

ASYLUM AND INTERNATIONAL LAW

by

S. PRAKASH SINHA



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CHAPTER I

PURPOSE OF THE INQUIRY

The practice of asylum originated in sanctuaries offered by the holy places in ancient times. Since then the institution has developed in various ways. An examination of the current situation of asylum in international law is the purpose of this inquiry.

The interests of both the individual and the states are directly involved in asylum. Therefore, the issues of asylum in international law have been approached in this study both from the viewpoint of the individual and of the state. From the viewpoint of the individual, questions arise as to his position in international law with respect to asylum, the position of asylum as a human right, and the situation of the international political refugee. These are discussed in Part Two of this book. From the viewpoint of states, the nature of the issues involved suggests a classification of asylum into territorial and non-territorial. In exploring territorial asylum, the rights and duties of the state granting it need be examined. The problem of political offense also becomes important in this connection. These are discussed in Sub-part A of Part Three of the book. Non-territorial asylum is manifested in diplomatic asylum, consular asylum, and maritime asylum, although other forms of this type of asylum can also be conceived, such as asylum given in aircraft or military camps. Sub-part B of Part Three explores the basis for these forms of asylum in international law.

PART ONE:

HISTORY OF ASYLUM AND BASIS FOR ITS GRANT

CHAPTER IX

THE FORMS OF NON-TERRITORIAL ASYLUM

Asylum is non-territorial when it is accorded in embassies or legations, consulates, public vessels in foreign waters, military camps abroad, or aircraft outside the territory of the granting state. It is granted by the agents of another state within the territory of the state from which the escape is sought. It is commonly called diplomatic asylum since its practice has largely involved the premises of the diplomatic missions, namely, embassies and legations. The practice has been prompted primarily by a need to protect from violence those under political persecution, particularly in countries where such violence erupts often in the course of political struggles. Latin American states and Spain are usually pointed out as examples of the countries with frequent violent political struggles where, as a consequence, non-territorial asylum has been much in evidence. The above-mentioned places have become the natural places to seek asylum because of a certain inviolability which these places possess, reminiscent of the inviolability of the holy places in earlier times, discussed in Chapter II, *supra*, on History of Asylum. In the chapters which follow, an attempt is made to examine whether a basis exists for this type of asylum in international law.¹ For the purpose of our exploration, the major forms of non-territorial asylum may be classified as follows:

- A. Diplomatic asylum, being asylum accorded on the premises of the diplomatic missions;
- B. Consular asylum, being asylum accorded on the premises of the consulates;
- C. Maritime asylum, being asylum accorded on vessels in foreign waters.

NOTES

1. Non-territorial asylum has often been justified as an intervention supported by humanitarian, if not legal, grounds. For a discussion of the extra-legal basis of this asylum, see Chapter III, *supra*, on Basis for the Grant of Asylum.

CHAPTER X

DIPLOMATIC ASYLUM

Diplomatic asylum is the asylum which a state grants to a fugitive in its embassy or legation situated within the territory of another state. Territorial sovereignty is a fundamental principle of international law. Diplomatic asylum derogates from the territorial sovereignty, since it withdraws the fugitive from the jurisdiction of the territorial state.¹ Therefore, it is important that the legal basis for such an asylum is clearly established.² In this chapter, an attempt is made to investigate the basis in international law of this type of asylum. Specifically, investigation is made of:

- A. The principle of extritoriality of the diplomatic premises as a basis for diplomatic asylum;
- B. Diplomatic privileges as a basis;
- C. International custom as a basis;
- D. Usage as a basis;
- E. Treaty as a basis; and
- F. Regional customary international law as a basis.

A. THE PRINCIPLE OF EXTRITORIALITY OF THE DIPLOMATIC PREMISES AS A BASIS FOR DIPLOMATIC ASYLUM

Grotius invented the fiction of extritoriality to explain the immunities of diplomatic agents from local jurisdiction.³ Under this fiction, embassies and legations were considered immune from local jurisdiction because they were, so to speak, outside of the territory of the host state. The residence of the diplomatic agent in the receiving state was considered as if outside of it and a part of the sending state. As a consequence of this fiction, asylum given in legations was deemed as asylum given by a state on its own territory and, therefore, justified under international law. In this

CHAPTER II

HISTORY OF ASYLUM

ASYLUM IN SACRED PLACES

Man's search for a place of refuge is an old one. The primitive man needed an escape from the storms and avalanches of nature, and he found it in shelters built for the purpose ages ago.¹ He needed to escape the ferocity of the furious animals, and there were shelters for that, too.² He, in turn, gave shelter to the beast of the field, pursued by the hounds, in his cave or tent.³

But the wrath of nature and the ferocity of animals were not all that he needed to escape. He needed asylum to escape from the passion of men. He, therefore, sought out places commonly regarded as sacred and implored the masters of these places to give him refuge. For even the beasts had "their rocky retreats to fly to, slaves their altars."⁴ Certain places, such as a home, a battle-field, a river-side, a water-pool, a cave, and a grove enjoyed sanctity because of their association with certain circumstances invoking emotions of reverence, and the pursuer would not violate these places by capturing the pursued there. Since such emotions are common to all humanity, it is often believed that the practice of asylum is as old as humanity itself.⁵ However, as seen below in discussing asylum in certain ancient civilizations of Asia and Africa, the practice was not found in all human societies.

The holy places, by virtue of their association with divinity, came to be regarded as inviolable by the pursuing mortals. These places, consequently, provided asylum to the pursued. The reverence for holy places was probably based either on the superstition that the wrath of the god would fall upon the violator, or on the respect which these places commanded as being the abode of the god. Reverence to the gods and superstition as to their godly powers persuaded the pursuing authorities not to apprehend the refugee in a sacred place where the god resided. Divinity thus protected the unfortunate members of the society from certain