

DISSENTING OPINION BY JUDGE AZEVEDO

[*Translation*]

Much to my regret, I am obliged to dissent from the reasons and the conclusions adopted by the Court in its Judgment and to state my personal views on those various points.

1. Care must be taken that an exaggerated application of the grammatical method, excessive concern for the intention of the authors of a text and strict adherence to formal logic should not lead to disregard of the manner in which a legal institution has become adapted to the social conditions existing in a certain part of the world.

It should be remembered, on the other hand, that the decision in a particular case has deep repercussions, particularly in international law, because views which have been confirmed by that decision acquire quasi-legislative value, in spite of the legal principle to the effect that the decision has no binding force except between the parties and in respect of that particular case (Statute, Art. 59).

Technical procedures may be applied in such a strict manner that a chivalrous and traditional institution, the utility of which is universally acknowledged, may be weakened and transformed to such an extent that it becomes something akin to a police measure. Thus, in the field of asylum, the distinction on which the institution is based, i.e. between political offences and common crimes, is disregarded: the difference between *respect* in the first case and *prohibition* in the second disappears.

If indeed the main concern is the material protection of the individual against the excesses of an unruly mob during the time strictly indispensable to surrender the refugee to the local authorities, and if, on the other hand, it is inconceivable that temporary protection against lynching should be refused even to the most infamous common criminal during the time indispensable for their surrender to the custody of the territorial State, then all distinction disappears.

It would be equally possible to consider that a refugee is in safety by virtue of his surrender to the local authorities, even after it has been agreed that he is merely a political offender, without even a reservation concerning punishment for common crimes of which he may be subsequently accused, as is the rule in the case of extradition.

2. Reality, as I see it, is quite different, and the most firmly-established traditions of Latin America which ensure the advantages

of asylum to all persons accused of political crimes or offences, either during revolutions or in the more or less disturbed periods that follow, do not appear to me in the same light. This result goes beyond the intentions of the draftsmen of the Treaty of 1928 and rests, not on the sole grounds that the administration of justice should be presumed to be defective, but on the fact that such an adulteration is always possible in troubled times and that it is better in each case to avoid an inquiry which would be more offensive to the country concerned than a general provision which is always applicable on the basis of strict reciprocity.

No one disputes the fact that international law may be influenced by special factors which are perfectly compatible with it. This secondary formation may result from various factors such as those of race, religion or geographical proximity.

Diplomatic asylum is a striking example of the necessity of taking into account, in the creation or adaptation of rules of restricted territorial scope, of geographical, historical and political circumstances which are peculiar to the region concerned—in this case the twenty nations of Latin America.

In Europe, where social changes are rare but serious, the institution of asylum tends to disappear; in Latin America, however, where revolutions are less serious but much more frequent, the adaptation and development of this ancient practice has progressed, gaining force with each convention signed, and it is still not yet possible to foresee the high point, much less the low point, of the curve.

3. In that region, asylum has practically dated from the autonomy of the States concerned, which have been independent for less than a century and a half. The extent of the application of this institution is confined to the territories of Central and South America, and I cannot recall a single State that has remained aloof from the action of asylum in its two aspects. Hundreds of persons have benefited from asylum, and the protection of those precious lives weighs more with me than the punishment of a few political offences.

Apart from humanitarian considerations, however, which are clearly individualistic in character, asylum has another even more important aspect. It is also a highly social institution and has a deep educational action towards the control of passions, the exercise of self-control, and the respect for a rule which is so deep-rooted that it has become almost sacramental. This practice has asserted itself even on the most powerful *de facto* governments which have assumed power in the course of civil wars. At the most critical times of political strife, this fraternal voice is heard calling upon the combatants to separate and urging men to clemency.

That deep-rooted intuition is more powerful than any technical subtleties, and it is the first time that a dispute of this kind has been submitted to international jurisdiction, the few difficulties having been, so far, easily overcome.

If environment and other relevant factors are disregarded in favour of the literal interpretation of one single condition, the result would not then be a case of *summum jus*, but of an element of disturbance, which, far from contributing to peace, would be responsible for increasing the number of disputes and perhaps even of civil wars in America.

4. In my opinion, the institution of asylum in Latin America may be summarized as follows :

(1) It applies not only to political offenders, properly speaking, but also to persons who are persecuted for political reasons, as explained in a purely declaratory manner in Article 2 of the Montevideo Convention of 1939: all political opponents are protected, whether they be statesmen in disgrace or politicians who have failed in their attempt to overthrow the government.

(2) Its exclusive, if not its principal, purpose is not to protect the refugee from the excesses of a mob. Such excesses as may have sometimes occurred in the overthrow of corrupt dictators, remain rare because of the natural sympathy of the people for those in trouble. The purpose of asylum is not only to protect life, but especially to safeguard liberty against every kind of persecution.

(3) Its purpose is not only to prevent the application of *ad hoc* legislation by exceptional courts, but also to protect the refugee against ordinary justice, in cases of political offences which, by their very nature, do not lend themselves to judicial appreciation, and are sometimes deferred to political organs following a procedure of *impeachment*. Extradition of political offenders is refused the world over, even when requested by countries living under a normal constitutional régime. This fact is especially noteworthy, since the country of refuge does not itself take measures to punish the refugee, at least not to the extent it would punish an identical offence committed on its own territory. This attitude, however, would deprive a refusal of all moral justification and would reveal the doubts entertained concerning the proper administration of justice in the other State.

(4) Urgency, which may be interpreted in a number of ways, cannot be determined in relation to a unit of time, but in relation to various factors, including even the geographical difficulties of external refuge, which can be reached much more easily in densely-populated areas where rapid means of transportation are available to nearby frontiers.

(5) Periods of constitutional abnormality are among the first factors to be considered in assessing the danger threatening the refugee when the rule of law is suspended or practically ceases to exist. Serious concern for the safeguard of justice is then justified because of the direct or indirect pressure which unlimited power may exercise on ordinary or extraordinary courts.

(6) The restrictive clause on the duration of asylum, apart from being obviously illogical if the departure of the refugee depends on the goodwill of the other State, cannot be interpreted in the sense that the surrender of the refugee to the local authorities is an equivalent form of guarantee. On the contrary, because of the irreparable character of its consequences, asylum, if regularly granted, cannot in any way terminate without the consent of the refugee.

(7) Like extradition, asylum is instantaneous in its character and should be judged in relation to a very definite moment. Subsequent events, and their unpredictable developments, may sometimes assume an unexpected direction, but they merely represent the consequences and the conclusion of a previously existing legal situation.

5. To state these fundamental points does not imply that asylum may be granted without careful consideration. Indeed, this would increase the frequency of social disturbances and encourage the initiative of adventurers specializing in asylum. That is why a diplomat should not be approached concerning the attitude he may adopt in the future, should such a case arise. The regulations issued to the Brazilian diplomatic service expressly provide that diplomatic officials shall not offer asylum to anyone seeking it or lead such a person to the seat of the mission (H. Accioly, *Traité de droit international public*, Paris, 1940-1942, tome II, paragraph 1170/A). Moreover, asylum would not thereby be made easier, for it is inconceivable that a diplomat would welcome these alien guests, who are the cause of serious inconvenience and considerable trouble.

To prevent abuse, American writers on international law (see H. Accioly, *op. cit.*, paragraphs 1170/A and 1173; Heitor Lira, *Revista de Direito*, Rio de Janeiro, v. 126) warn against any extensive interpretation of this institution and restrict the grant of asylum to grave circumstances. Governments, as we have just seen, often send instructions to this effect to their diplomatic agents.

On the other hand, a strict interpretation should not lead to the distortion of the purposes of asylum, or, in practice, bring about its abolition by excessive respect for the letter of the texts or even of mere preambles.

6. We have already mentioned the antiquity, extent and, particularly, the continuity of this practice. It is indisputable that

Latin-American countries practise asylum extensively, whether actively or passively ; they sign conventions, even if they sometimes fail to ratify them ; they make solemn declarations, they issue press communiqués, they praise the services rendered by asylum. In a word, they appear generally proud of the extensive and continued application of this ancient institution.

But it will be argued that such a practice, if it is interrupted, cannot be regarded as a custom and that the Parties have dwelt particularly on the contradictions in their respective practices.

The difficulties involved in referring to custom as a source of international law are well known ; custom plays a most important part (the principal part, according to certain writers) in the development of international law.

It is therefore necessary to consider the examples of interruption in the practice in order to determine their true nature and decide whether they suffice to destroy the value of other concordant cases which, by their number, would clearly reveal an *opinio juris*. In the present case, it will be necessary, for example, to consider whether the nature and the purpose of the institution, as they may be deduced from the form it has assumed in that part of the world, have been affected by the exceptions or whether, on the contrary, the latter merely prove the rule. But these exceptions are only the result of personal attitudes and rather reflect the conduct of governments in defiance of the juridical conscience of States which had previously been firmly established. Such transitory or episodic reactions are always the counterpart of political situations in the process of consolidation and rarely arise from the normal functioning of constitutional organs. Viewed from another angle, these sporadic reactions have an abnormal character when they are confined to one aspect of asylum—the reluctance to recognize the measures taken by a foreign diplomat, whereas the recalcitrant State continues to grant asylum in other countries. It is unnecessary to qualify such conduct.

No value can attach to such weak elements, even if they assume, as has already occurred, the strange form of the abolition of asylum by unilateral declaration, for such an abolition is always immediately followed by a return to the previous practice, which is thus strengthened by facts and not merely by presumptions, although doctrine may consider the latter sufficient. The opponents of the voluntary theory even go so far as to say that it is impossible to seek a psychological element which remains necessarily intangible (Paul Guggenheim, *Les deux éléments de la coutume internationale*, in "La technique et les principes du droit public, Études en l'honneur de Georges Scelle", Paris, 1950, Vol. I, pp. 276 et sqq.).

On the contrary, those occasional denials constitute violations of an already established rule, for a State cannot oppose a custom previously accepted.

To destroy such a custom, a clear, coherent, unilinear attitude would be required, such as that of the United States for instance, which, while refusing to become in any way involved in the institution of asylum adopted by their sister-republics, have in practice shown toleration in some extreme cases, although with restricted effects.

7. What is the value, however, of such a custom as against conventions, and even a complex of conventions, the signature and ratification of which sometimes reveal a certain lack of consistency in the principles of the States belonging to the group which establishes them?

There is no need to go into the matter of the derogative action of treaties upon custom, nor into the question of the compatibility of the two sources of law. It will be sufficient to emphasize that treaties often embody principles already established by custom, and thus have a declaratory effect with regard to customary rules. This role is greater in a system where the field of written law is progressively extended by the reception of new practices which have manifested themselves in the interval.

It is then very dangerous for a State to proclaim that it is bound only by the treaties which it has signed and ratified. This purely gratuitous declaration is rather daring, particularly at a time when the contractual element is undergoing an obvious and deep change by virtue of the para-legislative action of an international character which is being developed even at the cost of substituting the majority principle for the principle of unanimity.

Thus, in a course at the Academy of International Law, Professor Balladore Pallieri referred to the current observation to the effect that "a large number of Pan-American conventions are observed, even by States which did not ratify them, and that they often become common and general law for America" (*Recueil des Cours*, 1949, Vol. 74, p. 540).

This practice is so deep-rooted that it may be observed that on several occasions in respect of the Treaty of mutual assistance signed at Rio de Janeiro on September 2nd, 1947, the signatories could not participate in the voting provided for in that Treaty unless they had ratified it.

8. To show the force of custom in the field of asylum in Latin America, it is sufficient to recall the significant fact that Spain was almost compelled to accept not only the institution of asylum, but also to comply with regional agreements, even though these had not been ratified by several American States, on the grounds that the mother-country was bound to accept from her numerous offspring a sort of estate in reversion.

Another decisive test may be mentioned. Very few of the twenty States of the group ever ratified or even signed a treaty on asylum. The names of Bolivia and Venezuela come to mind. In

so doing, did they avoid the general practice, or did they at least adopt other principles? On the contrary, they practise asylum naturally, like the other States, invoking and accepting indiscriminately the application of principles contained in regional treaties.

There is a third, though minor, factor, and that is the practice of immediately requesting a safe-conduct without awaiting the initiative of the territorial State. It is therefore not proper to deduce from the failure to ratify a new convention the conclusion that the State concerned remains outside the group in which the custom is respected.

9. In order to refute the claim that we should return to a literal interpretation of the texts, it will be necessary to add to these general data concerning the environment and the spirit of the continent two further considerations which apply particularly to the Respondent, although doctrine and jurisprudence are not concerned with seeking the recognition of custom in the practice of the contesting States (A. Verdross, *Recueil des Cours*, Vol. 30, p. 295).

On the one hand, on October 12th, 1948, the respondent Government recognized in an official note the respect of international obligations concerning established practices (Memorial). On October 26th, 1948, while already confining itself to conventions which it had ratified, the Respondent acknowledged the right of diplomatic agents to require the necessary guarantees for the departure of the refugee. This right cannot be disregarded, any more than the right to qualify the offence. In those conditions, the Court cannot readily suppose that an error has been committed, as was subsequently contended.

This was no extraordinary and isolated declaration of the Executive—of lesser importance than that accepted by the Permanent Court in the famous Eastern Greenland case, and I believe that in so doing that Court was applying international law—but a declaration merely interpretative of treaties, and in harmony with the normal attitude of the State (J. L. Brierly, *Recueil des Cours*, Vol. 58, p. 71), and which moreover is in accordance with views accepted and recognized by all American countries (Memorial).

On the other hand, on October 20th and 28th, 1948, it seemed natural to the diplomatic representatives of the Respondent in Guatemala and Panama to ask territorial States to recognize the protection granted by the Havana and Montevideo Conventions on Asylum (Memorial), whereas it was necessary to establish that the State of refuge would in any case not practise asylum to a greater extent than was warranted by its own usages, conventions or laws

These two considerations may lead to the belief that application *more geometrico* of treaty clauses—even by a court deciding strictly in law—would be difficult to justify.

But let us admit, for the sake of argument, that it is necessary to return to the pure theory of the autonomy of the will, irrespective of the direct action of custom exerting itself alongside that of treaties in functions which are normally exercised *præter legem*. Even then, it would not be possible to disregard the profound action of custom as a preponderant factor in the interpretation of any text adopted on the same subject, especially if such action assumes a character of reciprocity (H. Lauterpacht, *Recueil des Cours*, Vol. 62, pp. 157-161).

10. It has already been pointed out that the purpose of asylum, as traditionally practised in Latin America, is not only to protect the person of the refugee, but also to remove him from the jurisdiction of territorial courts for political offences, just as in the case of refusal of extradition.

Concern for a good administration of justice is thus shown in the same way in both institutions as regards political offences which are purely of an artificial or conventional nature (G. Sotgia, *Il delitto politico*, Rome, 1950, pp. 20 and 98).

The question might arise, however, whether this protection against a mere legal danger, the danger of unfair trial and condemnation, should not be set aside in the case of asylum, which differs from that of extradition in the sense that the offender continues to remain on the territory of the State of which he is a national, while protected not by the obsolete fiction of extritoriality, but simply by immunities granted to a foreign diplomat.

To dispel this doubt, it is enough to recall other examples in which international law, without any personal reflection on municipal judges, does not comply with their final decisions and recognizes compensation based on a denial of justice. This amounts to reciprocal control, which must be tolerated in the absence of a super-State order. The situation is the same in the case of recognition of individual rights below a certain standard type, even if this inadequate régime applies to nationals.

Continual efforts are being made at the present time to establish on an international plane a judicial organ to correct the inadequacy of municipal courts, so that the new Declaration of Human Rights may not remain a dead letter.

In this way the French law of March 10th, 1924, provides that extradition shall not be granted even in cases of common crimes if the request has been made with a political end in view (Art. 5, para. 2), and the grounds for such a provision have been very

aply explained by Professor Donnedieu de Vabres (*Traité de droit pénal et de législation pénale comparée*, 3rd ed., 1947, para. 1791).

Already in the municipal laws of some countries a prejudiced local attitude constitutes a legal reason for transferring the trial of a criminal to the assizes of another district, sufficiently remote not to be disturbed by the repercussions of the crime.

Finally, it would be difficult to understand why, in America, if the purpose of asylum was not to protect a political offender from ordinary courts, the territorial State should resign itself, in every case, to accept this serious consequence simply by courtesy or goodwill, even if at the outset that State sometimes makes a certain attempt to oppose it.

This fact is evident and irrefutable: it has just been naturally admitted, before or after a categorical denial.

Reference has been made to a certain lack of clarity in the circumstances of the numerous cases of asylum described before the Court by the Parties, but there is one point which in any case is beyond dispute—and that is, that among the means by which asylum was terminated does not appear the surrender of the refugee to the local authorities without his consent, even if the prevailing conditions had changed.

There is no known case to the contrary, and, as an indication of the extent to which the diplomatic code of honour is respected, the famous case may be cited in which a refugee wished to renounce the protection and surrender himself to the local authorities; on that occasion the Ambassador who, incidentally, was accredited in Latin America by a European country, demanded an explanatory letter, signed not only by the refugee, but countersigned by persons who were removed from constraint of any kind, and in that instance the letter was widely publicized by the Ambassador.

This fact is to be explained by the decisive consideration that the withdrawal of the favour which had been granted to the refugee would greatly aggravate his position. He could not be sent away with impunity; having lost his hiding-place and by appearing in the full light of day, he would become the object of special vigilance and would be deprived of the means of seeking another form of refuge, which would have been easier for him to do before leaving the Embassy.

11. Would not this evident restriction to sovereignty offend national feelings, particularly in America, where countries are most jealous of their independence, and have initiated well-known continental doctrines like those of Monroe, Drago, Porter, etc.? A mere reference to widespread historical factors shows that preoccupations of sovereign equality among American States are not based on inter-continental reasons, except in some exceptional

cases in the past, which showed apprehension of the extremes of a political hegemony without counterpart on the continent itself. The Charter of the Organization of American States, signed in Bogota on May 2nd, 1948, provides that an act of aggression against one American State is an act of aggression against all the other American States (Art. 5 f).

Particularly in the Latin-American group, there are no susceptibilities to trouble the fraternal atmosphere and the smallest country will, as a matter of course, grant asylum and ask the most powerful State for a safe-conduct without the slightest hesitation and with the clear conscience of exercising a right. Considerations of sovereignty easily give way to a superior spirit of justice in matters concerning the protection of the inalienable rights of man, even before the spectacular reception of the individual into the international field, as a result of the decision of the United Nations Assembly in Paris in 1948.

It must also be observed that in the Treaty of Rio de Janeiro of September 2nd, 1947, for the common defence of the continent, two procedures and two solutions were adopted depending upon whether the aggression was external or by an American State.

M. Levi Carneiro, Brazilian jurist now Counsellor to the Ministry for Foreign Affairs, referring to the best-known authors of the Northern and Southern American continents, says that asylum is not to be considered merely as the result of humanitarian concern, but as a preoccupation of justice—even of individual justice—based on a certain reserve, a certain distrust of executive organs of the government and the courts of the country of the accused or of the individual persecuted. The first grants of asylum were not motivated by humanitarian reasons alone. They therefore imply certain manifestations of opinion regarding the domestic affairs of the country (*O direito internacional e a democracia*, Rio de Janeiro, 1945, p. 140).

Besides, Article 3 of the Havana Convention has turned the old discussion on the nature of asylum—whether a right or a mere humanitarian practice—into an academic question. It was illogical in itself, as it opposed two heterogeneous factors, namely, cause and effect. A right may be based on ethical considerations or take its source from economic, political or other factors. In any event, the Convention has decided that the effects of asylum are the same, whatever the reasons for which it was granted.

If the relation between the individual and the State granting asylum alone is considered, any restriction may become an anachronism when asylum begins to be treated not as a mere option but as

a right, recognized in its external aspect by the Declaration of Human Rights.

The time is happily past when the preparatory work of the 1930 Rocco Code in Italy referred to the fact that "the right of political asylum is an anachronism incompatible with the situation of a strong State".

As early as 1939, Uruguay proposed the insertion in the Convention of a rule to replace the faculty for the diplomat to grant asylum by an obligation which he assumed *vis-à-vis* any individual who might need such protection (Franchini Netto, *O asilo diplomático e o costume internacional*, Sao Paulo, 1939, p. 100). Consequently, it is not a mere toleration, which would moreover be incompatible with any codification if asylum were to depend upon the goodwill of each government. On the contrary, a European writer, Cabral de Moncada, has emphasized the future of this institution in international law in respect of the determination of the minor rights of the human person (*O asilo interno em Direito internacional publico*, Coimbra, 1946, p. 158).

12. To understand the true American spirit, it is necessary to take into account other elements which might easily pass unobserved outside the continent.

For example, the Convention of 1928 on the effects of treaties contains a clause which says that treaties will continue to have effect even if the Constitution of a signatory State is modified (Article 11).

Finally, it was the American nations which, for the first time in the world, directly and explicitly agreed that a majority of them be empowered to take decisions binding upon all. This majority was two-thirds, and applied in matters of great importance such as mutual assistance in case of aggression, but did not apply to armed collaboration which continued to depend upon the consent of each State (the above-quoted Treaty of 1947, Articles 8, 17 and 20).

13. It matters little that, in the question of recognition of new *de facto* governments, the collective action of American countries has not yet made it possible to arrive at a definite solution by means of preliminary consultations. In accordance with new trends and doctrines such as those of Estrada, Tobar, Larreta, etc., there is an attempt to demand a perfect and immediate application of democratic principles after any political change (Charles Fenwick, *The problem of the recognition of de facto governments*, "Inter-American Juridical Yearbook, 1948, Washington, 1949, p. 18).

At any rate, there can be no comparison between the two cases, for the need to establish and maintain good-neighbourly relations explains why certain formal conditions have to be accepted for the recognition of a government as, for instance, apparent stability,

the maintenance of public order, or respect for international undertakings.

But these conditions do not justify the sacrifice of all concern for justice and the safeguard of the dignity of the human person. Restrictions on the administration of justice in the political domain do not offend governments to the same extent as a refusal of recognition, even if the new government owes its existence to force.

That is why the Latin-American countries have so willingly accepted the consequences of asylum which, at first sight, might gravely encroach upon their sovereignty ; moreover, the reciprocity which is the basis of this institution deprives this measure, adopted by a restricted group of States, of any aspect of intervention. It was therefore considered preferable to accept, even at the price of impunity, a privilege which was tantamount to a sort of amnesty having a general application in which any personal suspicion of the members of the judicial system of such a country was removed.

Even admitting that the intention at Havana in 1928 was to put an end to abuses, there is no evidence to prove that this purpose was achieved, in view of the imperfect character of the texts which were adopted at that time. Moreover, little value can be attributed to preparatory work, especially to such complicated work as that accomplished by a very large assembly (Max Sorensen, *Les sources du droit international*, Copenhagen, 1946, p. 215). On the contrary, it must be admitted that precisely after that date the institution of asylum assumed great importance, a phenomenon which has been often observed in connexion with articles of codes which, in response to the pressure of urgent social needs, frequently have effects which their authors had not foreseen.

All the foregoing considerations have clearly characterized the attitude adopted by the Respondent, as we shall see later on. In this connexion, we must examine frankly the clause which was clumsily introduced into the Havana Convention and which has given rise to so much misunderstanding. It is evidently that clause which refers to the "time strictly indispensable for the refugee to ensure in some other way his safety". Does this clause concern the State granting asylum ? But if it be concluded that the territorial State may reject the qualification and especially refuse to grant the safe-conduct, then the rule would have no meaning. Indeed, who would be responsible for the delay ? An enquiry would have to be opened in order to appraise the conduct of each State, and the conclusion might be that the clause had been violated but that no one was to blame for this violation.

In the circumstances it is not apparent how this text is conclusive, especially in the present case, where the reply to the three notes from the Applicant was despatched 48 days after the first note was sent.

But it would be an exaggeration to consider that, by virtue of that clause, the refugee must be surrendered to the local authorities at the first opportunity as if this represented a guarantee for his security comparable to that constituted by the diplomatic premises.

14. In support of almost all of what I have just stated, I could rely on a series of articles which are dated 1945 but which were published between January 1947 and August 1948 in the *Revista peruana de Derecho internacional*, the organ of the "Sociedad peruana de Derecho internacional" (Vols. 7 and 8, Nos. 23 to 28), by one of the directors of this review, M. Alejandro Deustua A., a summary of which may be found in the Yearbook of the Pan-American Union for 1948 (Washington, 1949, p. 219).

Let us briefly recapitulate the principal points : relying upon the definition of asylum of the outstanding international jurist Alberto Ulloa, the author proves the weakness of the arguments invoked by European authors, particularly those which refer to the reservation of sovereignty and the authority of local courts. In considering the prevailing opinion in his country, the author mentions as the sole exception one writer, M. Wiese, all other writers having adopted American continental practice ; he then examines the institution in the light of all the American conventions without exception, and points out that the life of the refugee is not the only human value that is protected by asylum, the purpose of the latter being also to preclude the possibility of unjust punishment ; the notion of danger is then carefully examined with a view to ensuring that the refugee will be free to choose the precise moment when he needs security, it being also left to the discretion of the diplomat to appreciate this necessity ; then the author points out that in principle the local government does not oppose this choice and, without disputing the urgency of the protection, rather seeks to deny the political character of the offence attributed to the refugee. Continuing what becomes almost a prophecy of future events, the author seeks to dispel the confusion between asylum and mere refuge, showing that such an institution cannot subsist without the recognition of political offences. And finally, after having emphasized that the qualification must not appertain to an interested party but rather to a neutral authority, such as a foreign agent, the author goes on to examine certain other interesting considerations relating to the institution which he has examined from its historical origins ; he reaches sixteen conclusions of which the fourth leaves the character of urgency on one side and the ninth recognizes that the State granting asylum has the faculty to qualify the offence.

15. Two particular aspects of asylum must be emphasized : the immutability of the conditions as viewed at the time asylum was granted and the irreparable character of the consequences which the withdrawal of asylum would imply for the refugee.

Whether asylum is considered as a simple option, as a humanitarian act, or as a veritable right, once it has been granted, it lays an obligation upon the State which granted it. It is true that the refugee runs a grave risk if the doors of the legation remain closed to him, but if he succeeds in being admitted he acquires the assurance that he will not be surrendered to the territorial State, except on serious grounds.

The two foregoing observations make it possible to eliminate all confusion between the grant of asylum, which produces instantaneous and final results, and the vicissitudes which may subsequently arise before the situation is resolved.

A radical change in the situation makes it indeed possible to conceive of the departure of the refugee, not in order to surrender to the police, but in order to return to his domicile with all due peace of mind ; for the intervention of new factors, without in any way affecting the regularity or irregularity of the asylum granted—which remains unchanged—might result in the elimination of the two reasons which gave rise to asylum, namely danger to life and liberty, on account of previous political activity. In such cases, which are not very rare, the objection of the refugee would be proof of a mere abuse which is never supported by law, and the rule *rebus sic stantibus* could then apply. Apart from this exceptional situation, the refugee cannot be surrendered to the local authorities without his free consent.

The grant of asylum gives rise to effects *ex tunc* and not *ex nunc* ; in fact, in this latter case the territorial State could always defer the issue of the safe-conduct or any other solution by agreement in the hope of laying hands on the refugee following a change in the *status quo ante*, for political events frequently take quite unexpected directions and there has even arisen a case of exchange of residence between the government and a diplomatic mission.

In the present case, it has been seen, for instance, that the Minister who had brought the charges against the refugee approached that same Ambassador three weeks later, and the latter, being above party considerations, granted him his protection.

The grant of asylum thus constitutes an admitted fact the circumstances of which must be fixed, once and for all, *ad perpetuam rei memoriam*, in view of any appreciation which may have to be made in the future. It is entirely independent of its maintenance for a necessarily indefinite period once it is recognized that the determination of its duration does not depend exclusively on the person granting it. Just as in all obligations, whatever their nature, the formation and effects of a contractual obligation cannot be confused with the manner in which it is terminated. As for extradition itself, it is necessary to consider a definite moment in order to appreciate whether the accused should be surrendered, and subsequent modifications cannot influence this appreciation ; on the contrary, efforts are made to ensure that the situation of the extradited person is not aggravated by other charges.

16. The Respondent has understood this problem perfectly. This is apparent from the clarity with which he has formulated the counter-claim *in verbis*: "the grant of asylum by the Colombian Ambassador was made in violation....".

But later on, the theory of the separate stages, which was still accepted at the time of the oral statements in order to explain an objection to a certain mode of terminating the asylum, was replaced by the theory of the continuity of asylum as a whole.

This change, however, has required a formal modification of the original claim; this modification, which was submitted with the consent of the agent of the Respondent, consisted of adding to the idea of grant that of maintenance.

Such a claim has been considered to be superfluous, but it was necessary to accept a prolongation until August 31st, 1949, of the circumstances constituting urgency, a concept which by its very nature is transitory, and this observation is also superfluous in view of the conclusion that asylum was irregularly granted on January 3rd.

In my opinion, this application of the theory of "continuous" asylum is even less defensible in that it even contradicts the ordinary meaning of the verbs used in this connexion ("*octroyer*", "*accorder*" and "*concéder*").

As has already been pointed out, it is difficult to draw conclusions from a delay which results from the very nature of a divergence of view, especially if the parties have reached an agreement on the means of solving the dispute, in a regular manner, thus rejecting on both sides the effects of a delay which had already occurred at the time the agreement was concluded, as well as the effects of any delay which might result from the subsequent procedure. The truth is that the parties have in this way mutually decided to remove any consequences which might arise from such a delay.

It is worthy of note, finally, that the draft approved at Bath used the conjunction *or* to separate the phrase referring to the grant of asylum from that which referred to the maintenance of asylum, instead of linking them by the conjunction *and*.

17. I shall not dwell on points which have become of minor importance after the modification of the case.

Thus, as regards qualification of offences, it was seen that the respondent State itself, invoking a precedent proper to its own practice, considered that it was for the State granting asylum to qualify the act which led to the asylum. That declaration would be sufficient to set aside the statement made incidentally during the proceedings that the Respondent had not ratified the Conventions of 1933 and 1939, because of an aversion from the right of qualification. But a host of other reasons would explain the omission—very

frequent in Latin America—to ratify a convention which also contained other provisions. It would be necessary to put forward some material evidence to establish this aversion. Moreover, in 1939 it did not then exist, since the delegates of the Respondent had renewed the signature already given to the same effect in 1933.

It is unnecessary to argue *ad hominem* because, in my opinion, the clause of unilateral qualification is self-evident and even constitutes the only means of settling such a difficult problem. It thus happened twice at Montevideo that previous practice was restated and that the texts merely proclaimed anew what was already accepted practice at the time (H. Accioly, *op. cit.*, para. 1171/A); a simple expression in the preamble recording the undisputed fact of a material modification could not act as an obstacle in the path of a reality recognized without exception up to 1949. This is a much more natural explanation of why four of the States which were signatories in 1928 considered it unnecessary to join by a mere declaration in the restatement of the existing law.

The decision of the territorial State would bring into play a practically arbitrary factor and the conditions of a prior agreement would be incompatible with the prompt action required. On the contrary, the conflicting solutions regarding the two kinds of offences—respect of asylum and surrender of the refugee—and the very general reference to the domestic law of the country granting asylum would amply justify the view that the Treaty of 1928 assumed the same preference for exclusive qualification which fourteen States later expressly accepted (eleven in 1933, plus Nicaragua, which had not then deposited the ratification which had been given, and two in 1939) and which six others accepted in practice.

It is thus seen that the fact in no way offends against national sovereignty, by virtue of the reciprocity and of the purposes in view, namely, the protection of human rights against the contingencies of political life.

18. The qualification of asylum must not only be unilateral but also stable, as has already been seen above.

What is involved here is not a provisional qualification or a mere question of effectiveness, but rather a necessary consequence of the normal functioning of asylum as understood in Latin-American practice.

The conclusion reached on the nature of qualification cannot, however, attribute the value of *res judicata* to a unilateral decision of the country of asylum, even if this qualification should assume a definitive character. This qualification is not unattackable and is subject not to the ordinary revision of facts in each case, but,

in exceptional cases, to a sort of appeal such as the *recours en cassation*, in the event of manifest violation of international law. Obvious abuse and misuse of powers may occur in the grant of asylum, in which case international law will intervene—as would municipal law—to suppress any arbitrary action by specific means for the peaceful settlement of disputes. In fact, reference to such means may be found in certain treaties (Treaty of Montevideo, 1939, Art. 16).

19. As regards the obligation to grant a safe-conduct without reservations, I agree in principle with the opinion of the majority of the Court, although this solution is entirely independent of the problem of qualification. It suffices, in this connexion, to recall that asylum may have been regularly granted and yet the territorial State may refuse to issue a safe-conduct for political reasons.

It is true that current practice has developed in the direction of the initiative being taken by the State of refuge, but a fundamental psychological element should here be taken into consideration. In order to respect asylum a State will yield, thus curbing its wishes and waiving its interests, thereby showing its obedience to a compulsory rule. But it is impossible to find here evidence of the recognition of any obligation, even reluctantly fulfilled.

Indeed, the easy grant of a safe-conduct coincides with the interest of the State. It consents to the departure of a dangerous individual, capable of creating difficulties, even though isolated in a diplomatic residence and subject to severe restrictions, for the material obstacle would be quite insufficient to control the excesses of an unruly mob, should such a case arise.

This attitude also shows the conviction on the part of the territorial State that it will not be able to punish the refugee, except after his departure and by means of a request for extradition.

But in some cases, on the contrary, the territorial State may have a reasonable interest in preventing the departure of the refugee, because of the greater danger he might cause to public order, as for instance by joining insurgent groups inside or outside its boundaries.

By virtue of direct negotiations or the mediation of a third State, it may be possible to arrive at a conciliation safeguarding the interests of the country, by means of restrictions which in fact have already been adopted in several conventions or drafts (Pessôa, 1912, Draft of the conference of jurists in Rio de Janeiro, 1927), and which recall, moreover, that asylum should not bestow unfair advantage on one of the opposing factions. It is quite natural, therefore, that with or without the guarantee of the State of refuge the refugee should undertake not to take up arms, or establish his residence near the frontier, as otherwise his unconditional departure might be most detrimental to the State.

20. In cases of asylum and non-extradition of political offenders, there is a degree of constraint upon the State which is thus unable to apply its criminal law—the obstacle being either the flight of the criminal or his entrance into a diplomatic residence.

This negative aspect should be emphasized, because it is a serious thing to put a State under an obligation to perform a positive act, such as the issue of an exit permit, the psychological repercussions of which are most serious.

In this connexion it is also necessary to admit that the State is free to discriminate and to decide on the danger which would result from the departure of each refugee individually, without such decision being subject to criticism.

Reservations made by the territorial State are even more understandable when that State considers that asylum resulted from an “abuse of right”. This constitutes a kind of reservation, comparable to the *exceptio non adimpleti contractus*, which consists in the postponement of the delivery of a safe-conduct until the dispute has been settled, instead of permitting immediate departure, even with the reservation of an ultimate request for extradition, especially when, in the country of refuge, the latter measure is left exclusively to the decision of the judicial authorities, thus depriving the obligation which the government might assume in this connexion of all its effectiveness.

21. Let us now examine the present case.

Following the grant of asylum to M. Haya de la Torre, the countries concerned embarked upon a diplomatic correspondence which finally resulted in a very clear legal dispute, in which the Respondent, while referring exclusively to the Conventions of 1911 and 1928, disputed the legitimacy of asylum on the sole grounds that the refugee was not a political offender but a common criminal previously accused of acts of terrorism. No one has claimed that the element of urgency required by the Convention of Havana was absent, and yet three months had already elapsed since the main fact with which the leaders of the party in question were charged, namely the military rebellion in the port of Callao on October 3rd, 1949.

Was this due to error or oversight? No, for in reply to the communication of January 4th, 1949, the first letter of the Respondent began with a reference to the rules of Havana, including the circumstance of urgency, without raising any objection in this connexion.

This was tantamount to a full recognition of the fact that asylum had been properly granted, for it was unnecessary to begin a painful discussion on any other point. Such an attitude further stresses the manner in which the institution of asylum is viewed in

its natural surroundings. The arithmetical aspect of the duration of this asylum did not attract the attention of any local jurist.

It is in this spirit that there arose a single dispute or controversy of crystal clarity, the main points of which have been indicated several times already. It is true that the two Parties did not agree on the terms in which the dispute should be submitted to the Court, but there is nothing to show that the lack of such agreement was due to a question which did not arise at the time; on the contrary, the divergence noted referred to the question of criminality, the Applicant preferring to confine himself to the two abstract problems—namely, the right of qualification and the obligation to deliver a safe-conduct—and the Respondent hoping to invoke the existence of a prior accusation of common crimes.

In any case, the Act of Lima was concluded in order to submit to the Court the dispute “which *arose following* a request for the delivery of a safe-conduct....”, etc. Thus, on these two occasions, namely January 3rd and August 30th, 1949, the dispute was confined to definite points, in accordance with consent of the Parties repeatedly expressed.

But, removed from the environment in which it arose, was understood and defined, the case began to undergo the effects of a process of change, at first discreet, but which finally resulted in completely transforming the dispute.

22. Thus the counter-claim has added to the complaint of violation of Article 1, paragraph 1, of the Havana Convention, that of violation of Article 2, paragraph 2 (“First”), of the same instrument.

From the antecedents of the case and in the absence of a precise explanation on the developments which that paragraph may permit, it could readily be imagined that, far from laying down a new ground, it referred rather to an alternative arising out of the previous discussion which has retained the same tenor in the subsequent development of the legal proceedings until the last oral statement, constantly recurring as a *leitmotiv* in the case: the charge of common crime made in respect of acts of terrorism to a certain extent tends to deprive such acts of their political character.

It could therefore be admitted that after such express declarations (see Memorial, Counter-Memorial, Rejoinder and oral statements) it would automatically follow that, once the existence of prior charges of common crimes has been disposed of, the grant of asylum to a mere politician in distress or to a political criminal whose right of asylum the Respondent has in principle always acknowledged, would appear to be perfectly regular.

In other words, if the Court finds that the refugee was not accused of a common crime prior to the grant of asylum, the asylum must be upheld.

A very careful scrutiny of the Pleadings was necessary in order to discover in two or three hidden references to urgency (Counter-Memorial, Rejoinder) a new and even subsidiary requirement for the acceptance of the asylum. I might even go so far as to say that the clarity of the reference which precedes the submission of the counter-claim is far from satisfactory (see Counter-Memorial).

But the question was presented in an entirely different form in the oral rejoinder, in order to make it possible to state to the Court that it was free to consider or not the question of the qualification of the offence, which question the Respondent at that time considered to be outside the debate and the "trend which it had assumed", for the Respondent was mainly concerned with the circumstance of urgency connected with a material and transitory danger.

The centre of the case was thus displaced ; all concern with common crimes, which had hitherto been the only grounds for not recognizing the asylum, disappeared ; and the question was then raised of the competence of the Court to decide on problems which had been raised only in the counter-claim.

I cannot, for my part, remain indifferent to such a practice, which is reminiscent of the Anglo-Saxon concept of *estoppel*, nor could I accept that the onus of proving urgency should, at the eleventh hour, be placed upon the Applicant who, in respect of the counter-claim, became the Respondent, when, in the absence of any objection regularly presented on the point of urgency, the procedural rule should be applied according to which facts not disputed by the other party should be assumed to be true.

In any case the question of proof has no importance whatever in the present case, for the documents submitted by both Parties, with different ends in view, are more than sufficient to prove the facts which are necessary for the Court's decision in this case.

23. In my opinion the Court was not even competent to decide upon a dispute which did not exist at the time of the conclusion of the Act of Lima, whereas that Act described a dispute which had already arisen and had been clearly defined. Under the terms of the Protocol signed in Rio de Janeiro by the Parties on May 24th, 1934, a direct preliminary diplomatic discussion would also have been necessary before a question could be brought before the Court.

It was considered preferable to confine the discussion to a tacit agreement of the Parties since, in the oral submissions, the Applicant did not again refer to the competence of the Court to consider what he called the first claim, whereas he referred to its lack of jurisdiction with respect to the second counter-claim (see Reply and Oral Statements).

This reason, although supported by the jurisprudence of the Permanent Court, is very weak. First of all, I would prefer to this

jurisprudence the dissenting opinion submitted among others by Judge Max Huber (P.C.I.J., Series A, No. 15 : Judgment No. 12, p. 53). Furthermore, this was a case of a lack of jurisdiction *ratione materiae* which the Applicant has in fact recalled in connexion with the duty of the Court to examine *ex officio* the two requirements laid down in Article 63 (jurisdiction and connexion).

But there is yet a more important circumstance ; it is that the modification to the essential basis of the claim was pleaded at a time when the other Party was no longer able to reply, and that condition was in any case required by the Permanent Court in connexion with a simple modification of submissions (M. O. Hudson, *The Permanent Court of International Justice*, New York, 1943, page 576, and note 25).

In any case, instead of seeking the consent of the Parties in the weak measure of a tacit or a *contrario* renunciation, I would prefer to seek it in a solemn document such as the Act of Lima, which is at the basis of the whole case, and limits the jurisdiction which was conferred upon the Court only by the will of the Parties and which the Court must observe *ex officio*. (Viktor Bruns, in *Recueil des Cours*, Vol. 62, p. 603.)

24. The counter-claim, and especially the importance so unexpectedly assumed by the circumstance of urgency, has brought about a considerable modification in the case, removing it from the field of simple juridical discussion to a plane where the political aspect is of paramount importance. The intention has clearly been to "burst an abscess".

The Applicant, who had displayed extreme reserve throughout the diplomatic discussions, refraining from appraising the facts (see Rejoinder) and relying on the general aspects of the law, was forced to set forth the existing political motives on the first occasion which presented itself after the Counter-Memorial, namely in the Reply.

The Court has rejected almost unanimously the contention concerning the existence of a common crime at the time at which asylum was granted. This is the complete rejection of the view maintained by the Respondent up to the date of his Counter-Memorial, a view which was relegated to a subsidiary position only on October 9th, 1950.

But it has been argued that another provision of the Havana Convention was violated because, within three months after the principal event, there was no urgency and because on January 3rd, 1949, there was not sufficient real danger to justify the grant of asylum.

25. But even up to that time, several diplomats continued to grant asylum, without opposition, to a great number of persons, and this circumstance further leads to the rejection of a strict interpretation of the word "urgency" in relation to time, according

to which the period should only consist of an unspecified number of days.

It is very difficult to adopt an interpretation of a text without regard to the special circumstances in which it was drafted ; these circumstances are both numerous and varied.

Sometimes even the dates are lacking which would permit the time to be calculated. It is also necessary to take into account the difficulties of reaching a legation, for the first concern of the police in such cases is to watch the premises of diplomatic missions in order to prevent suspects from reaching them. In such instances a refugee is forced to wait a long time for a favourable opportunity of passing through unnoticed, generally at night.

It will be noted in the present case that the first definite indication of an accusation of political offence was the summons which appeared in the official gazette of November 16th, 1948 ; the Ministerial letter to which we shall refer later had remained secret.

But could an anticipated request be willingly agreed to by a diplomatic agent or, on the contrary, would he reject it on the ground that it was premature ? It would be very difficult to appraise such a situation in such different conditions of time and place with a view to understanding the hesitation which might arise in the mind of the fugitive.

It will be argued that there had existed since October 4th, 1948, a decree outlawing the Aprist Party, the recitals of which contained clear references to the intention to punish the moral authors of acts contrary to the public order of the nation, in spite of the fact that the programme of that party had been known for a long time and that many of its members had belonged to the Congress or the Government. But the constitutional validity of this act was none the less open to judicial appreciation, since the Peruvian Constitution remained in force before October 27th with only the restrictions pertaining to a state of siege. It will be sufficient to note that the said decree was based on Article 154, No. 2, of the Constitution, which attributes the maintenance of public order to the executive power, without however authorizing that power to violate the Constitution or the laws.

Other circumstances could also be considered in appreciating the conduct of the Ambassador, as well as that of his Government, which subsequently had to support him. First of all the letter of the Minister of the Interior of October 5th, 1948, denouncing crimes ; this letter was of a clearly political nature, and although it remained secret, produced visible results such as the sequestration of his assets and newspapers ; then the successive renewals of a state of siege, the last of which occurred the day before the asylum was granted, showing that the fear of social disturbances had in no way disappeared ; and, finally, the decree-law of November 4th, to which we shall refer later.

On the other hand, there could remain the danger of private attacks, for instance from personal enemies, who might evade all precautions taken by the police guard.

26. But indisputable proof that the decision of the Ambassador was not abnormal, unlawful or hasty, is to be found in the profound change in the circumstances during the three months' period which elapsed between the two facts of rebellion and asylum.

It is most regrettable to be obliged to examine the merits of political facts, but there is no other means of considering the problems raised by the counter-claim, and even then we are bound to argue in a hypothetical and retrospective manner, since we are dealing with a situation already past.

The success on October 27th, 1948, of another revolutionary movement aggravated the situation of the refugee, especially if he is held responsible for the distribution of the pamphlets that have been submitted to this Court.

It may perhaps have been considered that the punitive action instituted by the constitutional President against the Aprist Party was insufficient, and it has been stated, on the other hand, that the new Government did not consider itself bound by the policy of the preceding Government in a question such as the qualification of asylum.

It is important to recall that a Military Junta of the Government was set up or, as is stated in the Judgment, "seized the supreme power". Such a situation was incompatible with a real constitution, and in the first place with that particular Constitution which had been violated by the installation of this new organ. The limitations of power which those who govern by virtue of an act of force impose upon themselves are always deceptive, since they proceed from a will that can be changed at any moment. The decree of November 4th, for instance, is founded on the powers which have been conferred upon the Junta without its having been thought necessary to give the least explanation concerning the source of such powers.

Thus, the monthly renewal of a state of siege, which normally is confined to the suspension of certain constitutional guarantees, has but little significance in the light of the unlimited scope of the powers which the *de facto* government could assume in any case; the said decree of November 4th, providing the death penalty and simplifying the legal procedure in cases of political crimes, is clear proof of the force of a practically unlimited power.

It is therefore possible to admit in principle that a foreign diplomat could have serious doubts concerning the functioning of ordinary justice. For the dismissal, under various pretexts, not only of military judges, but also of permanent judges even

belonging to a Supreme Court, is not an unusual possibility in a country which might find itself for any length of time deprived of its normal constitutional régime. Such a possibility need not seem surprising in the light of a famous attempt which was made to change the majority of a court in one of the greatest democracies of the world, although the object in that instance concerned only the fundamental interests of the country and consisted in transforming the economic system of the State.

It matters little whether the decree-law of November 4th was not actually applied in the proceedings against the subordinate accused, for, at any time, another act based upon the same unlimited powers could have, by a mere stroke of the pen, given an entirely different course to these proceedings in a manner which could not have been foreseen in so unstable a situation.

Thus, a diplomat placed in similar circumstances could not be certain that the old and deep-rooted cultural tradition of the country to which he was accredited could be a sufficient obstacle to a possible retroactive application of a new law, the intimidating effect of which was undeniable.

It is true that a declaration made before the Court on June 15th and October 2nd, 1950, by a constitutional government deserves absolute respect and constitutes a guarantee against the future application of the exceptional law in case the refugee were to stand trial, although the task of applying a law appertains to the judicial and not to the executive authority. But, in any case, such a declaration is irrelevant to the situation, as it existed at a time when it was considered easy to abandon the policy of the preceding constitutional government (see Memorial).

The observation made by the Respondent that the Applicant had adopted similar laws relating to the aggravation of penalties and the simplification of procedure in cases of political offences is not an argument in support of his case. On the contrary, if a constitutional government can, in a simple state of siege, exercise such essentially legislative functions by virtue of particular provisions in its constitution, it can readily be imagined what might happen in a case where such provisions did not exist or were only partially applied at the discretion of the *de facto* authorities.

The Ambassador was able to note that proceedings were to continue in the absence of the accused pursuant to a summons published officially by order of the military Examining Magistrate (see Counter-Memorial). Could he foresee that this penalty would not be imposed by virtue of a legal provision prohibiting proceedings *in absentia*? The exact terms of this provision are not yet known to the Court and would need explanation especially as regards the significance of the references in the last part of the decision reproduced in the Rejoinder. It matters little that a moderate judgment was delivered without haste on March 22nd, 1950, against those of the accused who put in an appearance ;

for it also proclaims in an unduly anticipatory manner the main responsibility of the leaders of Apra for events from which they were to derive personal advantage (see Rejoinder).

27. In fact, there is only one way of appraising any question of responsibility whatsoever, and that is to return to the conditions of place, time and environment in which the events took place, although it is possible to hesitate between a subjective and an objective appreciation by adopting, in the first case, the point of view of the accused and, in the second, an abstract attitude comparing the criticized conduct to an ideal conduct which is the well-known criterion of *bonus paterfamilias*.

The approval given by the Government to the action of its representative has not changed the aspect of the situation nor displaced the facts a single day after January 3rd, 1949. It would therefore not be reasonable to set against the facts, which occurred at that time, a subsequent version which has been constructed two years after the events and at a place far removed from the scene of those events.

The sole purpose of the diplomatic discussion was to achieve a re-consideration of attitude in the light of reasons going as far back as the grant of asylum. These negotiations did not succeed, and the problem has remained in the state in which it was referred to the Court by the text of the counter-claim.

The dispute remained the same, and it was impossible to escape from the following dilemma: either the violation is admitted, in which case the Ambassador was wrong in the light of the only circumstances that may be taken into consideration, or else he was right, in which case there can be no question of violation or even, in an attenuated form, of lack of conformity.

If this harsh alternative is abandoned, then the only course is to enter the field of arbitrary action, for there can be no question of passing judgment on the personal conduct of the Ambassador, or whether he committed an error or not, whether such an error was excusable, or whether he should be acquitted.

28. There are other elements in the case which the Court cannot fail to consider, especially as regards the change which has allegedly occurred in the situation since January 3rd, with a view to deciding whether the surrender of the refugee would make it possible to ensure his safety.

Thus it will be seen, apart from the letter of the Minister of the Interior of October 5th, 1948, that:

(1) on May 25th, 1949, the prosecutor denounced the refugee for participation in the crime of homicide on the count of second-degree instigation and on the basis of mere presumptions (see Counter-Memorial);

(2) on September 7th, 1949, another enquiry was opened into the forgery of a document which was to benefit the party and the refugee (Counter-Memorial) ;

(3) on September 13th, 1949, the prosecutor brings a charge against the refugee for the crime of usurpation of authority (see Counter-Memorial) ;

(4) on September 21st, 1949, an enquiry was opened on the count given above under No. 3 (see Counter-Memorial) ;

(5) on December 5th, 1949, the judgment accepts in a preliminary manner the accusations of homicide and offences against the administration of justice and against the good name of the State (see Counter-Memorial) ;

(6) on December 31st, 1949, an Examining Magistrate was appointed who on that same day ordered the opening of two enquiries on counts given above in No. 5 (see Counter-Memorial);

(7) on April 22nd, 1950, the enquiry into offences against the good name of the State and the administration of justice was completed and an order issued for the application of the provisions of the law against the defaulting defendants without the scope of such penalties being known (see Rejoinder).

All these facts have made it possible to argue during the oral proceedings that "the municipal courts [of the country of which the refugee is a national] consider him responsible for the assassination of Graña and for crimes against the administration of justice and against the good name of the State, and it is on these counts that the proceedings were instituted" (see Rejoinder).

29. My conclusion that both the main claim and the counter-claim should be dismissed could obviously give rise to the criticism that the deadlock would continue after the twenty-two months which have already elapsed ; but the two Parties, whilst having urgently appealed to the Court to resolve the dispute, have not furnished it with the means to arrive at an independent solution as would have been possible under Article 38, paragraph 2, of the Statute of the Court (judgment *ex æquo et bono*). On the contrary, the Parties have limited the action of the Court by indicating only the legal data applicable to the case.

But, if the fundamental points were finally settled as suggested in my opinion, i.e. if the Respondent were not obliged to deliver a safe-conduct and yet were not authorized to require the surrender of the refugee, this situation would be conducive to an agreement compatible with the requirements of security of the territorial State and the individual rights of man, by virtue of conditions

relating to the protection of the fundamental interests of the country and the dignity of its citizens.

It would therefore not be possible to speak of life imprisonment or even indefinite imprisonment, for the question of the asylum would be easily solved as it was in all other cases where a dispute arose.

30. In the circumstances, if the principal Applicant is dismissed by an admission of the counter-claim, I wonder whether the Respondent, who up to now has not demanded the surrender of the refugee, will not be induced to do so in accordance with the reservation made in that connexion (see Counter-Memorial). I wonder what the attitude of the principal Applicant may be if such a claim were made, or even whether, in the absence of any request, the Respondent would not compel the refugee to leave the Embassy. I wonder whether both sides will not be led to admit that the surrender of the refugee to territorial justice is the only solution. If that were so, then it would happen that after hundreds of cases of asylum, we might witness, and for the first time—at any rate as regards Latin America—the surrender of a political offender to territorial justice, whether civil or military. I wonder if, in that event, that justice would try him not only for the political offence with which he is charged, but even for common crimes, applying to him that curious Article 248 of the Military Code of Justice which provides that, when the real authors of related crimes are not known, it is permissible to punish the principal leaders of the rebellion. Such results appear to me to be contrary to the idea of asylum to political offenders, which prevails in Latin America.

(Signed) PH. AZEVEDO.