

CHAPTER I

LAW OF ASYLUM

CHAPTER - 1

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It is a matter of common experience in the political life of nations that certain individual are forced to escape from their state and seek shelter in foreign countries, this may be due to there political persecution on the ground that they are enemies of the established order in the state. When the political revolutions take place and the rebels who have successfully engineered the revolution try to prosecute those who have opposed them, and if the revolution fails, the government against which the revolution was unsuccessfully engineered will certainly try to punish those who rose up in rebillion. Persons, in such circumstances, are forced to seek asylum in foreign countires. Among such persons are not only political leaders but also sovereigns and their families.

Asylum may be defined as sanctuary granted by one state to the nationals of another state. Normally it is granted to the persons of foreign orgin for his fear of being persecuted in his own state because of his race, religion, political belief or activities. In other circumstances a person may be seeking asylum for his having committed some political offence for which his custody may have been sought by the parent state, the state of asylum therefore grants protection to the refugee who has sought and got asylum in the given state.

Historically, the word extradition stands for the opposite notion of traditional hospitality offered to an alien and is, therefore, extradition. It is a process which derogates to the tradition of asylum, The practice of asylum precedes in origin that of extradition, and therefore extradition became the exception to asylum, both by the reason of substance and in consequence of their historical development. Historically asylum was the place where a state could not exercise its jurisdiction over any individual. This gave rise to legal connection between asylum and jurisdiction.¹

Asylum was not always recognised or practiced by societies through history; in fact it was spotty and uneven, at times selectively applied, others deemed privilege rather than a right. Nevertheless, many examples of granting asylum throughout the times are increasingly relied upon to give credence to the theory of Grotius that asylum is an inherent human right deriving from Natural law. In Greece where asylum flourished it was institutionalized in two forms: as applicable to certain places. The persons were at first athletes who participated in olympic games; the Dorian artists and ambassadors. In contemporary terms, their status would be that of immunity which is a form of exemption from the application of jurisdictional authority over the persons enjoying that privileged status. The places, usually temples, were those historical sanctuaries where for certain reasons sanctuary was

1. J. C. M. International law and world public opinion, 3rd edition, 1974, p 86

granted there in. The historical inviolability of sanctuary was respected vis-a-vis persons sentenced to death found their way, to so long as they remained on the premises.²

Asylum says Starke involves two elements; shelter, which is more than merely temporary refuge; and a degree of actual protection on the part of authorities in control of the territory of asylum. The institute of international law defines asylum as the protection which a state grants on its territory or in some of its other place under the control of certain of its organ to a person who come to seek it.³

The asylum connotes three following legal meaning, Grant of admission to refugees in its territory; Protection of refugges; and lastly non-extradition of political offenders. Asylum is of two types:

(a) TERRITORIAL ASYLUM

(b) EXTRA-TERRITORIAL ASYLUM

Territorial Asylum is granted by a state on its territory. Where as, Extra-territorial asylum is granted by a state outside its territory such as in legation consular premises, international headquarter and warships. The difference between the principle applying to two kinds of asylum flow from the fact that the power to grant territorial asylum is an incident of territorial sovereignty itself, where as granting of extra-territorial asylum is rather a

² Ibid. p-87-88

³ Starke **J.G.**: Introduction to International Law, 10th edition, Buttersworth publication, 1989, p-358.

derogation from the sovereignty of the territorial state insofar as that state is required to acquiesce in fugitive from its authorities enjoying protection from apprehension. The general principle is that every state has a plenary right to grant territorial asylum.

Unless it has accepted some particular restriction in this regard. While the right to grant extra-territorial asylum is exceptional and must be established in each case. Both type of asylum have this in common, that they involve an adjustment between legal claims of state sovereignty and the demands of humanity.⁴

TERRITORIAL ASYLUM:

Question of granting territorial asylum arises when a person or group of persons having fled from another country enter the territory of that state and seek permission to remain there. This may happen when individual ~~individual~~ in order to escape persecution in their own land on account of their race, religion, or political belief leaves its territory and try to find refuge in some other land where they could live and enjoy some of the fundamental freedom.⁵

The competence of the state to allow political offenders or political refugees to enter and to remain on its territory under its protection and there by grant asylum to them, has

⁴ Ibid, p-357-358

⁵ Sen. B. A diplomat's hand book of law and practice, martinus Nijhoff, 1979, p-351.

never been doubted in International law. According to Article 14 of Universal declaration of Human rights, 1948: "Every one has the right to seek and enjoy in other countries asylum from persecution". The constitution of certain states provides for political asylum to the persecuted. It is however, to be noted that the individuals have no right to asylum. It is however for the state granting asylum to judge the circumstances of each particular case. If a claim is made out on the usual immigration laws and requirement it will normally be waved; Nor the state from which the person seeking asylum has fled regard his reception as a hostile act: the state, in granting asylum is exercising a right of territorial sovereignty.⁶ The state's liberty to grant asylum in its territory is of ancient origin and extends not only to political, social, or religious refugees, but to all persons from abroad including criminal offenders. It is merely one aspect of a states general power of admission or exclusion from its territory. Normally however, persons not being nationals of the territorial state, and who are held in custody on foreign vessels with in that state's waters, will not be granted asylum.⁷

Thus a foreign state is provisionally at least, an asylum for every individual who being persecuted at home crosses its frontiers. In recent years many such instances have arisen,

⁶ Green. Maryan, International law, Macdonald evas, London, 1973, pp-109-110.

⁷ Starke J.G. op. cit. p.389.

the cases of Jewish refugees who were made to flee from Nazi persecution in Germany on account of their race; the refugees from Hungary and East European states and the Tibetan refugees who sought their freedom from domination by leaving their homes and taking refuge in other lands including India. Alongwith these, there have been Palestinian refugees and those from korea, Burma, Vietnam and Angola. In general states usually accept people who are politically persecuted in their own country.⁸

Political asylum says Grieger is, in which an alien seeks permission to to be allowed entry to, or permission to remain in a state because he would face political persecution if he were forced to return to his own state. In the absence of an extradition treaty there is no obligation upon a state to return. Offenders to the state from which they have escaped, and if the individual is in no sense an offender, or if his crime is of political nature, the territorial state is under no obligation to surrender at all, extradition treaty notwithstanding, It follows that a decision to allow an alien to enter and to remain to, in a state is only the normal application of its rights as territorial sovereignty to exercise exclusive or primary jurisdiction over persons within its territory.⁹

Thus territorial asylum is a recognised and well

⁸ Sen. B. op.cit p-351

⁹ Grieger D.W. International law, Butters worth, London, 1970, pp-350-351

establish rule of International law. It can be granted to political refugees, for instance to defector, and to refugees who have a well founded fear of persecution in their own country, and it could be granted to general asylum seekers. i.e. those who have fled from their own country to seek economic betterment, but do not have the status of immigrants.

A state is at liberty to do what ever it chooses with in its own territory without reference to the wishes of other state so long as its acts are not directly injurious to them, it has the right of receiving and giving hospitality of asylum to emmigrants and refugees, whether or not the former have violated the laws of their country in leavin · it, and whether the latter are accused of political or of ordinary crimes.¹⁰

The principles concerning the grant of asylum in the territory of a state under international law is that in the absence of any treaty obligation to the contrary, a state is free to admit any one it likes into its territory and to allow him to remain their. It is however to be made clear fugitives have not no right of asylum though it has been claimed that there is such an individual right of asylum because the fugitive is not usually surrendered, in the absence of extradition treaties, and if his offence is political he is generally not subject to extradition, but the flaw in this proposition is that it takes account only of persons whom asylum has been granted and not of those to whom asylum has

¹⁰ Hall W.E: A treatise on International law, 8th edition, Pierce Higgins, Oxford, London 1924,p-328.

been refused.¹¹

The Constitutions of several countries provide in their preamble the right of asylum to persons fleeing from persecution for e.g. constitution of France; Article 10 of the Italian Constitution; Article 31 of Yugoslavia constitution. Another provision of a modern International instrument not being binding convention which provides for an individual right of asylum from persecution is article 14 of the universal declaration of Human rights 1948 which rather weakly refers to a right to seek asylum but so far no such individual right is guaranteed by international law.¹²

The true position with regard to right of asylum is, it is the right of refugee to seek asylum in a state other than its own, the decision as to whether or not to grant him that asylum is a matter of the state concerned. The state has, however has unquestionable right to grant such asylum and incurs no legal duty to refuse admission to a fugitive alien into its territory, or in case where he has been admitted to or deliver him upto the persecuting state. On the contrary states have always upheld their option to grant asylum. It has been recognised as an institution of humanitarian character. One can almost maintain, that this right state, has become a part of general principles of the law of nations as recognised by civilized states.

¹¹ Starke J.G. op. cit p-359.

¹² Oppenheim. L. International Law a treatise, Ed. by Sir Robert Jennings and Sir Arthur Watts KC MG QC, volume 1, 8th edition, Longman Green, 1992, p-950.

United Nations general assembly adopted a declaration on territorial asylum on 14th December 1967 which recommended that in their practice states should follow the following principles:

- (a) Article 1 states "that asylum granted by a state to persons entitled to invoke article 14 of the declaration of human rights including person struggling against colonialism shall be respected by other states".
- (b) Article 2 states "Where a state finds difficulty in granting or continuing to grant asylum, states individually or jointly or through the United Nations should consider "in a spirit of international solidarity, appropriate measures to lighten the burden of that state".
- (c) Article 3 states "A person seeking asylum from persecution referred in article 14 of the Universal declaration of Human rights should not be subject to rejection at frontier, or if he has already entered the territory in which he seeks asylum to expulsion or compulsory return. If there are overriding reasons of national security or if it be necessary to safeguard population as in the case of mass influx, asylum may be refused, but the state concerned should consider granting the person seeking refuge an opportunity, by way of provisional asylum, or otherwise, of going to another

state".¹³

Thus the right of granting asylum mainly concerns with the bonafide political refugees, who may have been guilty of actual political offence, or who had been prosecuted on the ground of his political belief, and who in the country of refuge does not abuse the hospitality granted to him, by engaging in activities detrimental to his state of Origin. The right of asylum which is closely connected with the non-extradition of political offenders, which is wider in scope as it embraces the victims of persecution fleeing from the country of oppression. Oppenheim explains, "at present it is probable that the so-called right of asylum is nothing but the competence of every state to allow prosecuted alien to enter to, remain on, its territory under its protection, and thereby to grant asylum to him. Such fugitive aliens enjoy hospitality of the state which grants him asylum, but it might be necessary to place him under surveillance or even to interim him at some place in the interest of the state which is seeking to prosecute him".¹⁴

Practice of states shows that in case of refugees from political persecution, the right of asylum is liberally exercised and even the local immigration laws are not enforced against them in many respects. For example, in Britain and the United States of America, the governments have

¹³ Declaration on Territorial Asylum, Year book of Human rights, 1967, pp-383-384.

¹⁴ Oppenheim, L. : op. cit., p-678.

never been known to close their door to refugees from Nazi persecution and more recently to those who have fled from European Countries where communist regimes had taken over. British practice regarding granting of asylum was declared in Parliament in 1958: "Application for political asylum are dealt with in the light of the fact of the particular case. The result of refusing admission to a foreigner would be his return to a country in which, on ground of political opinion, race or religion, he would face danger to life or liberty....Thus, he would normally be admitted unless there were positive grounds for considering him undesirable".¹⁵

Politics took a different turn in the granting of asylum after the second world war when two distinct ideologies, the Capitalists and the Communist emerged. The practice of asylum then became more melodramatic, the establishment of a wall between East and West Berlin was an effort to end once for all mute plebiscite of hundred of thousands of persons who had fled from soviet zone of Germany to take political refuge in West Germany, Due to prevailing uncertaining about the legal regulation of asylum, which is governed by customs and thus have no independent states in International law.¹⁶

Recently political asylum was granted to Saudi Diplomat who diffected to United State of America alleging that his

¹⁵ Hingorani, R.C. : International Law, 2nd ed., Oxford and IBH Publishing House, 1982, p. 162.

¹⁶ Evans E. Elona : 'Observation on Territorial Asylum in United States', American Journal of International Law, V. 56, American Society of International Law, 1962, p.148.

government secretly acquired nuclear arms and was engage in human rights abuses; United States immigration and Naturalization services granted asylum on request, as the defactory had a well founded fear of being persecuted if return to his home land.¹⁷ Regarding Indian practice, the refugees from Tibet have been allowed to enter and remain in its territory and seldom has any one been known to have been turned back.

Question of granting of asylum is motivated by number of considerations, political as well as humanitarian. For instance a state liberty to grant asylum to refugees may cause political tension between the country of asylum and the country of origin. Secondly, it may happen large number of refugees may tilt the balance in favour of one community to the prejudice of another, thus states may refuse admission to asylee, who enter in large number due to war or political instability in their country. Thirdly, it is desirable on humanitarian ground to allow refugee who had fled from political persecution to remain in the territory of the state they have entered. Economic consideration of the country have to be taken into account, particularly in smaller nations as the influx of large number of refugees may upset the economy or the economic stability of the country itself. Above all these considerations, the prime factor in the mind of states is: what would be the fate of man if he is pushed back to the

¹⁷ Times of India, August 26th, p. 11, Column-2, 1994.

territory from which he had crossed the frontier. The practice of states show that if there is a possibility of a man being sentenced to death or being subject to degrading and cruel punishment, then the state would grant him asylum.

In spite of several conventions and agreements grant of asylum in International law has yet to cope effectively with the mass exodus of refugees in the last few decades. In this effort a draft convention on Territorial asylum emerged in United Nations in 1974-75. This draft instrument spelled out with more, precision the principles enunciated in the Declaration on Territorial asylum of 1967 and like wise stopped short of conferring an absolute right of asylum. Article 1 of the said convention recognised that "the grant of asylum pertained to the sovereign right of the states, but that state parties should use their "best endeavours" in "humanitarian spirit" to grant asylum in their territory to persons eligible under the draft convention, by reason of fear of persecution or punishment for reason set out in Article 2. However this convention could not reach a consensus on the matter of conferring an absolute right of asylum since 1985 United Nations High Commission for refugees has launched a campaign to break down mounting pressure barriers against the tide of refugees world wide, and to treat asylees as an asset.¹⁸

ASYLUM TO PRISONERS OF WAR

The right of a state to grant asylum has been recognised

¹⁸ Starke J.G .op cit., p. 361.

as an institution of humanitarian character, several states expressly provide this in their constitution. Persons prosecuted for political reasons are granted asylum by the states. This has become a general principle of law. However it is a matter of controversy whether a state may grant asylum to Prisoners of war detained by it, but unwilling to be repatriated.¹⁹

During the Korean conflict, 1951-53 a new problem arose when the United Nations command ascertained by the so-called screening of thousands of prisoners in its custody. Owing to fear of persecution, many were unwilling to be repatriated. After the end of hostilities, those prisoners of war who desired to be repatriated had been restored to forces to which they were the members but still there were around twenty two thousand prisoner of war in the custody of U.N. command and several thousand in the hands of Korean Peoples Army volunteers who wished not to return to their home-land.

"It was affirmed by U.N. in its resolution of 3rd December 1952 that 'Force shall not be used against Prisoners of war to prevent or their return to their homeland". The communist divided whole sale repatriation of North Korean and Chinese Prisoners of war to communist territory, their demand was based on Article 118 and 119 of the Geneva Convention 1949 relating to the treatment of prisoners of war which provides: for the unconditional handing over of prisoners without delay

¹⁹ Baxter, R.R. : "Asylum to Prisoners of War", British Year Book of International law, Volume . 30, Oxford University Press, 1953, pp. 490-491. ALSO see appendix -II.

after the end of hostilities. U.N. negotiators objected to forced repatriation of unwilling prisoners to the communist territory and contented that many prisoners on the communist side came to fight U.N. Forces under compulsion and as such, their forced repatriation was against all canons of justice and humanity and that Geneva convention could not contemperate extra-ordinary situation arising out of the conflict of ideology in the Korean crisis".²⁰

Thus it was a point of argument whether the detaining power may, if it desired to grant asylum to prisoners of war who do not wished to be repatriated. The problem arose with the repatriation of Chinese and Korean Prisoners of war in accordance with the rights given to them under Geneva prisoner of war convention 1949. In accordance with the resolution of U.N. General Assembly of 3rd December 1952 a Korean armistice agreement was signed with Comander-in-Chief of U.N. at Panmunjon on 27th July 1953, which dealt with the legal position of prisoners of war in accordance with Geneva prisoners of war convention 1949.

This armistice agreement settled the fate of Prisoners of war following the korean war, and it was a step forward to the Geneva prisoners of war convention 1949 which gave more emphasis to the humanitarian treatment of Prisoners of war. It was agreed in the armistice agreement 1953, that Neutral nation repatriation commission would be formed. Para 2 of the said convention provided "prisoner who had not exercised

²⁰ Ibid., p. 492.

their right to be repatriated, could be placed in the custody of composed members appointed by Sweden, Switzerland, Poland, Czechoslovakia and India". The commission was charged with the responsibility of affording the opportunity of repatriation to those prisoners in its custody who signified a desire to return to their own forces. Thus agreement is an extensive interpretation of Prisoners of War convention with hard effort to cover inequitable situations, it suggest the this document was drafted on the periphery rather than in the center of living international law. One may than consider it as a milestone in its own rights but it also reminds of progressive type of legislation, which the particular climate and strains of the present world community requires".²¹

2. **EXTRA-TERRITORIAL OR DIPLOMATIC ASYLUM**

Foreign Ammbassadors, Ministers, and other accredited diplomatic officers are entitled under International Law to certain well recognised immunities from local jurisdiction, including among others, immunity of their official residences and offices from invasion by the local authorities. Such authorities may not enter an embassy or legation for the purpose of serving legal process or of making an arrest. These places are declared by treaty provisions to be inviolable however, such treaty obligations are coupled with prohibition against the use of consular premises for purposes of asylum Reasons analogous to those appartaning to Embassies and

²¹ Ibid., p. 438

legation, or public vessels of a state while in the ports of a friendly foreign state, enjoys certain immunities under international law from local jurisdiction. It is therefore frequently happens, that in time of local political disorder, that persons desiring to evade the local jurisdiction or to escape from threatened danger seek refuge in these places.²²

Article 6 of Harvard Research draft on diplomatic priveledges and immunities provides. " 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". As these places were considered exterritorial i e. beyond the Jurisdiction of the local authority thus provides an exemption to political offenders and fugitives from justice. The question of granting asylum in the premises of a diplomatic mission, arises under number of principles, It is possible that in times of an uprising or civil war or coup'd'et at the leaders of the defeated faction or members of the government who have been disposed may seek shelter in the premises of a diplomatic missions. It may also happen that person may seek such shelter committing a political assasination or even a common crime.²³

The granting of asylum by the foreign governmental agencies was formerly recognised and paracticed to a considerable extend but in more recent times it has been

²² O'connel D.P. International Law, Volume-2, Oceana Pub., London, 1965, Page 692.

²³ Sen. B. op.cit P.356.

discontinued for the most part, except in a limited number of countries. Practice shows that such refuge in the premises of a mission is sought only in cases of extreme urgency, only when the local government has become unable to assure the safety of the refugee and his life is consequently endangered through mob violence. In no case shelter be continued after the emergency has passed the Basis on which diplomatic asylum is exercised is that the diplomatic mission enjoys extritoriality and form part of the territory of the home state of the diplomatic envoy. The distinction between territorial asylum and diplomatic asylum is since the competence to grant territorial asylum is, derived directly from supremacy of a state over its territory, whilst in the case of diplomatic asylum the refugee is within the territory of the state from whose Jurisdiction he is seeking protection.

"During early seventeenth and eighteenth century immunity of domicile was claimed by diplomatic envoys to grant asylum to refugees within the boundaries of their residence, but it was never accepted as a general principle of International Law Grotius refused to recognise the right of asylum in Legations and Embassies, Vattel termed practice of asylum as an abuse of diplomatic immunity. The modern view regarding inviolability of diplomatic premises, as borne out by state practice and decisions of national courts, tends to show that such premises are regarded as part and parcel of the territory of the state in which they are situated and that these premises are inviolable merely for the purposes which are necessary for

effective functioning of the diplomatic mission, the theory of extritoriality of diplomatic premises does no longer find support. It is, therefore, asserted that the so-called right of diplomatic asylum has no basis in international law and as such cannot be recognised."²⁴

Diplomatic asylum is sub-divided into :

1. Asylum in Foreign legations
2. Asylum in consular premises
3. Asylum in War ships
4. Asylum in Merchant Vessles
5. Asylum in Premises of International Institutions.

1. **Asylum in foreign legations :**

Modern International Law recognise no general right of a head of mission to grant asylum in the premises of legation or Embassies, as such a step would exempt the fugitive from the regular application of law and administration of justice by the territorial state. Granting of diplomatic asylum in legations goes against the two principles; it is a violation of territorial sovereignty of a state thus a sort of intervention; Secondly, it implies a great abuse of authority emanating from principles of diplomatic immunity. Such grants prevent the territorial law taking its own course and thus would involve a derogation from the Sovereignty of the state

²⁴ Ibid., p. 357

where the diplomatic mission is situated.²⁵

Two cases relating to the grant of diplomatic asylum in foreign legation was reported in Britain in 1726 & 1747. 'In 1726 Duke of Riperdia Minister of Spain accused of high treason took refuge in Embassy of Britain in Madrid but he was forcibly arrested as asylum could not be granted in Embassy. British ambassador complained of this act as a violation of International Law'. In the another case in 1747, a Swedish merchant Soringer accused of high treason took refuge in the house of British ambassador at Stockholm. On the refusal of the British envoy to surrender Springer Swedish government surrounded the embassy with troops. Later Springer was handed over to Swedish government under protest, Great Britain complained and recalled her ambassador as Sweden refused to make the required repatriation.²⁶

As these two examples show the right of asylum although claimed and openly conceded, was nevertheless recognised.

In recent times diplomatic asylum has been discontinued in most of the world except in Latin American countries where there is extreme government instability and violence, Latin American countries "grant asylum to political refugees in times of revolution and persuasion of certain classes of the population. It is however acknowledged that this practice is not based upon a rule of International Law but merely upon

²⁵ Starke, J.G. : Introduction to International Law, 9th ed., Buttersworth Publication, 1989, pp. 560-561.

²⁶ Booth, G. Lord : Satow's Guide to Diplomatic Practice, 5th ed., Longman, 1979, pp. 112-113.

local usage. It does not have the validity of the general rule of International Law, according to which there is no obligation on the part of the receiving state to grant asylum to individuals not belonging to their state. However, it follows from the principle of inviolability diplomatic premises under Article 20(1) of the Vienna Convention which suggest, agents of the receiving state may not enter without the consent of the head of the mission, if a refugee is allowed to remain in the Embassy, the correct procedure for the territorial state is to take up the matter with the foreign state concerned, and not to break into the premises without permission. In British view the temporary shelter may be provided to foreign nationals whose lives are in immediate danger e.g. if pursued by a violent mob.

Several International agreements have been concluded regarding granting of asylum among the latin American countries. Notable among them are the 1889 convention regarding International Criminal Law between Argentina, Bosnia, Peru, Uruguay and, Sixth International Conference of American State in Havana 1928 states adopted a Pan American convention on asylum which laid down that, asylum granted to political offenders in legations shall be respected, subject to certain conditions.

This convention was latter amended in 1933 by the Seventh International American Conference at Montivideo, Uruguay. Article 1 of the former convention was amended, in as such as, it forbids the granting of asylum to persons accused or

condemned for common crimes, to deserters from the army or the navy. Such person taking refuge in foreign territory shall be surrendered upon request of the local government through extradition treaties and constitutes asylum as an institution of humanitarian character, it is not subject to reciprocity and that any person may resort to its protection whatever his nationality.²⁷

"The theory of extritoriality of diplomatic premises does no longer find support, it is therefore asserted that so called right of diplomatic asylum has no basis in International law as such it can not be recognised. This view finds support in Peru-Colombia asylum case".²⁸

"Haya de la Torre a political leader and a Peruvian national was accused of having instigated a military rebellion, he was granted asylum in the Colombian embassy at Lima on 3rd January 1949. The granting of asylum was subject of dispute between Peru and Colombia. The matter was referred to ICJ. According to Pan American Havana Convention on asylum 1928, subject to certain conditions asylum could be granted in a foreign legation to a political offender who was the national of the territorial state. The question in dispute was whether Colombia as the state granting asylum was entitled unilaterally to qualify the offence committed, in a manner

²⁷ Havana Convention on Diplomatic Asylum and its protocol of 1933, American Journal of International Law, Volume. 47, 1953, pp.445-446.

²⁸ International Court of Justice Reports: Reports of the Judgement Advisory Opinions and Orders, 1950.pp.266-270.

binding on the territorial state that it was to decide whether, it was political offence of a common crime. The court was also asked to decide whether the territorial state was bound to afford the necessary guarantee, to enable the refugee to leave the country in safety. In its judgement of 20th November 1950 the court held "that institution of diplomatic asylum owes its development in Latin America to extra legal factors with different political interests of the government and have favoured the mutual recognition of asylum apart from any clearly defined Judicial system and thus should not be regarded as capable of generalisation. The court considered that on January 3rd and 4th 1949 there did not exist a danger constituting a case of urgency with in the meaning of Article 2 para 2 of the havana convention 1929. Thus consideration of conveniences of simple political expediency seems to have led the territorial state to recognise asylum without that decision being decline by any feeling of legal obligation".²⁹ International Court of Justice further declared :

"Diplomatic asylum withdraws the offender from the Jurisdiction, constitutes an intervention in matters which are exclusively with in the competence of that state such derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case". The court by fourteen votes to two rejected the

²⁹ Green, L.C. : International Law Through Cases, 2nd ed., Stevens and Sons Ltd., 1959, pp319-326.

Colombian contention that it was entitled to qualify the offence by unilaterall decision binding on Peru and allowed only "Provisional qualification of any offence alleged to have been committed by a refugee. The treaties in question did not support the Colombian contention. The court also found that Peru had not pronounced tha fugitive to be other than political ofender but that asylum under the terms of Havana Convention 1928 shoudl be granted only went conditions of urgency, which did not exist in this case".³⁰

Later Colombia then applied to the court for interpretation in Haya de la torre case. Asking whether in accordance with the law in force, between the parties and particularly American law, government of Colombia is or is not, bound to deliver Haya de la Torre. The question in dispute was whether or not asylum ones having been granted must be respected by the receiving state unless terminated in fact. The court rejecting the appeal held that Colombia was not bound to surrender Haya de la Torre once the asylum has been granted even though irregularity has occured, the convention was silent on the question of its termination.³¹ The court held that grant of asylum is a continuous process constituted by the protection which the Embassy affords him, being a diplomatic act it involves the legation state in a continuous legal relationship with the territorial state.

³⁰ International Court of Justice Reports, 1951, pp.266-270.

³¹ International Court of Justice Reports 1951, pp 71-80.

Before the court decision it was generally assumed that asylum if allowable at all was to be regarded as an aspect of inviolability of legation. The court decision has proved specifically that, asylum must stand upon its own feet and not to be linked with inviolability of Premises. A fugitive might well be immune while in a legation building but still not have asylum so as to relieve the sheltering state of the duty to deliver him.³²

Regarding the granting of diplomatic asylum in Legation and Embassies outside Latin American countries, there is no universal rule. USA being a signatory to the Havana convention 1928 did not ratify the treaty explaining explicit reservation and strongly disapproved the principle of diplomatic asylum. It has however on occasion sanctioned the granting of temporary refuge by American public Vessels when the affording of such asylum seemed to be necessary for the preservation of human life. However, this should only apply when the local authorities are unable to ensure the safety of the refugee and his life constantly endangered by mob violence. In no case should shelter be continued after emergency has passed.

In 1930 American diplomatic officers sent a circular to latin American countries regarding grant of diplomatic asylum "Immunity from local jurisdiction is granted in foreign Esbassies and Legations to enable the foreign representatives and their suites to enjoy the fullest opportunity to represent the interest of their country. The fundamental principle of

³² Ibid, pp. 81-84.

Legation is that it should yield entire respect to the exclusive jurisdiction of the territorial government in all matters not within the purposes of the mission. The limited practice of Legation asylum is a derogation of the local jurisdiction, but it is permissible under local customs as practiced in a limited number of states where unstable political and social conditions are recurrent. There is no law of asylum of general applications in International law.³³

In spite of rejection of asylum in Legation by United States Temporary asylum have been granted in times of grave political emergency, or for humanitarian reasons to political refugees in imminent danger of their lives. American ambassador in Haiti in 1911 was permitted to give shelter to the deposed President in order to save innocent life. During Chinese revolution in 1911 American chargé 'D' affair at Beijing was instructed at his discretion to grant temporary refuge to Emperor and Empress Dowager, stating temporary refuge be accorded with the uniform policy of this government in order to preserve innocent human life, assuming such actions would not unnecessarily endanger the safety of legation quarter. In a similar incident 1917 Ex-president of Costa Rica Gonzales was afforded shelter in the American Embassy following the revolution who had overthrown the government later. Department of State declared, that an Amnesty has been provided, and that safe conduct visa had been

³³ Hackworth, H.G. : 'Asylum'; Digest of International Law Volume II, Chapters VI and VII, Department of State Publication, 1521, pp. 623-624.

arranged for the president. ³⁴

In 1919 following a coup 'd'tat and establishment of dictatorship in Honduras, the American Minister there granted asylum to certain person to save them from condition of arrest and execution, in his report Minister stated that, he permitted five gentlemen to remain in legation after they had reached there, as the brutalities were purely political and that parties were in great bodily danger. In a similar case during Spanish Revolution in 1936 American ambassador in Madrid was instructed to give refuge to those who were in actual danger from mob violence or from hostilities, but not to grant protection for the purpose of enabling the refugees to avoid arrest on charges brought against them by proper officials.³⁵

"In recent times an 'ad hoc' arrangement of diplomatic asylum was granted to Cardinal Mindszenty in U.S. Embassy in Budapest after the unsuccessful Hungarian uprising of 1956. Any punitive action against Cardinal Mindszenty would have brought opprobrium on the Hungarian authorities. As long as he remained in the embassy the Hungarian authorities took no step to seize him".³⁶

Regarding British practice there is no general legal right to grant asylum in diplomatic, consular premises or

³⁴ Ibid., p. 625

³⁵ Ibid, pp. 626-631.

³⁶ Grieg, W.E. : International Law Buttersworth Publication, 1970, p.351.

public ships and no legal right to demand it exist, but on humanitarian grounds it has been frequently authorized its diplomatic and other officers to grant temporary asylum in cases of emergency. "In 1896 Webster and Finley reported upon an incident arising with the grant of asylum by German consul at Zanzibar to one Khaled who had failed in attempt to seize the Sultan's palace by force. German government claimed that by virtue of a treaty between Germany and Zanzibar conferring extraterritoriality upon German subject, as the German consulate was on German soil, it was not claimed that Khaled possessed German Nationality, but Webster and Finley, denying that treaty which dealt with the question of asylum argued:

"The proposition that German consul can grant asylum to alleged criminal whether political or ordinary cannot be sustained. It is true such a privilege has been exercised by Diplomatic representatives in Spain and in South America but in Britain this right of asylum can be conferred only by the consent of the countries to whom they are accredited. It is no way necessary that ambassadors house should be an asylum for persons charged with crime".³⁷

The inviolability of foreign Embassy both from Judicial process and from executive action was clearly established in Britain concerning the incident of Sun yat sen in 1896. In 1896 Sun Yat Sen Chinese national and a political refugee was

³⁷ McNair Arnold : 'Extradition and Extraterritorial Asylum (Based on the opinions of the Law Officers of the Crown)', British year book of International Law, Volume 28, 1951, pp. 202-203.

³⁸ Booth G. Lord, op cit., p. 110

detained as a prisoner in the Chinese legation in London with the apparent intention of transporting him to China. On the matter coming to light, his friends applied to the court for the issue of writ of Habeas corpus. The court in judgement declined doubting the propriety of such action where a foreign legation was concerned. The Chinese minister was requested by British government to release the man whose detention was contrary to law and an abuse of diplomatic privilege, he was released on the following day.³⁸

Despite the fact that asylum in some times granted in legations its legality is doubted in the realm of International Law. Vienna convention of 1961 on Diplomatic Relations does not say any thing like the right of the state to grant asylum in its legations abroad. Like wise Article 6 Harvard Research draft on Diplomatic Privileges and immunities also provides 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.

Regarding Indian practice of granting diplomatic asylum in legations and Embassies. India is against diplomatic asylum, government of India issued a circular to chanceries in India on 30th December 1967 "Government of India wish to draw attention of foreign and commonwealth diplomatic mission in India that India does not recognise the right of such mission to give asylum to any person or persons in their premises.

³⁸ Booth G. Lord, op cit., p. 110

Immunity from local jurisdiction is granted to legations to enjoy fully the opportunities to represent the interest of their states. Affording of asylum is not within the purposes of Diplomatic mission. India expects the foreign mission in India to respect this well established international practice".³⁹ In spite of this India did give diplomatic asylum in 1950 to late King Tribhuvan of Nepal when he sought asylum at the height of Rana revolt against him. Later asylum was accorded to Svetlana Stalin's daughter. It is considered that the practice is motivated by humanitarian considerations. But political consideration could not be ruled out. Territorial states do not interfere with these practices in most of the cases because they do not intend to strain relations with foreign states over the question of custody of an individual.⁴⁰

"In another case Soviet defector Aziz Olough Zade who had sought refuge in the American Embassy in India. Indian Government urged foreign mission in India to respect the well established International practice of not affording asylum to any person within their legation premises as such grant of such asylum is not recognised by a general principle of International Law." ⁴¹ Thus, practice of granting asylum in legations and Embassies has not been recognised as principle

³⁹ Lingorani, R.C. op cit., p.166.

⁴⁰ Tondon, M.P. : Public International Law, 20th ed., Allahabad Law Agency, India, 1985, p. 294.

⁴¹ Times of India, June 27th, 1974.

of International law but temporary refugees could be granted in case of imminent danger to life. Which is been justified on humanitarian considerations.

2. **ASYLUM IN CONSULATES OR CONSULAR PREMISES :**

Similar principles subject to same exception apply in the case of consular premises. However government discourage granting of asylum in consulate and it does not enjoy that much of sanctity as diplomatic asylum in legations and embassies, Nevertheless some people do take asylum in consulates and they are not disturbed because of comunity. ⁴²

Regarding American practice of granting asylum in consulates, at the first instance American government do not recognise asylum in consulates except in mob violence where life of person is in sudden danger. At several occassions U.S. have granted asylum in consultates. In 1907 the consul in San Salvador reported to the department of state in U.S, that Diplomatic agent of Nicargua here seeks asylum in this consulates owing to continued threat and denial of passport. Department instructed the counsel, you may grant temporary protection to diplomatic agent of Nicargua if he is in immediate danger from lawless violence, agent must suspend all diplomatic business and communicate with other world while under protection American consulate should not be used as Nicarguan Legations. In another case during a revolutionary outbreak in Persia in 1908 American counsel at Tabriz reported

⁴² Hackworth, H.G. op cit, p- 633.

that he has offered a Muslim subject of Persia, temporary asylum from assault at the hand of two Muslim outlaws.⁴³

U.S. department in its reply stated it is not an instance of asylum from the operations of the laws of the land but merely a charitable shelter for the time being from imminent law less danger.

Consulates does not give asylum in such a way to withdraw any accused person from the rightful jurisdiction. A consular convention was concluded between U.S. and Cuba in 1926 Article VIII of which provided: "Counsular offices shall not be used as a place of asylum. Counsular officers are under the obligation of Surrendering to the proper local authority which may claim them, persons prosecuted for crime in accordance with the domestic laws of the country which receives them and who have taken refuge in the building occupied by the counsular office".⁴⁴

Consulates do not possess the immunities of granting shelter but can provide temporary refuge on certain occasions as specified above. The treaties of U.S. which specify inviolability for consular offices and dwellings in every instance forbids their use as a place of asylum.

3. **ASYLUM ON WARSHIPS :**

Asylum on board worships applies the same laws of

⁴³. Ibid, p. 635

⁴⁴ Fenwick. G. Charles : International Law 3rd ed., Vakils Feffers and simons, 1971, p. 387.

extritoriality as of legations, embassies and consulates, thus when the grant of asylum on board warships are analysed, it is that men of war enjoy immunity from local jurisdiction. Fugitives once on board is immune from seizure by the territorial state as this is not asylum, mere refuge does not exonerate the sheltering state from the duty to deliver up the offender. Article 1 of Havana Convention on diplomatic asylum 1928, recognises in principles the right of asylum on warships for political offenders but not for persons accused or convicted for common crimes, or for deserters from army or navy. As such persons should be surrendered upon request of the local government, through extradition treaties and constitution and laws of the country of refuge.

Some writers are of the view that individuals not being members of the board vessels who take refuge after committing a crime on shore cannot be arrested by local authorities and removed from vessels in case the commander of vessels refuses to hand over fugitives. On the other hand some writers are of the view that such fugitives should be handed over to the local police. Such writers do concede that asylum may be granted on humanitarian ground where there is extreme danger to the life of individuals seeking it. While asylum is no longer granted to ordinary criminals it is still granted quite frequency to political refugees. ⁴⁵

To a large extend diplomatic asylum on board warships has tended to assimilate the position of warships with the status

⁴⁵ Griege, D.W. : op cit., p. 354.

of diplomatic premises. U.S. Navy Regulation and Naval instruction act 1913 clearly contemplates that, right of asylum for political or other refugees has no foundation in International law, those fugitives who board vessels in order to avoid arrest may be handed over to local police. These U.S. Naval instructions refer to local usage in South America which sanctions grant of asylum on board warships as part of regional treaty law only.

U.S.A. and U.K. reluctantly accept the practice of granting asylum on board warships for a temporary period on humanitarian grounds. Temporary grant of asylum is made through special treaties and arrangements with the territorial states including sheltering the fugitives from political persecutions, these arrangements comes part of regional treaty laws. In 1863 instructions were given to Naval officer that H.M. Ships While lying in the ports of a foreign country, are not to receive on board persons although they may be British subjects, seeking refuge for the purpose of evading the laws of the foreign country to which they may have become amenable. During political disturbances refuge may be afforded to persons from imminent personal danger. These principles are still the basis of Queens Regulations and admiralty Instructions.⁴⁶

American practice is similar to that of United Kingdom. In 1930 a Mexican and an American boarded a U.S. ship "Whelling", in the harbour of Mexico, asking for protection

⁴⁶. Ibid. p. 355

U.S. Secretary of state in a reply said, as a general rule against the policy of this government to grant asylum in its ships to the citizens of foreign country engaged in political activity. Only temporary shelter can be conceded to such persons on ground of humanity. Least advantage to be taken of to further the political fortunes of individuals which could result in involving us in domestic politics of foreign countries. ⁴⁷

U.S. Navy Regulations make specific reference of granting asylum to political refugees in countries where revolutions are common place and governments are unstable. The practice is not found in International law but is justified as a usage of long standing.

4. ASYLUM ON MERCHANT VESSELS :

Mechant vessels do not enjoy immunity from local shelter, political refugees can be withdrawn from the vessels while it is with in the territorial waters. Thus isolated incidents of asylum on merchant ships have not been established as usage. A person who commits a crime on shore and than seeks asylum on board of merchant ships is arrested by local police either before the ship leave the port, or when it comes to another port of the same state, the local interest and the peace of port is disturbed. Thus in order to avoid such situation shelter in Merchant Vessels are not entertained.

U.S. practice in granting asylum on merchant Vessels is,

⁴⁷ Hackworth, op cit., p. 641.

that it insists on courtesy of informing the U.S. counsel of the facts rather than the immunity of American ships from public intervention, therefore there is no right of asylum on board of merchant vessels. In a case regarding granting of diplomatic asylum on merchant vessel, in 1922 American Minister in Guatemala reported to department of state in reply to an inquiry of Mexican Minister, as to whether a certain Guatemalan to whom the Mexican legation had given asylum on an American vessel in Guatemalan harbour. U.S. state department replied Guatemalan authorities have the right to arrest the person in such circumstances so long as the vessel was within the Guatemalan Water. ⁴⁸

"The Institute of International Law at Stockholm in 1928 adopted a draft resolution Article 21 states "to the effect that the captain must be aware of the fact that his passenger is a political refugee, he must accept his conditions and act does not constitute on his part assistance to one of political parties, disputing power with another, and must not land the refugee in another part of the country."⁴⁹

Latin American Republics have unanimously decided to bind themselves, to respect the inviolability of the right of asylum abroad the merchant vessel who so ever be the nationality; persons accused of common law crimes can be taken from said vessels, by order of a competent judge and after due

⁴⁸ Moore, J.B. : 'Jurisdiction Over Merchant Vessels', Moore Digest of International Law, Volume II, Government Printing Press, 1906, pp. 290-291.

⁴⁹ Ibid, p. 279

legal procedure Fugitives from Justice, accused of political crimes or of common law crimes of political nature can in no case be removed from the merchant vessel. In the Eisler case it was stated : In case of ordinary criminals British practice is criminals finding refuge on Board British ships of war in foreign ports ought to be surrendered to the local authorities. Merchant vessels are not exempted from local jurisdiction and therefore can not grant asylum to local offenders.⁵⁰

5. ASYLUM IN THE PREMISES OF INTERNATIONAL INSTITUTIONS :

International law does not recognise any rule regarding the grant of asylum in the premises of International Institution. The head quarters agreement of U.N. and of specialised agencies reveal no general right of international institutions to grant asylum or even refuge in their premises to offenders not even a right of protection on humanitarian ground, it is difficult to conceive however that a right to grant temporary refuge in an extreme case of danger from mob violence would not be asserted and conceded. Regarding the legal status of granting asylum in United Nations and other International Institutions is, among the various aspects authorities of the host state shall not enter the premises, except with the permission of organisation provided the institute premises shall not be used as a place of asylum.

⁵⁰ Eisler Case: American Journal of International Law, Volume, 1936, p 576-581.

State practice supports the view that no customary International law on subject of asylum has come into force.⁵¹

Institute of International law at both its sessions in September 1950 adopted a resolution on asylum that do not support granting of asylum in the premises, of international institutions. Article 6 Harvard Research draft convention on diplomatic privileges and immunities 1932 places an obligation upon the head of the mission not to allow the premises as a place of asylum. However Article 2(17) of Havana convention on diplomatic officers does not recognises the grant of asylum in the premises of International Institutions to political offenders by customs and conventions. It provides that diplomatic officers are obliged to deliver the offender to the competent local authority any persons accused or condemned for crime and have taken refuge in mission. Thus it has been well established the premises of International Institution should not be used as place of asylum.⁵²

In the light of the practices stated above it would appear in both types of asylum i.e. diplomatic and territorial asylum, the ultimate purpose is to accord protection to the refugee, or the person concerned to bring him under the Jurisdiction of the granting state. The distinction between two types of asylums was defined in Peru Columbia asylum case 1950.

In territorial asylum the refugee is with in the

⁵¹ Starke, J.G. : opcit., p. 360.

⁵² Ibid. P 360-361.

territory of the state of refuge a decision with regard to surrender implies only the normal exercise of territorial sovereignty. The refugee is outside the territory of the state where the offence was committed and decision to grant him asylum in no way derogates the sovereignty of that state". "In 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 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 recognised, unless its legal basis is established in such particular case". Thus territorial asylum which is a well recognised legal right in International law on the contrary diplomatic asylum is a matter of humanitarian practice rather than a legal right, granting of diplomatic right asylum involves derogation from the territorial sovereignty of the state. Most nations do not recognise it as a general right of International law.

In both types of asylum main purpose is to afford protection to the asylum on humanitarian basis thus political offenders are given asylum if they are in imminent danger of their lives or persecuted on race religion or political beliefs but persons wanted on criminal charges or warrant of arrest has been issued against them by the competent authority then they are not accorded asylum but must be surrendered to

local authority, as stated in Article 1 (2). The right to seek and enjoy asylum may not be involved by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instrument drawn up to make such provision in respect of such crimes.