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Problems with the Asylum System and Their Solutions: Take Case of Colombia v. Peru on the Right of Asylum as an Example

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Abstract: The right of asylum in international law refers to the right of citizens of one country to enjoy asylum in another country, and in the interaction of sovereign states, the right of asylum is usually applied in the context of a citizen of a country requesting to enter another country or having entered another country for political reasons and in an emergency, and is approved by the government of another country. For a long time, there have been debates on the definition, establishment conditions and examination procedures of the right of asylum, and there have been many differences in the determination of the application of the right of sanctuary in practice. Based on the study of the Colombia v. Peru asylum case and the literature related to the right of asylum, this paper uses the comparative research method and the case analysis method to discuss the differences between the academic research on the right of asylum in the past and the present, and analyzes the problems and challenges of the asylum right system in the current international environment based on real cases, and finally provides suggestions for clarifying the criteria for determining the right of asylum in the form of a convention and formulating strict review procedures.

Keywords: right of asylum, sovereignty, order, review process

1. Introduction

In October 1948, there was an unsuccessful coup d'état in Peru. The coup d'état Aya della Torre was criminally prosecuted. After three months in hiding, he fled to the Colombian Embassy in Peru and sought refuge. The Embassy of Colombia considers that the Embassy has the right to unilaterally determine the criminal nature of the applicant and grant asylum, and requested Peru to guarantee the safe departure of Aya della Torre. Peru considered itself exempt from the so-called "extraterritorial asylum" rule and demanded that Colombia surrender the prisoner. The dispute arose between the two countries and in August 1949 the Lima Agreement was signed, referring the dispute to the International Court of Justice for settlement. The International Court delivered three judgments in this case, the first two known as the "Right of Asylum case" and the third as the "Aya della Torre case" [1].

More than 70 years have passed since the case, the international community is constantly evolving, and the dispute over the right to asylum is raging. Based on the study of the Colombia v. Peru asylum

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case and the literature related to the right of asylum, this paper will discuss the comparison of academic research on the right of asylum and the problems and challenges of the asylum system in the current international environment. Then provide some suggestions for solutions.

2. An Overview of the Right of Asylum

2.1. The Concept

The right of asylum refers to the right of a citizen of a State who, for political reasons, requests permission from another State to enter that State for residence or has entered that State, requests permission to stay in that State, and is authorized by the Government of that State and thus enjoys asylum. In general, national law determines whether a person has the right to asylum [2].

Asylum is linked to the political principle of non-extradition but broader than non-extradite, allowing the people who are sheltered to settle in the territory of the State in which asylum was granted.

Academically, asylum is generally divided into territorial asylum and extraterritorial asylum. Territorial asylum is the usual meaning of asylum. Extraterritorial asylum means that the state grants asylum to foreigners in its embassies, consulates, warships, military aircraft or military bases. The meaning of diplomatic asylum remains controversial. For example, the Soviet scholar Krimenko argued that diplomatic asylum "means giving anyone the possibility of escaping persecution for political motives, on the premises of diplomatic or consular offices and on board foreign warships." Some scholars believe that diplomatic asylum is a kind of extraterritorial asylum, which only refers to the asylum granted by the state in its own embassies and consulates abroad. Diplomatic asylum arises from the general provision of the inviolability of the premises of embassies or consulates [3].

Diplomatic asylum is the granting by a State of asylum to an asylum seeker at its embassy or consular premises abroad or on a public vessel. Diplomatic asylum arises from the inviolability of embassy premises. Article 22 of the Vienna Convention on Diplomatic Relations provides for the inviolability of embassies. Foreign non-commissioned officers should be protected from the general public and from official abuse. Neither the Vienna Convention on Diplomatic Relations nor the Vienna Convention on Consular Relations deal with the granting of asylum by embassies and consular premises, except that article 22 provides that the premises are inviolable and that officials of the receiving State may not enter the premises of the embassy or consular post without the consent of the embassy or the head of the consular post. These rules on the inviolability of embassies raise the question of diplomatic and consular asylum [4].

2.2. Conditions under Which the Right of Asylum Is Established

2.2.1. An Analysis Based on the Judgment

(1) In its Judgment of 20 November 1950, the International Court of Justice held that "extraterritorial asylum" differs from territorial asylum in which unilateral determination of the criminal nature of the asylum-seeker would violate the sovereignty of the place where the crime was committed. This is provided for in article 2 of the Inter-American Convention on the Right to Political Asylum, signed at Montevideo in 1933. But the clause is not binding on Peru, which has not ratified it. Colombia cannot prove that this rule has become international practice. The Court therefore rejected Colombia's claim to determine unilaterally the nature of the crime committed by the person being sheltered.

(2) With regard to the granting of guarantees of safe departure to asylum seekers, the Court considered that article 2 of the 1928 Havana Convention on Asylum imposes an obligation on the territorial State to grant guarantees of safe departure only when it requests the departure of asylum-

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seekers. This is not the case in the present case, and Peru is therefore not obliged to provide Torre with guarantees of safe departure.

(3) Aya della Torre, who took refuge in the Embassy only three months after being wanted, cannot be considered to have existed as an "emergency" within the meaning of Article 2 (1) of the Havana Convention, and the right of asylum granted to Torre by Colombia is therefore unjustified.

(4) While Colombia is not obliged to hand over Aya della Torre to the Peruvian authorities, his asylum should cease immediately. The Court considered that the parties could agree on a practical solution on the basis of "comity". It was not until 1954 that the two countries finally reached an agreement to let Aya della Torre leave Peru [5].

It can be seen that the International Court of Justice at that time held that the establishment of the right of asylum generally requires the following elements: (1) In terms of the right to decide: the country of asylum does not have the right to decide unilaterally. (2) There must be a temporal and actual emergency.

2.2.2. The Determination of "Absolute Necessity of Emergency" (In Light of Modern US Judicial Practice)

In deciding the Torre case, the International Court of Justice determined whether the timing of Torre's request for diplomatic asylum was "strictly necessary by necessity of necessity". The criteria for recognition are primarily two-dimensional criteria of time and order, including the time of asylum sought three months after the coup d'état and whether the local order was under judicial order or martial law at the time of asylum. It is noteworthy that the International Court of Justice adopted an objective criterion rather than a subjective criterion for asylum-seekers in determining these two criteria. In that case, the International Court of Justice held that the "imminent risk" required by Article 2, Paragraph 2, of the 1928 Havana Convention on Asylum did not include the risk of being subjected to normal retroactive effect of law. The Court stated that, in principle, asylum could not be used against justice except where the rule of law was replaced by arbitrary conduct.

Since the 1950s, the United States has begun to accept the concept of diplomatic asylum in practice, which is determined by the criterion that "asylum seekers are in a clear risk of public violence or of persecution claimed to have given political reasons." It can be seen that the United States does not fully agree with the value judgment that "Asylum can fight arbitrariness, but cannot oppose justice" as determined by the International Court of Justice, and its criteria of "danger of public violence" and "danger of persecution for political reasons" are different from the standards of "absolute necessity of emergency" set by the International Court of Justice in the Torre case, but have obvious ideological characteristics of their own.

In 1980, William T. Lake, legal adviser to the U.S. Department of State, made a statement on the issue when Monrovia asked about the U.S. government's policy on diplomatic asylum: In principle, the U.S. government does not recognize the use of asylum provided by its own embassies or consulates within the jurisdiction of a foreign territory. At the same time, there are exceptions. For reasons of human rights protection, a U.S. embassy or consulate may grant asylum to a person in two categories: temporary refugees; There is an imminent threat to a person's life or safety, such as being chased by a mob.

2.3. The Rules on the Right of Asylum in the Existing System of International Law

Diplomatic asylum, which means freeing asylum-seekers from the jurisdiction of the State in which he is wanted for criminal purposes or the State in which he is pursued, constitutes interference in the internal affairs of the receiving State, and does not occur exclusively within the territorial jurisdiction of the State granting asylum. In the era of extraterritoriality, embassy premises and public ships

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enjoyed inviolability as extensions of the territory of the sending State and as drifting territory. It consists of two aspects: first, in the case of embassies, embassies abroad are an extension of the territory of the sending State and are therefore outside the territory of the receiving State; Second, in the case of diplomatic agents, they are outside the territory of the receiving State as if they had not left the territory of the sending State, so a violation of the extraterritorial status of the Embassy and its personnel is a violation of the territorial sovereignty of the sending State. On this issue, the views of the International Court of Justice in the 1949 Colombia v. Peru Right of Asylum case are largely consistent with those now in public international law.

The conditions for the establishment of the right of asylum are defined by the international community differently from those at the time of the case.

Taking the Chinese Constitution as an example, according to the Chinese Constitution, the right of asylum must be established by the following four elements: (1) The subject is a foreign national who makes the application. (2) The reason for application must be for political reasons and not ordinary criminal offenders. (3) The Government has the right to decide whether asylum is granted. (4) Aliens granted the right of asylum shall not be extradited or expelled but, in principle, be treated as foreign nationals in general.

In addition, international jurists have developed some general theories on the issue of asylum:

(1) A State may exercise its right of asylum in its territory only on the basis of territorial superiority. Under international law, asylum is a territorial-based act. Since modern international law no longer recognizes the validity of extraterritoriality, and embassies and warships and merchant ships anchored in foreign ports are no longer considered part of or a natural extension of the territory of the sending State, the facilities may not be used as sanctuaries for any criminals. The right to asylum is derived by the State from its territorial superiority, and when a State's place of asylum does not have the superiority of territorial jurisdiction, it must give way to the territorial territorial superiority of another State. Thus, the current rule of international law is that embassies cannot harbour any criminal, including political prisoners, unless there is a treaty or established practice to the contrary or indicates. If a foreign embassy grants asylum in violation of this rule, the asylum must be surrendered at the request of the prosecuting State. But at the time of the case, asylum for political prisoners in other countries in many countries around the world, especially in South America, seemed to have become an international practice.

(2) The definition of "ordinary crime" and the question of "unilateral determination". In the Torre asylum case, the first of the claims submitted by the Government of Colombia to the International Court of Justice was that Colombia, the country of asylum, had the power to determine, for the purposes of that asylum, the nature of the crime against which the asylum-seeker was charged. For its part, the Government of Peru argues that the act of asylum violates Article 1, paragraph 1, of the 1928 Havana Convention on Asylum, which prohibits the safe haven of common criminals. In its judgment in the present case, the International Court of Justice held that "if the asylum State has the right to determine unilaterally the nature of the crimes committed by the asylum-seeker, it will cause damage to the sovereignty of the territorial State", and therefore cannot recognize such diplomatic asylum as a violation of territorial sovereignty. But it goes on to write that "except in a particular case its legal basis has been established... Moreover, in the absence of a rule to the contrary, the State of asylum and the State of territory must be recognized as equally entitled to determine the nature of the crime committed by the asylum-seeker. "At the same time, the International Court of Justice, in its subsequent examination of Peru's counterclaim, found that the Peruvian Government had failed to prove that Torre's involvement in military rebellion, which in itself constituted an 'ordinary crime' within the meaning of article 1, paragraph 1, of the 1928 Havana Convention on Asylum, and therefore dismissed Peru's claim. At the same time, the Court implicitly excluded Peru's claim as a

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local State to forcibly remove persons hiding in foreign embassies, arguing that such coercive action would adversely affect normal relations between the two countries.

2.4. The Issue of the Provisions on the Right of Asylum

2.4.1. No Uniform Standard

Since there is no unified international convention on diplomatic asylum or international practice, the objects of diplomatic asylum in various countries are also ambiguous. This leaves a lot of room for manoeuvre. Countries are free to regulate their own policies according to their own interests, make decisions that benefit them, and use them for high-sounding reasons. In the judicial practice of various countries, most countries advocate diplomatic asylum for refugees on the grounds of human rights protection.

Combined with practice, the international community outside Latin American countries has never stopped controversy over whether asylum seekers are "ordinary crimes". Based on their own national security, political needs and interest choices, different countries have tried their best to narrow the scope of "political prisoners" by means of domestic legislation. For example, in Chapter I of the Criminal Law of China, most of the crimes can be regarded as "political prisoners" in international treaties, but convicted and sentenced as ordinary crimes in domestic criminal law, so as to avoid the possibility of criminals seeking political asylum when prosecuted [6].

Latin America has recognized diplomatic asylum in long-standing diplomatic practice, such as the Chilean embassy in Moscow granting asylum to the German federal Honecker. The Chilean government's justification is that temporary refugees are granted asylum based on human rights protection and refer to them as "temporary guests" at embassies. "Temporary guests" are also the same as "temporary refugees" advocated by the United States. Although international law does not interpret the status of temporary guests of foreign embassies, there are a considerable number of States whose diplomatic asylum involves such refugees in their practice and protects them on the basis of this status. For example, on April 1, 1980, six Cubans drove a car into the Peruvian Embassy in Havana to request political asylum.

China has not only narrowed the scope of political prisoners, but in practice does not recognize refugees as asylum targets [7].

Paragraph 2 of Article 32 of the Chinese Constitution stipulates: "The People's Republic of China may grant the right of asylum to foreigners who come to seek refuge for political reasons. Although China is a party to the Refugee Convention, China's domestic legislation does not make detailed provisions for political refugees, only in the constitution. This makes refugee protection difficult to implement. Moreover, China does not recognize the status of refugees in judicial practice. For example, defining Indochinese refugees as returned Chinese diasporas does not help them solve identity problems; Those returned to North Korea are considered illegal immigrants rather than refugees; Kokang refugees in Myanmar, on the other hand, are considered not war refugees and do not provide asylum. This blanket rejection of refugee rejection is not scientific [8].

2.4.2. Violation of Sovereignty

From a legal point of view, a country's embassies abroad perform diplomatic functions, and the diplomatic privileges and immunities of embassies and their personnel are based on their duties. It is on this basis that embassies and their personnel enjoy special protection and respect. If a country's embassies abroad are used for asylum, it is contrary to the diplomatic functions of the embassy. Moreover, such conduct was contrary to the provisions of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. The embassy granting diplomatic asylum would face charges of violating the Vienna Convention on Diplomatic Relations. Article 41,

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Paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations stipulates: "The premises of an embassy shall not be used for purposes incompatible with this Convention or other rules of general international law, or with special provisions in force between the sending State and the receiving State."

At the same time, using the embassy abroad for asylum may also be accused of "interfering in the internal affairs of other countries." Because the object of diplomatic asylum is often political prisoners. Non-interference in the internal affairs of other countries is one of the basic principles of international law and was established in the 1970 Declaration on Principles of International Law. The principle makes it clear that interference, whether direct or indirect, armed intervention and all other forms of interference or attempted threats against the character of the State or its political, economic and cultural elements, are contrary to international law [9].

2.4.3. Lack of Screening Procedures

Some countries do not have a complete asylum system and legal system, resulting in the handling of asylum issues mostly relying on the form of special government offices. Legal asylum application and screening procedures play a crucial role in determining whether the right to asylum has been established. Once the asylum application and screening process is completed, it is much more efficient than the traditional political settlement process [10].

2.4.4. No Need to Surrender Asylum Recipients

While the international community does not recognize diplomatic asylum, it likewise does not mandate that embassies granting diplomatic asylum surrender the people who are sheltered must be surrendered. Therefore, in practice, once a diplomatic mission of a country agrees to grant asylum, regardless of whether both parties recognize the legal validity of diplomatic asylum, the receiving country has no right to take the asylum holder out of the embassy, which is also the helplessness of diplomatic asylum [11].

2.5. Solutions

2.5.1. Clarify the Criteria

The concept of the right of asylum had not been recognized by the international community for a long time since its inception because it contradicted the sovereignty of other States. However, in modern times, the international community has gradually developed a new way of saying that if a country uses the right of asylum for humanitarian reasons against persons from other countries suffering humanitarian distress, it can be an exception to the unrecognized right of asylum. The author believes that this statement should be considered from different aspects. First, standing idly by in the face of humanitarian distress in foreign countries is clearly contrary to humanity and international law. However, asylum can only be resorted to when there is a clear humanitarian crisis. If it were for the State exercising the right of asylum to decide for itself whether a humanitarian exception had occurred, it would inevitably lead to abuse of that exception. Second, even when a humanitarian crisis arises, the use of esophagus as a last resort to shelter the lives of others should be only expedient, and once the humanitarian crisis is over, the asylum seeker should be returned to another country.

At the same time, strict restrictions should be placed on such cases of taking asylum and clarified in the form of conventions. The restrictions imposed on the right of asylum should take into account factors such as time, order, sovereignty, and scope of asylum. If the time required for asylum to be carried out is shortly after the onset of the humanitarian crisis; Order requires the existence of an emergency and absolute necessity; In matters of sovereignty, the State claiming asylum must not

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infringe upon the sovereignty of another State; Asylum may only be sought in political prisoners or persons in humanitarian distress.

2.5.2. Clarify the Distinction Between Political Prisoners and Ordinary Crimes

It is generally accepted in international jurisprudence today that a distinction should be made between political crimes and ordinary crimes with regard to the right to asylum, and that asylum can only be granted for political crimes. If it is an ordinary crime, other States have no right to grant asylum to it, because it is a violation of the laws of other States or the sovereignty of other States. Clarity between political prisoners and ordinary crimes, then, becomes the key point of legitimacy for asylum.

Based on the above situation, the author believes that the concept of "political prisoner" should not be interpreted too broadly. In order to protect the sovereignty of countries and the ideology of the independence of different peoples to the greatest extent, the scope of "political prisoners" should be strictly limited. The author makes three suggestions for defining the scope of "political prisoner": (1) We should exclude the types of crimes listed in Article 1, Paragraph 2, of the Declaration on Asylum in the Territory; (2) Acts considered to be criminal under the laws of both the country of asylum and the country in which the suspect was originally located, and political prisoners are not established;(3) Based on humanitarian criteria. If the suspect acts contrary to ordinary international humanitarianism, he is not considered a political prisoner; Conversely, if the suspect's conduct does not violate humanitarianism and meets the previous two requirements, he may be considered as a political prisoner.

2.5.3. Define Asylum Review Procedures

In order to improve the efficiency of screening asylum recipients, countries that do not yet have asylum review procedures can learn from and learn from the experience of countries that have developed a sound asylum review system and develop asylum review procedures that are in line with their own level of development.

3. Conclusion

In the context of the uneven identification and handling of asylum issues in today's international judicial practice, this paper further explains the definition of the right of asylum and puts forward some suggestions on how to deal with the issue of asylum in judicial practice. However, there are some unfinished aspects of the research method in this paper, such as the failure to combine a large number of cases to illustrate the different attitudes of countries towards asylum in practice; and a failure to make a clear distinction between political prisoners and refugees' eligibility for asylum.

Future research directions: clarify the differences between political prisoners and refugees' asylum status through the judgments of international courts and national courts. Your paper will be part of the journals therefore we ask that authors follow the guidelines explained in this example, in order to achieve the highest quality possible.

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