

DIPLOMATIC ASYLUM

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THIS short article on diplomatic asylum is based on the Saulo incident.

The incident was ushered in the limelight by a report that Alfredo B. Saulo described as No. 3 Huk Leader was seeking asylum at the Indonesian Embassy in Manila invoking the protection of Article 14 of the United Nations Universal Declaration of Human Rights. Fortunately, but not without regrettable incident this international faux pas was settled to the satisfaction of the Philippines and Indonesia. In the manner of a military communique the seven-day incident might be tersely described:

Alfredo B. Saulo, a huk leader wanted by the Philippine Government entered the Indonesian Embassy without the knowledge and consent of the Indonesian Ambassador. He left the embassy voluntarily with the Ambassador's blessings.

Unfortunately the incident brought out certain points that need clarification. There are some reports connected with the incident which would lead to confusion if not clarified. These reports are the following:

1. The claim of the Indonesian Embassy that there being no extradition treaty between the Philippines and Indonesia, Saulo could not be surrendered.
2. The claim of Saulo for asylum under Article 14 of the United Nations Universal Declaration of Human Rights.
3. The question of diplomatic asylum.

TERRITORIAL AND DIPLOMATIC ASYLUM

Asylum is applied to privileged places devoted to special uses, among which is that of shelter for the fugitive. If the fugitive could reach one of them he is safe from pursuit.¹ The State's right to grant asylum in its territory to aliens fleeing from political, racial or religious persecution in their country of residence follows from the exclusive character of its territorial jurisdiction. What is called "the right of asylum is nothing more

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¹ MOORE, DIGEST OF INTERNATIONAL LAW, VOL. II, 756.

than the liberty of every State to offer asylum to anyone asking it.²

Diplomatic asylum on the other hand refers to asylum granted by heads of missions. The diplomatic representative who grants such asylum within the precincts of his mission purports to remove from the local jurisdiction nationals of the State to which he has been accredited. A celebrated example is the asylum granted by the United States embassy to Cardinal Mindzenty in Hungary. A more recent happening is the grant of asylum by some embassies and legations in Cuba to supporters of the Batista regime.

Apparently one of the sources of the confusion in the Saulo incident is the failure to distinguish territorial from diplomatic asylum. Territorial asylum refers to asylum granted to a person convicted or accused who has successfully escaped into another country or who being in another refuses to go back to his own country. One celebrated example of territorial asylum is the case of Madam Kasenkina. Madam Kasenkina was a Russian School Teacher assigned to teach the children of Russian diplomats accredited to the United Nations in New York. She was ordered to return to Russia. Madam Kasenkina, however, has learned to love the capitalist way of life and she did not want to return to Russia. To prevent her from communicating with American authorities she was held incommunicado in a building. In a dramatic bid for freedom she jumped from the building. In the hospital she was able to make known her wish to secure territorial asylum in the United States. The United States finally decided to grant her territorial asylum.

A more recent headliner is the grant of territorial asylum to the Dalai Lama in India. Although earlier international press reports misdescribed it as diplomatic asylum. When the Dalai Lama crossed the border of Tibet into India, the asylum granted to him is clearly territorial asylum. It would be correct to call it political asylum, territorial asylum, or simply asylum but never diplomatic asylum.

In discussing the question of diplomatic asylum it is important to bear this distinction in mind. Territorial asylum is a right recognized in international law it being embraced within the supremacy of a State within its territory, while diplomatic asylum is in derogation of that supremacy. Territorial asylum is an inherent right of a State, while diplomatic asylum is recognized only if there is a treaty to that effect. In the absence of a treaty there is no right of diplomatic asylum in international law.

The International Court of Justice clearly pointed out the distinction, between territorial and diplomatic asylum when it held:³

"In the case of territorial asylum the refugee is within the territory of State of refuge. A decision with regard to territorial asylum implies only

² DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 182 (1957).

³ Asylum Case, International Law Report 1950, 282-3.

normal exercise of the territorial sovereignty. The refugee is outside the territory of the State where the offense was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State."

"In the case of diplomatic asylum the refugee is within the territory of the State where the offense was committed. A decision to grant diplomatic asylum involves derogation from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case."

EXTRADITION AND TERRITORIAL ASYLUM

Extradition is the delivery of an accused or a convicted individual to the State on whose territory he is alleged to have committed, or to have been convicted of a crime, by the State on whose territory the alleged criminal happens for the time to be.⁴ From the above definition it is clear that extradition is applicable only when the accused or convicted person is in the territory of another State. It is not applicable to diplomatic asylum where the person wanted merely seeks refuge in the embassy or legation of a foreign country. In the Saulo incident there is no reason at all for raising the question of extradition.

Specialists of international law would be happier if the word "extradition" was not injected in the discussion of the Saulo incident. There is really no room for extradition in the Saulo incident. Saulo has never left Philippine soil. At the time of the incident he was in the Indonesian Chancery. Neither the Indonesian Embassy nor the Chancery is a foreign soil. It would certainly be carrying the fiction of extritoriality too far if we would consider the Indonesian Embassy or Chancery a foreign soil. It is true that embassies and legations are granted inviolability in order that the representatives of foreign governments could perform their functions freely and without hindrance. But the grant carries also the corresponding obligation to cooperate with the territorial government and not to do anything in violation of its law. In support of the view that the embassies and legations do not constitute foreign soil the following cases may be cited:

1. While I was a student at the Institute of International Air Law in Montreal, Canada, the Montreal Star reported that the foreign office of Canada ruled that a child born in a Canadian Embassy in one of the countries of Europe is not deemed to be born in Canada. In short Canada rejected the view that its embassy in Europe is a Canadian territory.

2. The Case of Trochanoff.⁵

Trochanoff, a Bulgarian, assaulted within the Bulgarian Legation in Paris a member of the Legation staff. The Bulgarian Minister instituted criminal proceedings against Trochanoff in the Tribunal Correctional de

la Seine. Trochanoff's lawyer contended on his behalf that, as the act was committed within the Legation, it must be deemed to have been committed on a foreign soil and, therefore, the court had no jurisdiction. The court decided that the doctrine of extritoriality could not be pushed to that extent. The principle existed only to protect and help the foreign representative and his staff in their work.

3. The Case of Turkish Ambassador.⁶

The Turkish Ambassador in Paris loaned 5,000 francs to one of his compatriots and the contract between them was made in the Turkish Embassy. It became necessary for the Ambassador to institute proceedings to recover the money, and as the borrower lived in Paris these proceedings were instituted in the French court. Objection was taken on behalf of the defendant that as the agreement was made in the Embassy and the Embassy must be regarded as foreign soil, the agreement must be regarded as contracted abroad and the French court had no jurisdiction. The Court overruled this contention and held that the theory of extritoriality did not apply.

Of course the Indonesian Embassy is not the first one to be confused by extradition in relation to diplomatic asylum. For in the celebrated "Asylum Case"⁷ the Columbian Government also raised the question of extradition in connection with the diplomatic asylum granted by it to Haya de la Torre. The International Court of Justice properly dismissed the claim in this way:

"The Columbian Government has also relied on Article 4 of this Agreement concerning extradition of a criminal refugee from the territory of the State in which he has sought refuge. The arguments submitted in this respect reveal a confusion between territorial asylum (extradition) on the one hand, and diplomatic asylum on the other."

Worthy of mention is the special relation existing between extradition and territorial asylum. This special relation is evidenced by the fact that the grant of one precludes the other. A decision to grant asylum is a refusal of extradition. The reason for this is simple. Asylum is usually granted to political offenders. While extradition treaty usually provides that political offenses are non-extraditable.⁸ So, in the Saulo case, even if we take for granted that Saulo was in Djakarta, Indonesia at the time of the incident and that there was an extradition treaty between the Philippines and Indonesia, the latter might still refuse to surrender Saulo on the ground that Saulo having committed a political offense is non-extraditable.

⁶ WHEATON, INTERNATIONAL LAW, 5th ed. 339.

⁷ International Law Report 1950, 280-95.

⁸ ART. 5, HARVARD RESEARCH DRAFT: "A requested State may decline to extradite a person claimed if the extradition sought for is an act which constitutes a political offense or if it appears to the requested State that the extradition is sought in order that the person claimed may be prosecuted or punished for a political offense."

⁴ OPPENHEIM, INTERNATIONAL LAW, (8th ed.) VOL. I. 696.

⁵ HURST, THE COLLECTED PAPERS (INTERNATIONAL LAW) 200.

ARTICLE 14 OF THE UNITED NATIONS UNIVERSAL DECLARATION OF HUMAN RIGHTS

The claim of Saulo for asylum under Article 14 of the United Nations Universal Declaration of Human Rights can best be explained by quoting hereunder the said article:⁹

"Everyone has the right to seek and enjoy in other countries asylum from persecution."

A careful perusal of the above-quoted article clearly shows that it refers to territorial and not diplomatic asylum. The phrase "in other countries" makes this provision applicable only in cases where the accused or convicted person seeks asylum in countries other than his own. In the case of Saulo the said article would apply only if he had successfully fled into another country like Djakarta, Indonesia, and that he was the victim of persecution as distinguished from prosecution.

It might also be added that this declaration, as most of its declarations are, is a statement of principles which the family of nations desire to achieve sometime in the future. This declaration is not a legally binding instrument either directly or indirectly.¹⁰ At this stage of international relation it would be asking too much to compel a State to open its gate to any individual on his mere wish. No State would be willing to open its door to persecuted aliens indiscriminately. Witness the recent uprising in Hungary. In spite of sympathy for the Hungarian rebels, only a limited number of them were admitted in the United States showing that States as presently constituted are not yet prepared to admit indiscriminately aliens who are being persecuted in their own country.

DIPLOMATIC ASYLUM

Diplomatic asylum is the concession of refuge by heads of missions, commanders of military camps, aircraft and warships to those accused of or condemned for political crimes. The diplomatic representative who grants such asylum within the precincts of his mission purports to remove from local jurisdiction nationals of the State to which he had been accredited.¹¹

In antiquity, Greece recognized the right of asylum. It was called amphictyony. An amphictyony was an association bound by a covenant to protect a common sanctuary. The sacred bond established among its members was frequently extended beyond the prime objective of the covenant so as to make them political confederates. This was particularly true of the amphictyony which was dedicated to the protection of the temple of

⁹ SOHN, BASIC DOCUMENTS OF THE UNITED NATIONS 135.

¹⁰ OPPENHEIM, *op. cit. supra* note 4, at 743.

¹¹ R. B. GREENBURGH, RECENT DEVELOPMENT IN THE LAW OF DIPLOMATIC ASYLUM, The Grotius Society, Transaction for the Year 1955, Vol. 41, 103.

Delphi, the holiest sanctuary of the Greeks . . . Thus, throughout Greece, the right of asylum was recognized (although not always respected) with regard to the persecuted who were taking refuge in certain temples.¹²

In some places, churches are regarded sanctuary for those wanted by the police. Even to the present day giving asylum is tolerated in Latin American countries and in the Middle East. But these are customs of the place rather than a recognized customary rule of international law.

In the early days, the grant of asylum was justified by existing conditions. But as government became more stable, and the treatment of offenders more humane, there is obviously no need for asylum. With the constitutional rights granted to the accused as are found in ours, in the American Constitution, and those granted in the Bill of Rights of England, the need for asylum is rendered obsolete. In fact both the United States and England pointedly refuse to recognize the right of asylum. If ever they allow their embassies to grant asylum it is only a concession to humanitarian motives or to the custom of the place. In fact American diplomats are specifically instructed not to grant asylum.¹⁴ In signing the Havana Convention of February 20, 1928, the U.S. delegation established an explicit reservation, placing on record that the United States does not recognize or subscribe to as part of international law the so-called doctrine of Asylum.¹⁵ The United Kingdom recognizes no legal right to grant asylum in diplomatic premises . . . but on humanitarian grounds it has frequently authorized its diplomatic and other officers to grant temporary asylum in cases of emergency.¹⁶ The present status of asylum in international law is best described by Hyde:¹⁷

"There is no law of asylum of general application in international law. Hence, where the asylum is practiced, it is not a right of the State, but rather a custom invoked or consented to by the territorial government in times of political instability. x x x"

This view is supported by Oppenheim,¹⁸ Satow,¹⁹ Moore,²⁰ Hackworth,²¹ De Visscher,²² etc.

In case the ambassador fails to heed a request to surrender the accused or convicted person to the proper authorities of the territorial government, the latter might take any measures short of such as would involve an attack on the person of the ambassador. Thus the embassy may be surrounded by

¹² NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS, 7.

¹³ SATOW'S GUIDE TO DIPLOMATIC PRACTICE, 4th ed. 220, 225.

¹⁴ Sec. II-4, Foreign Service Regulation of the United States (E. O. June 27, 1939).

¹⁵ HYDE, INTERNATIONAL LAW, VOL. 2, 1287.

¹⁶ LORD MCNAIR, INTERNATIONAL LAW OPINION, VOL. II, 76.

¹⁷ Note 15.

¹⁸ OPPENHEIM, *op. cit. supra* note 4, at 797.

¹⁹ *Id.*, at 219-20, note 13.

²⁰ MOORE, *op. cit. supra* note 1, at 622.

²¹ *Id.*, at 779.

²² DE VISSCHER, *op. cit. supra* note 2, at 184.

soldiers and eventually the criminal may be forcibly taken out of the embassy. A case in point is that of Count Ripperda.²³ Ripperda was given refuge in the British Embassy in Madrid. When the British refused to surrender him on request, Spanish soldiers entered the Embassy and Ripperda was forcibly taken out, and his papers were seized.

CONCLUSION

In the absence of a treaty providing for diplomatic asylum no State has a right to grant diplomatic asylum. If at all allowed in some cases they are merely tolerated.

In the Saulo incident Indonesia had no right to grant diplomatic asylum. Even in the tolerated cases it had no cause for granting asylum. From the time Secretary Serrano impressed upon them that asylum would not be tolerated in the Saulo case, it was the bounden duty of the Indonesian Embassy to have done either of three things:

1. Surrendered Saulo to the Philippine authorities.
2. Let Saulo leave the embassy voluntarily, or
3. Expelled Saulo from the embassy.

The Saulo Case is unique in one sense. It is one of the few if not the only case in which asylum was granted when there was no revolution and in a country where the bill of rights gives the accused ample protection. In fact the previous politburo trials showed that the accused not only had a fair trial but they also had the services of the legal luminaries of our country. It is true that Spain and Cuba tolerated the grant of diplomatic asylum during the revolts in those countries. But in the Philippines there was no revolt during the Saulo incident although it is true that for a time there was a rumor of coup d'etat which proved out to be false.

In closing, we wish to emphasize that the institution of asylum was never intended as a shield from legal prosecution. This is one of the points emphasized by the International Court of Justice in the aforecited "Asylum Case." In that case the said Court ruled:²⁴

In principle, therefore, asylum cannot be opposed to the operation of justice x x x. On the other hand, the safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals. Protection thus understood would authorize the diplomatic agent to obstruct the application of the laws of the country whereas it is his duty to respect them; x x x.

²³ SATOW, *op. cit. supra* note 13, at 219.

²⁴ International Law Report 1950, 290-1.

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Published four times during the academic year by Ateneo Law Students

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