Asylum Case: Colombia v. Peru

INTERNATIONAL COURT OF JUSTICE

1950 ICJ REP. 266 (1950)

< http://www.icj-cij.org/docket/files/14/1937.pdf>

Author's Note: Haya de la Torre was a Peruvian national. He led an unsuccessful rebellion against Peru in 1948. The Peruvian government issued a warrant for his arrest on criminal charges related to this political uprising. He fled to the Colombian embassy in Lima. He therein requested, and was granted, diplomatic asylum by the Colombian ambassador on behalf of the government of Colombia. Colombia then requested permission from Peru for de la Torre's safe passage from the Colombian embassy, through Peru, and into Colombia. Peru refused.

Colombia then brought this suit against Peru in the ICJ, asking the Court to declare that Colombia had properly granted asylum, pursuant to a recognized regional practice of granting asylum in such political cases. Peru's lawyers responded that Colombia could not unilaterally grant asylum over Peru's objection. De la Torre had committed a common crime, subjecting him to prosecution by Peru, just like any other criminal. Colombia had no right to employ asylum as a means of avoiding Peru's criminal laws.

Court's Opinion:

In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State [Peru]. Such a derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case....

The Havana Convention on Asylum of 1928 ... lays down certain rules relating to diplomatic asylum, but does not contain any provision conferring on the State granting asylum a unilateral competence to qualify the offence with definitive and binding force for the territorial State....

A competence of this kind is of an exceptional character. It involves a derogation from the equal rights of qualification which, in the absence of any contrary rule, must be attributed to each of the States concerned; it aggravates the derogation from territorial sovereignty constituted by the exercise of asylum. Such a competence is not inherent in the institution of diplomatic asylum. This institution would perhaps be more effective if a rule of unilateral and definitive qualification were applied. But such a rule is not essential to the exercise of asylum....

The Colombian Government has finally invoked "American international law in general" [to justify its grant of asylum]. In addition to the rules arising from agreements,

... it has relied on an alleged regional or local custom peculiar to Latin-American States. The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party, ... that it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law." ...

[T]he Colombian Government has referred to a large number of particular cases in which diplomatic asylum was in fact granted and respected. But it has not shown that the alleged rule of unilateral and definitive qualification was invoked or ... that it was, apart from conventional stipulations, exercised by the States granting asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency. The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, mutually accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence.

The Court cannot therefore find that the Colombian Government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offence [as "political" in nature] in matters of diplomatic asylum. ...

Article 2 lays down in precise terms the conditions under which asylum shall be granted to [political] offenders by the territorial State ... the essential justification for asylum being in the imminence or persistence of a danger for the person of the refugee. It was incumbent upon the Government of Colombia to submit proof of facts to show that [this] condition was fulfilled. ...

Asylum may be granted on humanitarian grounds ... to protect political offenders against the violent and disorderly action of irresponsible sections of the population. It has not been contended that Haya de la Torre was in such a situation at the time when he sought refuge in the Colombian Embassy at Lima. . . .

In principle, it is inconceivable that the Havana Convention could have intended the term "urgent cases" to include the danger of regular prosecution to which the citizens of any country lay themselves open by attacking the institutions of that country, nor can it be admitted that in referring to "the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety," the Convention envisaged protection from the operation of regular legal proceedings. ...

In principle, asylum cannot be opposed to the operation of justice. An exception to this rule can occur only if, in the guise of justice, arbitrary action is substituted for the

rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a Government might take or attempt to take against its political opponents. The word "safety," which ... determines the specific effect of asylum granted to political offenders, means that the refugee is protected against arbitrary action by the Government, and that he enjoys the benefits of the law. On the other hand, the safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals. Protection thus understood would authorise the diplomatic agent to obstruct the application of the laws of the country whereas it is his duty to respect them; it would in fact become the equivalent of an immunity, which was evidently not within the intentions of the draftsmen of the Havana Convention.

It has not been shown that the existence of a state of siege [in Peru] implied the subordination of justice to the executive authority, or that the suspension of certain constitutional guarantees entailed the abolition of judicial guarantees. ...

The Court cannot admit that the States signatory to the Havana Convention intended to substitute for the practice of the Latin-American republics, in which considerations of courtesy, good-neighbourliness and political expediency have always held a prominent place, a legal system which would guarantee to their own nationals accused of political offences the privilege of evading national jurisdiction. Such a conception, moreover, would come into conflict with one of the most firmly established traditions of Latin-America, namely, nonintervention [for example, by Colombia into the internal affairs of another State like Peru]....

[The court must] reject the argument that the Havana Convention was intended to afford a quite general protection of asylum to any person prosecuted for political offences, either in the course of revolutionary events or in the more or less troubled times that follow, for the sole reason that it must be assumed that such events interfere with the administration of justice. It is clear that the adoption of such a criterion would lead to foreign interference of a particularly offensive nature in the domestic affairs of States; besides which no confirmation of this criterion can be found in Latin-American practice, as this practice has been explained to the Court.

In thus expressing itself, the Court does not lose sight of the numerous cases of asylum which have been cited. ...

If these remarks tend to reduce considerably the value as precedents of the cases of asylum cited ... they show none the less, that asylum as practised in Latin-America is an institution which, to a very great extent, owes its development to extra-legal factors. The good-neighbour relations between the republics, the different political interests of the Governments, have favoured the mutual recognition of asylum apart from any clearly defined juridical system. Even if the Havana Convention, in particular, represents an indisputable reaction against certain abuses in practice, it in no way tends to limit the practice of asylum as it may arise from agreements between interested Governments inspired by mutual feelings of toleration and goodwill. ...

The Court considers that there did not exist a danger constituting a case of urgency within the meaning of Article 2, paragraph 2, of the Havana Convention.