asylum — or, more correctly, for non-extradition. In this case, however, the offence was mutiny aimed at preventing the possibility of a charge for a political offence. Further, the fugitives had acted as individuals protecting their own liberty, and not as members of an organised political movement seeking to take over the reins of government.

While preserving the appearance of continuity with earlier practice, *Kolczynski's* case opens the door to granting asylum to an individual *qua* individual, rather than as an offender who has committed a particular type of offence.

This door has in fact been opened, at least in the most recent practice of the United Kingdom in granting political asylum. In a written answer to a parliamentary question the Home Secretary explained, on March 6, 1958, that "applications for political asylum are dealt with on their merits in the light of the facts of the particular case. If it is reasonable to suppose that the result of refusing admission to a foreigner would be his return to a country in which, on grounds of political opinion, race or religion, he would face danger to life or liberty, or persecution

8. *Ex parte Kolczynski* [1955] 1 Q.B. 540, 550, 551.

of such a kind and extent as to render life insupportable, he would normally be admitted unless there were positive grounds for considering him undesirable".[9]

This statement is only expressive of executive policy. It may not be taken to indicate the line likely to be followed by a court when confronted with a request for extradition in accordance with a treaty. Then, it is to be hoped, Lord Goddard's liberal approach will be applied. The Federal Constitutional Court in Bonn has adopted a similar humanitarian approach to this problem.[10] In February 1959, when a Yugoslav citizen maintained that the charges lodged against him by Yugoslavia were false and claimed asylum as a political refugee in accordance with Article 16 of the Federal Constitution,[11] the Court pointed out that the legislative history of this clause indicated that political asylum was ' "a right granted to a foreigner who cannot continue living in his own country because he is deprived of liberty, life or property by the political system prevailing there". The concept of political persecution must not be narrowly interpreted. It is characterised by deep-seated socio-political and ideological contrasts between States which have developed basically different internal structures. There are a number of States in which, for the purpose of enforcing and securing political and social revolutions, the power of the State is exercised in a manner contradictory to the principles of a liberal democracy. Hence the concept of political persecution must not be limited to so-called political offenders, . . . but must be extended to persons prosecuted for non-political offences "where such persons, if extradited, would be liable in their home country to suffer measures of persecution involving danger to life and limb or restrictions of personal liberty for political reasons".'

On the other hand, it would appear that United States courts are likely to continue to pursue the more traditional approach. In *Karadzole* v. *Artukovic* [11a], the United States Court of Appeals pointed out that *Castioni* had "recently been reconsidered in English courts", and mentioned *Kolczynki* by name. It continued, "American cases have more or less adopted language used in *Castioni",* and proceeded to do likewise.

Having thus defined the relevant terms, it is now time to examine how far any 'right to seek asylum' is recognised in international law.

ASYLUM IN THE DOCTRINE OF INTERNATIONAL LAW

The right to seek asylum in a diplomatic embassy has been based on the alleged ground that the embassy buildings are exterritorial, representing a small piece of the sending State within the territory of

9. *House of Commons Debates* Vol. 583, March 6, 1958, Written Answers, col. 153.
10. Summarised, without a name, 54 A.J.I.L. 1960, p. 416, 417-8.
11. Para. 2: " . . . The politically persecuted shall enjoy the right of asylum",
11a. (1957) 247 F. 2d. 198, 203.

the receiving State — it will be recalled that Mr. Khrushchev welcomed Mr. Kennedy to the Soviet Embassy in Vienna by inviting him to enter Russian territory. Today, however, this theory is outworn and it is generally accepted that the immunity of an embassy depends on a waiver of jurisdiction by the receiving State. While it has been confirmed by the International Court of Justice "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 people", [12] or even to preserve a fugitive from the operation of justice if, "in the guise of justice, arbitrary action is substituted for the rule of law",[13] it is by no means established that an ambassador may, let alone must, offer the hospitality of his hotel to one who may be described as a political offender. In fact, the latest edition of Satow[14] specifically states that "it is now an established doctrine in Europe that no right to give asylum to political refugees in the house of a diplomatic agent exists". This was also the view of the United States in the latter part of last century. An American missionary had given asylum in his residence to a Persian Jew who had become a Christian and refused to wear a patch on his garments. The American Secretary of State was explicit in his comments : "This Government does not claim that its agents have the right to afford asylum. . . . The domiciliary rights of citizens of the United States in Persia may not be expanded to embrace the protection by them of Persian subjects, when such protection is expressly disclaimed by the Government of the United States, and when its assertion by their diplomatic and consular representatives is positively inhibited" by the 1856 Treaty between the two countries.[15]

It has not, however, always been true that the subjects of international law have denied the existence of a right to grant diplomatic asylum. Perhaps as a reflection of his own experience of asylum as a political refugee in France, Grotius stated that "a fixed Abode ought not to be refused to Strangers, who being expelled their own country, seek a Retreat elsewhere".[16] In his view, asylum should be available "only for the Benefit of them who suffer undeservedly, and not for such whose malicious Practices have been injurious to any particular Men or to human Society in general".[17] This view was commented upon, but by no means accepted by Pufendorf, who introduced limitations and reservations that one might expect to find coming from a twentieth century statesman defending an illiberal policy in the field of political asylum : "Humanity, it is true, engages us to receive a small number of Men, expelled their Home, not for their own Demerit and Crime,

12. *Loc.. cit*., n. 3 above, pp. 282-3.
13. *Ibid*., p. 284.
14. *Guide to Diplomatic Practice,* (edited Bland) 1957, p. 219.
15. Aug. 18, 1894, cited in Adler and Margalith, *With Firmness in the Right,* 1946, p. 13.
16. *De Jure Belli ac Pacis*, 1625, Lib. II, Cap. II, s.16 (Eng. tr. 1738, p. 156).
17. *Ibid*., Lib. II, Cap. XXI, s.5 (tr. p. 460).

especially if they are eminent for Wealth or Industry, and not likely to disturb our Religion, or our Constitution. . . . But no one will be fond of asserting, that we ought in the same manner to receive and incorporate a great Multitude, . . . since it is scarce possible, but that their Admission should highly endanger the Natives. Therefore every State may be more free or more cautious in granting these Indulgences, as it shall judge proper for its Interest and Safety. In order to which Judgment, it will be prudent to consider, whether a great increase in the Number of Inhabitants will turn to Advantage; whether the Country be fertile enough to feed so many Mouths; whether upon Admission of this new Body, we shall be strained for room; whether the Men are industrious, or idle; whether they may be so conveniently placed and disposed, as to render them incapable of giving any Jealousy to the Government. If on the whole, it appears that the Persons deserve our Favour and Pity, and that no Restraint lies on us from good Reasons of State, it will be an Act of Humanity to confer such a Benefit on them, as we shall neither feel very Burthensome at present, nor are likely to repent of hereafter. If the Case be otherwise, we ought to so temper our Pity with Prudence, as not to put ourselves in the ready way of becoming Objects of Pity unto others. Further, since whatever we bestow on such Petitioners, we may justly reckon as a Matter of free Bounty in us, hence it follows, they are not presently to lay hands on what they please, nor to fix themselves as it were by some Right, in any Spot of Waste-ground they find among us, but that they ought to rest satisfied with the Station and Privileges we assign them".[18]

It would thus seem that while Grotius, the refugee diplomat, considered that persecutees had a right to receive asylum, Pufendorf, secure in the ivory castle of his academic chair, recognised the desirability of this, but was highly conscious of the significance of *raison d'etat.*

One of the classicists who seemed anxious to combine the humanism of Grotius with the practical approach of Pufendorf was Wolff. He preached compassion towards the exile, "driven out of the city or land where he has a domicile" and who "by nature [has] the right ... to dwell anywhere in the world", but "since it depends altogether on the will of the people, or on the will of the one who has the right of the people, whether or not he desires to receive an outsider into his state, ... if admittance is refused, that must be endured. . . . Since nations are free, the decision concerning these matters must be left to the nations themselves, and that decision must be respected. The right belongs to an exile to dwell anywhere in the world, but no absolute right to settle in any lands belongs to him . . . Consequently no nation can be compelled to receive exiles".[19] Here Wolff is revealed as the direct ancestor of the asylum clause in the Universal Declaration, but unlike that document he

18. *De Jure Naturae et Gentium,* 1688, Lib. III, Cap. III, s.10 (Eng. tr. by Carew, 1729, p. 246).

19. *Jus Gentium Methodo Scientifica Pertractatum,* 1764, ss.145-150 (Carnegie tr. 1934, pp. 79-81).

specifically states that asylum is a right only in the widest and most popular sense of the term, pointing out that there is no duty upon any State to afford the asylum to which the refugee imagines he has a right. It is also interesting to note that Wolff rejects the thesis that an ambassador's immunity rests on exterritoriality and, with it, any idea of a "right of asylum in the house where the ambassador resides".[20]

Of the remaining putative 'fathers' of international law, it is only necessary to refer to Vattel, a diplomat philosopher. In accordance with natural law, exile does "not take away from a man his human personality, nor consequently his right to live somewhere or other. . . . But if in the abstract this right is a necessary and perfect one, it must be observed that it is only an imperfect one relative to each individual country; for . . . every Nation has the right to refuse to admit an alien into its territory when to do so would expose it to evident danger or cause it serious trouble. . . . Hence an exile has no absolute right to choose a country at will and settle himself there as he pleases; he must ask permission of the sovereign of that country, and if it be refused, he is bound to submit. Nevertheless, ... no Nation may, without good reason, refuse even a perpetual residence to a man who has been driven from his country. But if for definite and just reasons a State is prevented from offering him an asylum, the man has no further right to demand it" Having thus reduced the right to asylum to a completely discretionary power on the part of a State to admit or bar one who has asked for protection, Vattel remembers that he has earlier stated that the exile "holds this right from nature", and therefore, in exercising its discretion, the State should "[never lose] sight of the charity and sympathy which are due to the unfortunate". [21]

It has been suggested [22] that these views of the 'founding fathers' recognise the sanctity of the individual and are in direct linear ascendancy of current attempts to secure international respect for the natural rights of man. It is submitted, however, that the conscious juxtaposition of right and discretion tends, if anything, to prove the veracity of Bentham's comment: "Right . . . is the child of law : from real laws come real rights; but from imaginary laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of monsters . . . Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense — nonsense upon stilts".[23]

With these words in mind, it is time to examine State practice in this matter.

20. *Ibid*., ss.1059, 1061 (tr. pp. 534-5, 536).
21. *Le Droit des Gens ou principes de la Loi Naturelle appliqués a la conduite et aux affaires des Nations et des Souverains*, 1758, Liv. I, Chap. XIX, ss.229-231 (Carnegie tr., 1916, p. 92).
22. Garcia-Mora, *International Law and Asylum as a Human Right,* 1956, p. 41.
23. *Anarchical Fallacies,* 1824, 2 Collected Works (Bowring ed.), 1843, pp. 523, 501.

ASYLUM IN THE PRACTICE OF STATES

Asylum in its earliest forms is related to the right of sanctuary enjoyed in holy places at home or abroad. As the idea of religious sanctuary fell into desuetude it was replaced by that of territorial asylum, for "hospitality and protection had come to be regarded as the fugitive's right, and in the end each separate country became a place of refuge for offenders against the laws of other nations".[24] This view accords with that of the Emperor Charles V, Charles I of Spain, who recognised diplomatic asylum in embassies. He considered that the houses of ambassadors must serve as "inviolable asylums, as did once the temples of the gods".[25] Nevertheless, this right to asylum, together with the State's right to grant it, was, like so many 'rights' under international law to the present day, only valid so long as the State of refuge was strong enough to resist the demands made upon it by the State of flight, and it is perhaps not surprising that in the days of absolute monarchs attempts were made to deny asylum to their political opponents. Thus, in 1506 when Philip of Castile became, by stress of weather, an involuntary guest of Henry VII, the latter demanded as the price of his hospitality the surrender of Edward de la Pole, Earl of Suffolk, who was enjoying asylum in Castile. At first Philip refused, but later agreed having secured a promise from Henry that Suffolk's life would be spared. The duress upon Philip is clear when it is borne in mind that he was not allowed to leave England until Suffolk was safely in the Tower. Henry's son did not regard his father's promise as binding, and Suffolk was executed in 1513.[26] Similarly, Charles II made treaties with Denmark in 1661 and with the States-General in 1662, whereby these States undertook to surrender the regicides seeking asylum within their territories.[27]

From the reaction of the King of Castile and the awareness of Charles II that a treaty was necessary it may be argued, *a contrario,* that in the sixteenth and seventeenth centuries the right of asylum was recognised in international law. In fact there is evidence to show that it was still recognised in the eighteenth century in so far as both State

24. Moore, *A Treatise on Extradition,* 1891, vol. 1, p. 8.

25. Rousset, *Le Cérémonial diplomatique du Droit des Gens*, vol. 1, Supp. IV to Dumont, *Corps universel diplomatique* (cited Silving, "In Re Eichmann: A Dilemma of Law and Morality", 55 *American Journal of International Law,* 1961, p. 307, at p. 319). It is of interest to note that, as late as 1937, the mandatory regime in Palestine recognised the Mosque of Omar as a place of asylum for the Grand Mufti of Jerusalem (see entry on "Asylrecht" in Strupp-Schlochauer, *Wörterbuch des Völkerrechts,* 1960, vol. 1). Cp., however, India's non-recognition of Sikh temples as places of asylum in 1955 and 1961, *The Times,* Sept. 16, 1961.

26. Hosack, *The Rise and Growth of the Law of Nations,* 1882, pp. 117-118 (in a footnote Hosack quotes from Bacon's history of Henry's reign the terms of the conversation between the two Kings).

27. Moore, *op. cit.*, p. 10.

ships and diplomatic premises were concerned. As regards the former, it was not until 1939 that the doctrine of exterritoriality — expressed in the terms 'a floating portion of the flag-State'[28] — was finally rejected.[29]

Perhaps the most famous instances of ships providing asylum relate to escaping slaves. In these cases, although slavery could not exist on a British ship,[30] asylum could not be extended to a slave so as to grant freedom so long as the ship remained in the territorial sea of the State from which he was escaping, in fact if the ship "returns within the limits of the country from which he has escaped, he will be liable to be surrendered".[31] Where criminals were concerned the British view was that, while they could not be forcibly removed from a public ship, they ought to be surrendered,[32] for there was "no such right of protection belonging to the British flag, and . . . such a pretension is unfounded in point of principle, is injurious to the rights of other countries, and is inconsistent with those of our own".[33]

It is not only the United Kingdom that denies any right of asylum on board public ships. The United States, too, declines to regard its State vessels as places of hospitality for refugees, political or otherwise, for "the right of asylum . . . has no foundation in international law . . . [Ships'] 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".[34] This ruling is the culmination of a long practice. Thus, in 1831 the Vice-President of Peru was afforded asylum, with the concurrence of the Government of Peru, only for so long as was necessary to protect him from mob violence. The problem frequently arose with regard to Latin American refugees during the nineteenth century and United States diplomats were constantly reminded that asylum, as an act of grace, might only be afforded when the dictates of humanity made it inevitable.[35] It would appear that French practice is identical with that of the United Kingdom and the United States. In fact, the leading French textbooks, while affirming the rule of humanity, cite the practice of these two States as evidence of the position in international law.[36]

28. Oppenheim, *International Law,* Vol. 1, 5th ed., 1937, para. 450, p. 666; now see 8th ed., para. 450, p. 853. See also Fauchille, *Traité de, Droit International Public,* 1925, tome 1, 2me partie, s.619.
29. *Chung Chi Cheung* v. *The King* [1939] A.C. 160, 174-5.
30. *Forbes* v. *Cochrane* (1824) 2 B. and C. 448.
31. Report of the Law Officers of the Crown, Oct. 14, 1875 (McNair, *International Law Opinions,* 1956, vol. 2, p. 93).
32. Report by Paul, Sept. 20, 1733 (*ibid*., p. 68)
33. Sir Wm. Scott, Nov. 18, 1820 (*ibid*., p. 71).
34. Art. 0621, *U.S. Navy Regulations,* 1948 (cited Brittin, *International Law for Seagoing Officers*, 1956, p. 88).
35. Moore, *op. cit*., n. 1 above, vol. 4, pp. 849-55.
36. Fauchille, *op. cit*., n. 28 above, pp. 997-8; Sibert, *Traité de Droit International Public,* vol. 1, 1951, p. 950.

What is true of the situation with regard to public ships is of course even more true in the case of merchant ships, for no fiction of exterritoriality can be found to give them this type of sanctity.

Territorial and diplomatic asylum have also presented problems to the legal advisers of foreign offices. As in the case of ships, the problem has frequently concerned asylum, that is to say, freedom, for slaves. In the early eighteenth century the Law Officers of the Crown did not think that a slave's arrival in Great Britain or Ireland gave him freedom — not even if he were baptised. [37] By one hundred years later a different view was in vogue. In 1842 Lord Ashburton pointed out to Secretary of State Webster that England and every part of the United States not recognising slavery recognised a right of asylum for slaves finding themselves within the local jurisdiction.[38] The situation was, however, controversial if the slaves were on a ship within British jurisdiction not by the voluntary act of the master alone. Between 1831 and 1841 four American slave ships were driven by stress of weather into British ports, while a fifth was brought in by the slaves who had mutinied and murdered a passenger. In all cases the slaves were freed, in the case of the fifth ship after the mutineers had been tried for piracy and acquitted. Acting on the advice of the Law Officers, the British Government rejected American requests for the return of any of the slaves.[39] The United States Legal Adviser rested his argument on the contention that, while a merchant ship might not be exclusively within the jurisdiction of its flag State when in foreign territorial waters, "if a vessel be driven by weather into the ports of another nation, it would hardly be alleged by anyone, that, by the mere force of such arrival within the waters of the state, the law of that state would so attach to the vessel as to affect existing rights of property between persons on board". [40] The disputes concerning these ships were referred to an individual umpire who sustained the American point of view. [41] The decisions and the American stand have been criticised by contemporary American authorities like Dana.[42] Today, the problem is covered by the fact that slavery and the slave-trade are contrary to both customary and conventional international law.

In so far as refugees other than slaves are concerned the practice of States, certainly until the end of the eighteenth century, has been more or less in accord with the views of the classical writers. Fugitives would find that foreign States would decide in their discretion whether to give them hospitality or not. Customary international law imposed no obligations upon any State to expel or return a wanted fugitive. By the end of the nineteenth century it was possible to say that "France

37. Report by Yorke and Talbot, c. 1729 (McNair, *op. cit.*, vol. *2,* p. 79).
38. Ashburton to Webster, Aug. 6, 1842 (Moore, *op. cit.*, n. 1 above, vol. 2, p. 355).
39. The relevant Reports are to be found in McNair, *op. cit.*, pp. 79-88.
40. Webster to Ashburton, Aug. 1, 1842 (Moore, vol. 2, p. 354).
41. Moore, vol. 2, pp. 354-361.
42. See Wheaton, *Elements of International Law,* Dana ed., 1866, s.103, n. 62.

Russia, England, and the United States of North America, have constantly, either by diplomatic acts or decisions of their tribunals, expressed their opinions, that upon principles of International Law . . . the surrender of a foreign criminal cannot be demanded".[43] On the other hand, there was nothing to stop a State from surrendering the fugitive, for, although there is no right to demand, the surrender of criminals is a matter of comity,[44] and in 1864, for example, the United States surrendered a Cuban fugitive from justice to the Spanish Government at the latter's request.[45]

Since the grant of asylum to fugitives from abroad may easily result in criminals evading justice, States have sought to avoid this possibility by imposing treaty obligations of a kind to deny asylum and to grant surrender. This has been done through the medium of, for the most part, bilateral treaties which have become so common as to comprise today a veritable network reproducing rules in common, so that it is almost possible to refer now to the customary law of extradition treaties. These treaties date from the eighteenth century,[46] and have become so fundamental a part of the law that it is generally recognised today that there is no right to demand extradition in the absence of treaty. There is, however, in the absence of any restrictions imposed by municipal law, no obligation upon a State not to surrender a fugitive in the absence of a treaty. Even when municipal law tends to prevent such surrenders, as does the English Extradition Act,[47] the same result may be achieved by declaring the fugitive an undesirable alien and deporting him. Although great inroads into the institution of asylum have been made by extradition treaties, such treaties generally preserve the right in so far as political offences are concerned.

It is far easier for a fugitive to seek asylum in a local embassy than it is for him to escape abroad, and during the eighteenth century States were inclined to recognise their embassies as places of asylum, while the territorial State was just as inclined to deny this. In 1726 the Duke de Ripperda had been given asylum in the British Embassy in Madrid from where he was forcibly removed by the Spanish authorities. The British Government demanded reparation which the King of Spain denied. The controversy was interrupted by the outbreak of war between the two States, and liquidated by the Treaty of Seville, 1729, which provided for "an oblivion of all that is past". Similarly, in 1747 the British Minister in Stockholm afforded asylum to Springer accused of high treason against the King of Sweden. The latter demanded his surrender under threats and this was complied with. In its protest the British Government asserted that there was no doubt that the residence of a minister should

43. Philhmore, *International Law,* vol. 1, 1879, p. 519.
44. *Ibid*., p. 522. See also, Wharton, *International Law Digest,* vol. 2, 1866, s.268.
45. Wharton, *ibid*., p. 746 *et seq.*
46. Moore, *op. cit.,* n. 24 above, pp. 10-11.
47. 1870, 33 & 34 Vict. c. 52. See decision in *Ex p. Westerling* (1950) 17 *Malayan Law Journal,* 1951, p. 38 (*International Law Reports,* 1950, p. 82).

enjoy the right of asylum. Sweden did have doubts and the two ambassadors were withdrawn.[48]

The Spanish authorities were not always successful in denying to foreign ambassadors the right to afford asylum to fugitives. Of those incidents which occurred in the 'forties, when "the houses of the foreign ministers [in Madrid] were filled with refugees", it is sufficient to refer solely to those in which, in 1841 and 1843, the Chevalier d'Alborgo, Danish charge d'affaires, gave refuge to various opponents of the Spanish Government. When the refugees came into power d'Alborgo received a Spanish title as Baron del Asilo.[49]

The European Powers during the nineteenth century were prepared to extend asylum to non-Christians in Christian countries and to Christians in non-Christian countries. Thus, in 1876 when Jews were being persecuted in Moldavia, Wallachia and Serbia, the British Consul at Galatz let it be known that persecutees would be able to find refuge in the British consulate[50] — this, despite the fact that British practice, in the absence of direct consent by the country concerned, does not recognise its own or foreign consulates as constituting places of asylum.[51] In so far as Christians are concerned, there is a long record of asylum being afforded to Christians, regardless of nationality, in the Barbary States, Turkey and Morocco,[52] and it is this right to protect such individuals which formed the basis of the regime of capitulations which, in so far as Morocco was concerned, was examined by the World Court in its judgment on the *Rights of United States Nationals in Morocco.*[53]

The issue of asylum for religious refugees has again become of topical interest because of the evidence in the Eichmann trial that various members of the diplomatic corps offered asylum to Jews in order to save them from the Nazi "Final Solution".

Outside Europe and outside the field of asylum for religious persecutees, the problem has been of importance in Latin America. In that area, revolutions are endemic and it may well be said that today's president is yesterday's revolutionary leader and tomorrow's political refugee. In view of this it is perhaps not surprising that questions involving diplomatic asylum have been most frequent in that part of the world. The refusal of the United States to recognise diplomatic asylum was made clear as early as 1794[54] and was well expressed by Black in

48. Satow, *op. cit.,* n. 14 above, pp. 219-220.
49. Moore, *op. cit.*, n. 1 above, pp. 354-361. For the position during the Spanish Civil War, see Hackworth, *Digest of International Law,* vol. 2, 1941, pp. 631-2.
50. 62 *British and Foreign State Papers,* p. 1009 *et seq.*
51. McNair, *op. cit.*, n. 31 above, vol. 2, pp. 74-76. See also, Adler and Margalith, *op. cit.*, n. 15 above, *passim.*
52. Wharton, *op. cit.*, n. 44 above, vol. 1, pp. 675 *et seq.*
53. *I.C.J. Reports* 1952, p. 176 (See Index under "Capitulations (Regime of — in Morocco)").
54. Att. Gen. Bradford, cited in Deener, *The United States Attorneys General and International Law,* 1957, pp. 271-2.

1857. In his view, such asylum would mean an embassy becoming the "place of refuge for any discontented wife [or] rebellious child.... If this were, the law of nations, there is no government in the world that would not be compelled, in self-defence, to refuse all other governments permission to be represented by ministers within its territory".[55] Nevertheless, United States ambassadors in South American countries did occasionally afford asylum to political refugees in times of unrest. Thus, in 1898 the American Minister in Bolivia took the initiative in drawing up with his French and Brazilian colleagues a code governing the asylum which might be granted, primarily on account of threats by the mob against the refugee's life, during the current insurrection.[56] Other cases occurred and, for example, Secretary of State Webster wrote to the United States Minister in Chile that "the propriety of your granting an asylum to Colonel Arteaga will depend upon circumstances which are at present unknown to the Department. If there should be any precedent showing that the Chilean Government had previously acquiesced in such a proceeding on the part of the diplomatic representative of any foreign nation at Santiago, it could not justly complain of our course, unless formal notice should have previously been given that it would not in future tolerate the exercise of the right".[57] Even as recently as 1931 humanitarian asylum was granted to the former President of Ecuador, although a year later it was denied to the family of the President of Chile who were threatened with violence as a means of compelling the President to resign.[58]

Despite this tendency to allow United States diplomats to grant asylum on humanitarian grounds — sometimes defined more narrowly than at others — the Department of State informed its representatives in Latin American countries that "the affording of asylum is not within the purposes of a diplomatic mission. . . . It is but a permissive local custom practised in a limited number of states where unstable political and social conditions are recurrent", and this view was reiterated in the 1939 Foreign Service Regulations of the United States which, having expressly denied any right of diplomatic asylum, went on to permit it on humanitarian grounds to " afford refuge to uninvited fugitives whose lives are in imminent danger from mob violence but only during the period active danger continues. [Nevertheless,] refuge must be refused to persons fleeing the pursuit of the legitimate agents of the local government".[59] Presumably, Cardinal Mindszenty is still in "imminent danger from mob violence" in Budapest.

55. Att. Gen. Black an *Hulseman's Case,* 1857, *ibid*., p. 272.

56. Moore, *op. cit*., n. 1 above, vol. 2, p. 784.

57. 1851, *ibid.,* p. 787.

58. Hackworth, *op. cit*., vol. 2, p. 630. Other instances of U.S. practice in Ethiopia and Spain will be found *ibid*., pp. 630-632.

59. *Ibid*., p. 623.

In so far as the countries of Latin America themselves are concerned, their practice *inter se* in this field has led to the general assumption "that the law of diplomatic asylum is an accepted part of general international law governing the Latin American nations".[60] This view has been encouraged by such actions as the assertion of a right to grant asylum in the Latin American embassies in Madrid during the Spanish Civil War. However, it was only after the despatch of an Argentine warship to Spain that the Spanish Government conceded the right.[61]

In view of the possibilities of abuse in an unrestricted right of asylum, the Latin American States have attempted to control its exercise by treaties. The Convention on Asylum adopted by the 1928 Havana Conference of American States explained that these States, "being desirous of fixing the rules they must observe for the granting of asylum, in their mutual relations have agreed to establish them in a Convention" [62] This Preamble implies that asylum is well-known in the area, but that its extent needs definition. This Convention was followed by the Montevideo Convention on Political Asylum, 1933, which was intended "to define the terms of the one signed at Havana".[63] While asylum is not to be granted to common criminals, "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 recognise political asylum, except with limitations and peculiarities, can exercise it in foreign countries only in the manner and within the limits recognised by such countries". These sentiments are, broadly speaking, reiterated in the 1939 Montevideo Convention on Political Asylum and Refuge,[64] the Preamble of which stated that "the principles governing asylum . . . require amplification in order that they may . . . serve to confirm the doctrines already sanctioned in America". It is provided, however, that "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".

The fact that reciprocity was not considered necessary, that asylum extends to all regardless of nationality, including non-Latin Americans, the acknowledgment that it may be recognised subject to limitations, and the assertion that the 1939 Treaty is to "confirm the doctrines already sanctioned in America", all tend to suggest that asylum is a right recognised in the area, regardless of any Conventions. This implies that Argentina, which has not ratified these Conventions, purported to be

60. Thomas and Thomas, *Non-Intervention: The Law and its Import in the Americas,* 1956, p. 392.
61. Padelford, *International Law and Diplomacy in the Spanish Civil Strife,* 1939, p. 157.
62. Hudson, *International Legislation,* vol. 4, p. 2412.
63. *Ibid.*, vol. 6, p, 608.
64. *Ibid.*, vol. 8, p. 405.

exercising its rights under Latin American international law by extending asylum to Eichmann. [65] This ignores, however, that regional international law will not operate against a non-member of the region unless the latter recognises it. It also disregards any obligations that may bind Argentina to surrender war criminals.[66]

Latin American practice on asylum was considered at some length by the International Court of Justice in the *Asylum Case* between Colombia and Peru.[67] The Court pointed out that Peru had not ratified the Montevideo Conventions and so it was primarily concerned with examining whether asylum, and the right unilaterally to qualify it as political, existed under "American international law in general". In the first place, the Court considered that the small number of States which had ratified the 1933 Convention indicated that they did not regard this Convention as a declaratory codification of existing law. However, it can equally be argued that States did not ratify because they were satisfied with the existing law and, as is so often the case, feared that by enacting a treaty they were opening the door to a narrow and rigid approach to the problem. The view of the Court serves to deny reality to asylum, for it is unlikely that both the ambassador granting refuge and the State against which it is sought will agree that the fugitive is a political offender rather than a common criminal. The Court went even further towards destroying the idea that asylum is a part of Latin American customary or conventional international law : [68] "The Court cannot admit that the States signatory to the Havana Convention intended to substitute for the practice of the Latin-American republics, in which *considerations of courtesy, good-neighbourliness and political expediency* have always held a prominent place, a legal system which would guarantee to their own nationals accused of political offences the privilege of evading national jurisdiction. Such a conception, moreover, would come into conflict with one of the most firmly established traditions of Latin America, namely non-intervention".[69] It is perhaps not uninteresting to mention that the Judges from Brazil, Chile and Colombia dissented from this judgment. The Inter-American Convention on Diplomatic Asylum signed at Caracus in 1954 redresses the situation.[70] In Article 4, the Convention, which was not signed by Peru, declares that "it shall rest with

65. See Green, "The Eichmann Case", 23 *Modern Law Review,* 1960, p. 507. For the judicial discussion of the jurisdictional issues involved in the Eichmann "kidnapping", see Rosenne, *6,000,000 Accusers: Israel's Case against Eichmann,* 1961 (Jerusalem), pp. 184-305.
66. See Resolution of the General Assembly, adopted unanimously, Feb. 13, 1946 (*History of the United Nations War Crimes Commission,* 1948, p. 411), and that of Oct. 31, 1947, adopted by 42 votes to 7 (*ibid.*, p. 413). See also Morgenstern, "Asylum for War Criminals, Quislings and Traitors", 25 *British Yearbook of International Law,* 1948, p. 382).
67. *I.C.J. Reports 1950,* p. 266.
68. At p. 285 (italics added).
69. Embodied, *e.g.,* in declaration adopted at 1928 Havana Conference.
70. *Yearbook on Human Rights,* 1955, p. 330.

the State granting asylum to determine the nature of the offence or the motive for the prosecution". On the other hand, while Article 2 recognises that "every State has the right to grant asylum, it is not obligated to do so or to state its reasons for refusing it".

ASYLUM AND THE UNITED NATIONS

The cruelties of the Nazi regime and the hunt for war criminals after 1945 attracted new attention to the problem and strengthened the case of those who demanded recognition of the right of asylum. In the first place it was necessary to make it clear that asylum was not to be granted to those whose crimes placed them beyond the pale of civilisation and this was done by wartime agreements and General Assembly resolutions. [71] This part of the problem, however, is not today of pressing importance. The countries of refuge have adopted the line that many of the "criminals" are wanted for trial not so much as war criminals, but as political opponents of the demanding State which is using the war crimes allegation purely for ideological purposes. In addition, the countries of refuge have in many cases applied the test that their courts would apply in matters of extradition[72] and asserted that the sixteen years since the war constitute unconscionable delay rendering it unjust and repressive to return the wanted man.[73] Further, the passage of the years of necessity renders this aspect of the matter somewhat transient in significance.

What is far more important is for the United Nations to protect those who have fled because the post-war condition of the home State is such as to cause them to seek asylum elsewhere. As has already been indicated, in the Universal Declaration of Human Rights the right to seek asylum is included among the fundamental human rights, although no effort is made to give this "right" any sort of legal recognition, and no concomitant duty is placed on any State to afford to the asylum seeker the hospitality which it is stated he has a right to seek. In any case, it must be remembered that, despite the fanfares that are sounded in certain

71. *Loc. cit.*, n. 66 above. See also Green, *loc. cit.*, n. 2 above, pp. 289-291.

72. *R.* v. *Governor of Brixton Prison, Ex p. Naranjan Singh,* [1961] 2 W.L.R. 980. See also the Argentine refusal to extradite Duriansky to Czechoslovakia on the basis of extinctive prescription in accordance with Article 62 of the Penal Code, *The Times,* July 22, 1960, as corrected in letter to the editor, 24 *Modern Law Review,* 1961, p. 555.

73. See, *e.g.,* the British rejection of the Soviet demand for the surrender of Ain Erwin Mere, *Daily Telegraph,* March 13, 1961. As long ago as May 1949, Lord Henderson stated that no further war criminal would be handed over to a demanding State for trial in the absence of a satisfactory explanation for the delay, *Parliamentary Debates* (Lords), vol. 162, col. 388. See also the case of Jan Durcansky decided by the Court of First Instance, Buenos Aires, July 18, 1960.

countries to mark the anniversary of "Human Rights Day", the Declaration is not a treaty but a mere statement of pious hope as to the standards of conduct that might one day be achieved. However, if the other rights mentioned in the Declaration did become real, it may be thought that there would no longer be any need to seek asylum from persecution.

An early attempt to recognise the legal status of those enjoying asylum is the United Nations Convention relating to the Status of Refugees, 1951.[74] No reference to any right of asylum is made in this Convention, but in the Preamble it is recognised that "the grant of asylum may place unduly heavy burdens on certain countries", and a call is made for international co-operation to deal with the problem. It describes a refugee as one who, "as a result of events occurring before 1 January, 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country". Having stated that the refugee is under a duty to obey the law of the country of refuge, it goes on to provide that, broadly speaking, refugees shall be accorded he same treatment as ordinary aliens. Further, by Article 33 contracting States are forbidden to expel or return (*refouler*) a refugee to any territory "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". This protection against *refoulement* does not extend to a refugee when there are reasonable grounds for regarding him as a danger to the security of the inhabitants of the country in which he seeks refuge.

The Convention on Refugees does not attempt to place any obligation upon the parties to grant the right of asylum, but merely stipulates the treatment to be enjoyed by refugees once asylum has been granted. Not only this, but the privileges conferred by the Convention only extend to a person who became a refugee because of events occurring by the end of 1950. Thus, in 1961 the Ansbach Administrative Tribunal denied asylum to two formerly Polish Jews seeking refuge from Israel on the ground that their flight was after the operative date.[75]

The Convention on Refugees only dealt with part of the problem, and in 1957 France submitted to the Human Rights Commission of the Economic and Social Council of the United Nations a Draft Declaration on the Right of Asylum which was resubmitted in an amended form in March 1960.[76] After much discussion this Draft was finally adopted by the Commission in a form which went some way towards imposing an

74. *Yearbook on Human Rights for 1951,* p. 581.

75. *Der Reichsruf* (Hanover), Feb. 4, 1961.

76. Comm. on Human Rights, Report of 16th Session, Feb. 29 – Mar. 18, 1960, *Economic and Social Council, Official Records,* Thirtieth Session, Supp. No. 8, p. 8.

obligation upon States to grant asylum, although in the debate "the members of the Commission were divided into two groups : the first (consisting mainly of representatives of Afro-Asian countries) pleaded for the maintenance of the State's sovereignty and *implicite* its right to be free in granting or refusing asylum for reasons of its own security and welfare, while the other (mostly European States) stressed the humanitarian duties of the States which should oblige them to deviate only in exceptional cases from the principle of *non-refoulement".* [77] This principle was finally embodied in the Draft adopted by the Commission in the form : "No one seeking or enjoying asylum in accordance with the Universal Declaration of Human Rights should, except for overriding reasons of national security or safeguarding of the population, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is well-founded fear of persecution endangering his life, physical integrity or liberty in that territory".

Nowhere in this Draft is it implied that any authority other than the receiving State itself is competent to decide whether there is in fact any basis for the assertion that there are "overriding reasons of national security" for deviating from the principle of *non-refoulement.* It is provided, however, that in the event of such deviation the State concerned "should consider the possibility of the grant of provisional asylum under such conditions as it may deem appropriate, to enable the persons thus endangered to seek asylum in another country". These provisions remind one of the writings of the classicists which recognised a right of asylum and then nullified it by making the grant discretionary. The Economic and Social Council[78] transmitted the Draft Declaration to the General Assembly. It might have been thought that, in view of the fuss that has been made in the United Nations about human rights generally and about the Universal Declaration, in which the right of asylum is embodied, in particular, the General Assembly would have seen fit to deal with the Draft Declaration on Asylum at the earliest opportunity. Instead, on December 18, 1960, the Assembly,[79] not having been able to consider the Draft at its fifteenth session, decided to take up the matter as soon as possible at the session opening in the latter part of 1961. If current political issues are anything to go by, it is perhaps not out of order to surmise that there will be no time to consider the Draft at the sixteenth session either.

At no time has the United Nations attempted to assert that the Organisation as such has the right to exercise asylum in its own buildings. Although the Headquarters Agreement of 1946[80] recognises the

77. *Bulletin of the International Commission of Jurists,* No. 11, Dec. 1960, p. 53.
78. Res. 772 E (XXX).
79. Res. 1571 (XV).
80. Doc. ST/LEG/2, Sept. 19, 1952, p. 57; 43 A.J.I.L. 1949, Supp. p. 21.

immunity of the Headquarters area and of the buildings, and forbids United States officials from entering therein without the consent of the Secretary-General, the Agreement provides that "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 United States for extradition to another country, or for persons who are endeavouring to avoid service of legal process". No attempt is made in the Agreement to differentiate political from other offenders. Perhaps this explains why Mr. Shou Kang-wang, a fugitive from a Chinese Nationalist death sentence, went to the trouble of fleeing, not to the body whose Declaration of Human Rights proclaims that "everyone has the right to seek and to enjoy . . . asylum from persecution", but to the United Kingdom, since the United States would have handed him back to the Formosan authorities.[81]

It is perhaps relevant to point out that the Vienna United Nations Draft Convention on Diplomatic Intercourse and Immunities[82] does not include any provision for the grant of asylum in a diplomatic building. In view of this and in view of the fact that there has not yet been any general convention recognising the right of asylum, the position is still as it was under customary international law. That is to say, in so far as territorial asylum is concerned, individuals may apply for asylum, but it is within the complete discretion of the State concerned whether it will grant the application. As regards diplomatic asylum, "there is no law of asylum of general application in international law. Hence, where asylum is practised, it is not a right of the legate state but rather a custom invoked or consented to by the territorial government in times of political instability. . . . The custom is justified publicly on humanitarian grounds, but in practice it is used primarily for the personal protection of conspirators planning a *coup d'état* or for the government fearing or experiencing one".[83]

L. C. GREEN. *

81. *The Times* (London), Jul. 27, August 10, 1961.

82. Doc. A/Conf. 20/10, Apr. 16, 1961, 10 I.C.L.Q. 1961, p. 600.

83. United States instruction on asylum to diplomats in Latin America, Oct. 2, 1930 (*loc. cit.*, n. 59 above).

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