DISSENTING OPINION BY JUDGE BADAWI PASHA

[*Translation*]

I share the opinion of the Court on the various conclusions except those relating to the American practice, the "question of urgency", and the maintenance of asylum until August 31st, 1949, the date of the Act of Lima.

To explain my dissent on the question of urgency, it will be necessary to recall the circumstances in which asylum was granted on January 3rd, 1949, and which are set out in the judgment of the Court.

* * *

Relying on these and certain other circumstances, Colombia has sought to imply that Peruvian justice, as a result of the events of October 3rd, was not, and could not be administered in an objective and impartial manner. I do not consider that it is necessary for the Court to examine this argument. The only issue before the Court is the validity or regularity of the asylum and the interpretation of the Convention of 1928. This question must and can be resolved without its being necessary to appreciate the operation of ordinary justice in the territorial State, because no measure, not even a state of siege, adopted by a *de jure* or a *de facto* government, was ever inspired by a desire to influence that justice, or aimed at such a result.

The denunciation by the Minister of the Interior, which has been described as an injunction to justice, is, in spite of its violent attack on Apra, quite usual for such denunciations.

On the other hand, in the opinion of Peru, the cases of urgency referred to in Article 2, paragraph 2, "First", seem to be none other than pursuit by a furious mob or the action of arbitrary justice, exercised by a political faction against its adversaries or in conditions which evidently preclude all guarantees of an impartial and objective examination. The danger of legal proceedings for political offences could consequently not be considered as a case of urgency within the meaning of the above-mentioned provision.

* * *

The Havana Convention of 1928 gives no definition of "urgent cases". That Convention is the only instrument to have used the expression. With the exception of the Montevideo Convention of 1933, the object of which was merely to define the terms of that of 1928, and which consequently does not regulate the question in its

entirety, the Conventions of 1889 and 1939 make no reference to the matter of urgency.

Indeed, can these terms be defined ? This is open to doubt. The conception of urgency is essentially variable and relative. It depends first of all on the cases to which it is applied, and then on the circumstances of time and place. It is experience—not general but particular—and experience alone which can give concrete form to this notion. Even the two cases cited by Peru and which are the only ones known or accepted in Europe (and then only in the drafts of learned societies and not by States) were not conceived *a priori*, but according to certain experimental data. Thus they cannot be restrictive to the exclusion of other or more subtle forms of urgency.

In the absence of definition and criteria, upon what basis can the expression be interpreted ? The etymological meaning is obviously of no help whatsoever.

Since this is not a rational institution which is in the process of creation or which is being regulated for the first time—as would be the case of a draft convention of a learned society—but a living institution which is almost a hundred years old, the only safe guide would appear to be practice, to the extent to which such practice interprets the intentions of the States which chose these expressions and agreed to adopt them, or of those States entrusted with carrying out their intention, either as States of refuge or as territorial States. This practice would be all the more decisive in determining the scope of these expressions if it is both subsequent and prior to the Convention, in other words, if it is uninterrupted.

This practice has been invoked by both sides. It is not limited to the parties to any particular convention. It has even been adopted by States which are not bound by any convention, as for instance Venezuela. It therefore transcends the Convention of 1928 and goes back to the origins of the institution of asylum.

Colombia has attempted, unsuccessfully, to draw from this practice certain conclusions respecting unilateral qualification. On the other hand, Peru, in arguing that the only cases of urgency are those arising from pursuit by a mob or from arbitrary justice at the hands of a political faction, is proceeding by mere assertion or has referred to non-American authorities. Peru has made no attempt to submit evidence derived from American life or practice or from American authorities who have studied this question.

The special circumstances, the conditions or details of the cases cited in illustration of this practice, have generally not been supplied or at any rate have not been supplied in a complete manner. It is, however, easy to see that all these cases without exception have a common characteristic, i.e., they arose in connexion with a revolution or a rebellion. Revolution or rebellion is their only reason and

circumstance. No reference has been made in that connexion to the threat of mobs or of justice at the hands of a political faction. The refugees were merely sought by the public authorities of their countries for the purpose of legal proceedings.

The cases cited as examples also present another aspect : they all terminated by the grant of safe-conducts to the refugees, and no case was mentioned of a refugee being surrendered to the territorial authorities for the purpose of legal proceedings.

In all such cases, revolutions may have produced a state of disturbance ; successful revolutionaries may then be seeking members of the former government to make them answerable for their past tenure of office ; or a government which has suppressed a rebellion may be seeking out its authors in order to prosecute them under the criminal code ; or, as in the present case, successful revolutionaries, having overthrown a government, may be seeking other revolutionaries who have been less fortunate than themselves.

In such troubled circumstances, exceptional measures are usually adopted, but the general structure of the government remains intact. More especially, justice continues to function as usual even in cases where special tribunals have been instituted in addition to the ordinary courts.

The existence of this practice is thus undeniable. In the absence of further proof, it is sufficient to recall what happened in connexion with these same events of October 3rd. Independently of the degree of responsibility (a question which is entirely irrelevant to the validity of the asylum), all the refugees in the eight diplomatic missions, with the exception of Haya de la Torre, received safe-conducts [1], whereas from the point of view of the nature of offence with which they were charged, and from the point of view of urgency, they were all in the same situation [2].

The only question which may arise in the circumstances is whether this practice is lawful or unlawful.

There is no doubt that an act resulting from an explicit or implicit agreement freely entered into by two States exercising their sovereign rights cannot be called unlawful.

There are only two alternatives : either this practice has abrogated the condition of urgency or it has merely interpreted it in a liberal fashion. Without having to consider whether an inter-

[1] See the communiqué of the Peruvian Government of October 12th, 1948, published in the official gazette *El Peruano* of October 13th (see Memorial of Colombia).

[2] In this connexion, see especially the correspondence exchanged between the Embassy of Uruguay and the Ministry of Foreign Affairs of Peru, quoted in the Reply of Colombia, in which even the unilateral and definitive qualification by the State of asylum has been invoked by Uruguay. In the case of the refugees who were granted asylum in the Uruguayan Embassy, safe-conducts were granted on February 17th, 1949.

national custom can abrogate a rule of positive law, it must be admitted that the most natural and the most juridical explanation is to consider this practice as a method of interpretation of the condition or urgency.

But this practice was not only subsequent to the Convention (and consequently constitutes a sound interpretation thereof), it also existed before the Convention. It should, therefore, be considered as one of the "rules they [the governments of the Latin-American States] must observe for the granting of asylum in their mutual relations", which rules these governments were "desirous of fixing" by that Convention (Preamble to the Convention).

This practice was known to these governments. It was common knowledge and had not been contested. If these governments had wished to discontinue it, they would not have failed to denounce it in one manner or another. The absence of such a denunciation is conclusive proof that the practice continues and is definitively recognized. This proof can only be refuted by showing that the words "urgent cases" thus interpreted would be devoid of meaning. This has not and could not be shown. It will later be shown what these words were intended to exclude.

* * *

It remains to be seen whether the other provisions of the Convention of 1928 corroborate the interpretation of the words "urgent cases" deduced from practice which is both prior and subsequent to the Convention.

In considering the provisions of the Convention, it is presumed that there is no conflict between the territorial State and the State of refuge concerning the political nature of the offence which gave rise to the asylum, or that any dispute arising on that point was resolved by the recognition of that political character by the territorial State.

But it will be admitted that asylum of a political offender, if it is not to be indefinitely prolonged, should come to an end by one or other of the following solutions: either the refugee leaves the territory with a safe-conduct, or else he is surrendered to the territorial State for the purpose of legal proceedings.

In order to contest the fact that, according to recognized practice, asylum should always terminate in the grant of a safe-conduct, it is necessary to admit that the territorial State has the right to demand the surrender of the political offender for the purpose of legal proceedings.

That State has, of course, the right to insist on the surrender of a common criminal. Article 1, paragraph 1, expressly says so. But nothing of the kind is said concerning political offenders.

Does it therefore not follow from this provision, by an argument *a contrario,* that such a right does not exist in the case of political offenders ? This argument *a contrario* is conclusive provided it is confirmed by other arguments or considerations. In this case it is confirmed by the fact that the Convention has sought to establish that the two cases of asylum are clearly distinct. Each is the object of an article which provides all the conditions relating to it.

Article 1, paragraph 1, states that it is not permissible to grant asylum to common criminals ; but paragraph 2 provides for cases where, in fact, asylum may have been granted, particularly the case where the head of a diplomatic mission, considering at the time of asylum that he was granting it to a political offender, subsequently recognized that the refugee was only a common criminal.

In such cases a measure of urgency is necessarily implied in the asylum. This measure can only be urgency in the strict meaning of the word, in accordance with Peru's interpretation of Article 2, paragraph 2, of the Convention, i.e., pursuit by a mob, or justice at the hands of a political faction. In fact, even a common criminal is entitled to regular justice, and he is justified in seeking asylum in such circumstances of urgency.

Paragraph 2 of Article 1 enacts that, in such a case (provided of course that the head of the mission does not dispute the fact that the refugee is a common criminal), the territorial State may demand the surrender of the refugee.

But it is quite obvious that, even in the case of a common criminal, urgency in its strict meaning described above ought to have ceased. The request for surrender made by the territorial State is in itself an implication of the fact that urgency has ceased.

In the circumstances, it might well be wondered why such a clear distinction has been established between the two categories of offenders if, on the one hand, urgency has the same strict meaning for both and if, on the other hand, the refugee, whether a common criminal or a political offender, has to be surrendered to the territorial State for the purpose of legal proceedings, as soon as the case of urgency has ceased or in case urgency never even existed.

The truth is that the notion of urgency is not the same for the two categories of offenders and that the consequences of asylum also differ according to whether the refugee is a common criminal or a political offender. In the former case, as soon as urgency in its strict sense has ceased, or if it has never even existed, the territorial State may demand his surrender, whereas in the latter case it is the nature of the situation (revolution or rebellion) which determines the urgency and justifies the request and immediate grant of a safe-conduct.

Practice has furnished indisputable confirmation of the conclusions deduced from the texts. Not only has this practice been constant in the sense that revolution is a case of urgency and a

valid condition for asylum, but also in the sense that the invariable effect of diplomatic asylum, regularly granted to a political offender, has been the non-surrender of the offender to the territorial State and his departure from the country by virtue of a safe-conduct granted by that State.

No case to the contrary has been cited.

* * *

Article 2, paragraph 2 ("First"), further provides that "asylum may not be granted except in urgent cases and for the *period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety*".

Could the last part of this sentence refer to the surrender to the territorial State for purposes of legal proceedings? It may be true that in case of pursuit by a mob or legal proceedings at the hands of a political faction, such a surrender may ensure safety in some other way, but it is even more true that this term would be inadequate; to ensure safety in some way other than asylum can obviously only mean departure from the country.

Thus, departure from the territory seems to be the end of any political asylum. That is the only conclusion compatible with the texts.

It could be argued, on the other hand, that, even admitting that general practice places revolution on the same footing as pursuit by a mob or justice at the hands of a political faction, all that the territorial State is bound to do is to respect asylum until the return of normal conditions. It could then request the State of refuge to surrender the refugee for prosecution before the ordinary courts.

But whether or not normal conditions have returned is a question of opinion. It might give rise to argument. On the other hand, such an interpretation of the phrase in question would lead to the inadmissible conclusion that the State of refuge was under an obligation to keep the refugee until such time as it might please the territorial State, at its absolute discretion, to demand his surrender.

Moreover, what would be the significance or the scope of the rule appearing in Article 2, paragraph 1, to the effect that "asylum granted to political offenders in legations, warships, military camps or military aircraft *shall be respected....*", if that respect were not to manifest itself as a last resort, by the grant of a safe-conduct? Does this obligation to respect asylum confine itself to a mere prohibition for the territorial State to force an entrance into the diplomatic mission for the purpose of seizing the refugee?

Here again it should be recalled that practice gives no example of asylum granted on the occasion of a revolution having continued

until return to normal conditions or having terminated otherwise than by the departure of the refugee.

* * *

The analysis of the practice of the South-American States (whether signatories or not) before and after the Convention of 1928 and the analysis of the provisions of that Convention as regards the difference it laid down between common criminals and political offenders, the absence of any reference to the surrender of the latter to the territorial State, as well as of the meaning and scope of the expression "ensure in some other way his safety", and of the obligation to respect asylum — this double analysis establishes beyond any question that Article 2 refers especially to cases of revolution which are qualified in that article as urgent cases.

In fact, the Convention of 1928 merely seeks by this reference to "urgent cases" to exclude from asylum those cases in which it is granted following legal proceedings, instituted in normal circumstances and in the absence of revolutionary disturbances or of possible exceptional measures.

Of course, the Convention of 1928 as a whole has a restrictive character with regard to the exercise of the right of asylum, but that general character cannot offset all the arguments derived from a practice which is both constant and unambiguous on a given point ; this practice is further corroborated by the analysis of the principal provisions of the Convention itself.

* * *

It results from the foregoing description of asylum that this institution has an aspect in South America which it has not elsewhere. If the reason for this difference cannot be discovered, the conclusions deduced from practice and from texts, however concordant they may be, might not appear decisive.

In the search for this difference, I do not consider it necessary to dwell on the nature of revolutions in that part of the world, their causes or the various conditions which favour their outbreak. It is sufficient to say that revolutions and rebellions are very frequent. They sometimes fulfil the functions of an election, when a section of public opinion which is dissatisfied with the government wishes to effect a change in a manner which is less slow and laborious than voting.

It is this frequency of revolutions combined with their character, causes and conditions, which has given to asylum an object and a usefulness which it does not seem to have elsewhere. By a kind of general and implicit agreement it is to be regarded as a means enabling the authors of unsuccessful conspiracies to

escape the severity of the acts of vengeance of the government in power and permitting members of a defeated government to evade the measures by which a successful conspiracy would seek to ensure its security.

By virtue of this usefulness, asylum has become a factor of peace and moderation to the extent that it avoids violence, it provides a certain respite, attenuates the bitterness of defeat and imposes wisdom and moderation in view of the potential danger of the return of an exiled refugee.

There is no doubt that asylum can also be an element of instability in so far as it reduces or eliminates the risks involved in revolution, but these disadvantages, in comparison with the afore-mentioned advantages, do not seem to have affected either its course or recurrence.

It is sometimes attempted to explain the particular development of this institution in America by referring to chivalry and humanity. This point may be open to doubt, although these concepts are not completely alien to the institution of asylum. In any case, the idea of chivalry is quite relative. In former times, asylum for common crimes was recognized in the name of chivalry, whereas we now condemn this practice as being contrary to social security and solidarity. In those days it was refused in cases of political offences, being contrary to a certain dynastic solidarity. In modern times it is admitted for these offences precisely because governments to-day no longer have the character of permanency which they enjoyed in former times. In fact, democracy necessarily supposes struggle for power and changes of government. In such struggles and changes errors may be committed, but they are considered as the price that must be paid for the advantages of democracy.

* * *

But however great the usefulness of asylum may be, this usefulness would be insufficient to explain the development of asylum without having regard to another consideration relating to the character of revolutions. In fact, in the troubled times which accompany or follow them, passions are unleashed which frequently cannot be controlled by reason and justice, and generally have at their command an almost absolute power which, it must be admitted, may be necessary in order to curb the disturbances occasioned by the revolution. This power would, in the case of a constitutional government, result from the proclamation of a state of siege. A *de facto* government simply confers this power upon itself. In both cases it manifests itself by a fusion of the legislative and executive powers in the hands of the members of the government. It is in such circumstances that the government, without

having to encroach on the general judicial organization, could be tempted to create special organs of justice bearing the imprint of political justice.

Such is the case of the decree of November 4th enacted by the Military Junta providing for Courts-Martial to judge summarily the authors, accomplices and others responsible for the offences of rebellion, sedition or mutiny within short time-limits (enquiry three days; prosecution and judgment six days).

It matters little whether this particular decree was retroactive or not from the point of view of the summary justice which it instituted. What is important is the fact that such political justice could be set up by that same Junta and could examine facts which had occurred prior to its institution. Such a fact could have been the case of Haya de la Torre where the enquiry seems to have been suspended since the summons to appear published on November 16th, 1948, in spite of the fact that the summons informed the accused that the enquiry would proceed in their absence.

The creation of new judicial organs and the recognition of their competence to judge facts prior to their existence, which hitherto fell within the jurisdiction of ordinary tribunals, could have been regularly accomplished by a constitutional government. Legislative power is not prevented from so doing by the rule of non-retroactivity which is not generally applicable in matters of judicial procedure and organization. The possibility for an unconstitutional government to proceed in this manner is even more obvious.

The Junta assumed power on October 27th, 1948, as a *de facto* government. It thus held all the power without needing to invoke the state of siege proclaimed on October 4th by the constitutional government which had preceded it. However, it saw fit to renew the state of siege whenever it expired (every thirty days). In fact, the state of siege was renewed on November 2nd, December 2nd and January 2nd. These successive renewals, although superfluous, prove that, at any rate until the last date, the Junta considered it necessary to announce publicly that it might still need exceptional measures and that the situation, at the time, was not yet normal.

The fact that the Agent of Peru declared in his Rejoinder on behalf of his Government—a declaration which was subsequently confirmed in the oral statement of October 2nd, 1950—that the decree of November 4th was "intended to apply to crimes occurring after its publication" in no way alters the possibility existing in January, 1949, of enacting another decree providing for another Court-Martial with similar summary procedure to deal with facts which had occurred prior to the decree. The reference to retroactivity in the foregoing declaration must be interpreted as bearing on the application of the penalties provided in the decree of November 4th.

It is this possibility of exceptional measures which characterizes periods of revolution and which makes it always possible to speak of the danger of legal proceedings, in so far as it involves a further danger, namely proceedings before a political tribunal.

Obviously the danger of legal proceedings for a political offence is not in principle sufficient to justify the grant of asylum to the person threatened.

But asylum as practised in America has been indissolubly bound to the conception of revolution. On the one hand, it provided the social and political usefulness referred to above, and on the other hand, it found a general justification in the possibility of exceptional measures.

In this very special environment, asylum assumed the aspect of a regional or continental institution, approved by the governments in power, those which triumphed over a conspiracy as well as those which had triumphed as a result of a conspiracy ; and by their recognition of asylum both types of government considered it as a possible resort in the event of a reversal of fortune. Just as there exist usages of war, so a usage of revolution has arisen, which became the object of implicit and general agreement between the American States.

It is as such that the exercise of asylum is so frequently and widely recognized.

Viewed as an isolated phenomenon, the asylum of a political offender may easily acquire the aspect of an encroachment on territorial sovereignty, and, as far as it is an obstacle to legal proceedings, it may appear as a suspicion of the national justice and, in any case, as an interference in the domestic affairs of a State. However, when it is accepted by all States, both in the rôle of the territorial State and the State of refuge, it loses all such aspects and becomes a general and impersonal rule of conduct.

The fact that abuses may have arisen in the exercise of asylum is absolutely alien and irrelevant to the appreciation of that institution as a juridical phenomenon. Just as alien and irrelevant is the fact that established governments, enjoying general respect and confidence, owe their existence to revolutions or to the exercise of asylum. Such merits or abuses may influence the evolution of the institution or its transformation, or bring about its extinction. They remain, however, irrelevant to the task of the Court when considering an individual application of that institution.

On the other hand, it may readily be agreed that a number of cases which are not regular cases of asylum have intruded on the practice already referred to which is recognized as a general rule of conduct. Such, for example, are cases where, for reasons of political expediency, safe-conducts may have been granted to refugees whom the territorial State regarded as common criminals, but in whose case it did not choose to enter into a dispute. I do not include in this

category the case of persons against whom no charge has been made but who, fearing that such a charge may arise, seek asylum ; for it is in the spirit of the institution to grant to such persons the protection of asylum.

In spite of this intrusion, the practice of asylum as a usage of revolution remains a juridical phenomenon which can be regulated, interpreted and applied, just as the usages of war. The fact that the Parties had recourse to the Court in order to solve a dispute on the subject of asylum is sufficient proof thereof.

* * *

It may therefore be concluded that in enacting that asylum may only be granted in urgent cases, the Havana Convention of 1928 was desirous of "fixing the rules" (preamble to the Convention) which had been applied up to that time. These rules tend not to admit asylum in times of peace and order, but to grant it in times of revolution, euphemistically described in the Convention as "urgent cases". To interpret asylum in such a case, as implying suspicion of territorial justice or interference in the domestic affairs of another State, is definitely out of the question because this is a special situation, with ample possibilities of deterioration through the adoption of exceptional measures, and because all the States, in their alternative capacity as State of refuge and territorial State, have accepted this rule as a general rule of conduct.

In the case under consideration, the state of disturbance caused by the revolution of October 3rd still persisted on January 3rd. Proof of this may be found in the fact that, the day before, the Military Junta considered it necessary to proclaim the renewal of the state of siege, thus implying the possibility of taking exceptional measures. Asylum was thus regularly granted to Haya de la Torre since this was a case of urgency, the state of disturbance caused by the rebellion still persisted, and the offence with which he was charged was unquestionably a political offence [1].

---

[1] In fact, the proceedings for rebellion against Haya de la Torre, in the absence of almost all those responsible, who had been authorized by the Government of Peru to leave the country, could only be partial and fragmentary. This initial discrimination by the Executive does not appear to be a perfect guarantee of impartiality.

The *de jure* Government of Peru seemed specially desirous of depriving Apra of its financial and publicity resources. (See in the Counter-Memorial the denunciation of the Peruvian Minister of the Interior of October 5th, 1948.) Judging by the communiqué of October 12th, the prosecution assumed secondary importance. On the other hand, the *de facto* Government, this aim having been achieved, seemed to be especially anxious to strike at the head of the party. (See the contradictory attitudes of this Government at that time towards Colombia and Uruguay.)

It is very significant in this connexion that the diplomatic correspondence between Colombia and Peru, which lasted three months, and which purported to reflect the direct reactions of the two Parties and to contain the fundamental bases of their respective attitudes, does not for a single moment touch on the question of urgency; see especially in the memorial, the letter of Peru of March 19th: VI, second paragraph; VII, first paragraph; IX, X, first paragraph, and Peru's letter of August 6th: VI.

If Peru considered that there was no urgency in this case, she would not have failed to rely on this argument and to avoid this long controversy concerning terrorism, which apparently had no chance of convincing Colombia for the simple reason that it had no foundation in fact or in law, and that the so-called terrorist crimes had not given rise to any accusation prior to the grant of asylum.

It was only after the presentation of the Counter-Memorial that an attempt was made to argue urgency in the case of Haya de la Torre, without, however, attributing to this argument, at the beginning, the importance which it subsequently acquired. It was especially in the final oral reply that this absence of urgency became the essential basis and grounds of the counter-claim. No explanation has been given—and for an obvious reason—to show why this argument, if it is so decisive and so much less controversial than that of terrorism, has not been invoked at the very outset in the diplomatic correspondence.

In that correspondence, Colombia, relying on her doctrine of unilateral and definitive qualification, refrained from any discussion of the domestic affairs of Peru, although the latter, curiously enough, had invited Colombia to participate in such a discussion. This attitude on the part of Colombia may easily be explained by a desire to avoid being drawn into a discussion of the responsibility of Haya de la Torre and the terroristic aspect of the crimes committed in the course of the events of October 3rd, which, in the view of Peru, were to transform the offences with which Haya de la Torre was charged into common crimes and thus render his asylum pointless.

* * *

In view of the foregoing conclusion, any consideration of the duration of asylum seems to me completely superfluous, especially since the prolongation of asylum is, in fact, entirely due to the diplomatic correspondence. This correspondence constitutes the negotiations between two States concerning a dispute which has

arisen between them. It was these negotiations which led to the Act of Lima, by virtue of which the dispute was submitted to the Court.

It is impossible to deny that Colombia is entitled to maintain, by means of negotiations, what she considers to be her right or to deny that she is entitled to continue the asylum throughout such negotiations.

(Signed) BADAWI PASHA.
