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ASYLUM CASE (PERU V. COLUMBIA)

AUTHORED BY - MS. MAARIA LAKDAWALA (A017)

YEAR: BBA-LLB 3rd YEAR, SEMESTER-VI

RESEARCH PAPER SUBMITTED

TO THE SVKM'S NMIMS, NAVI MUMBAI

KIRIT P. MEHTA SCHOOL OF LAW

FOR BBA LLB [HONS.]

FACTS OF THE CASE:

The origin of the Colombian-Peruvian Asylum case lies in the asylum granted on January 3rd, 1949, by the Colombian Ambassador in Lima to Mr. Victor Raul Haya De La Torre, head of a political party in Peru, the American People's Revolutionary Alliance.

On October 3rd, 1948, a military rebellion broke out in Peru it was suppressed the same day. On the following day, a decree was published charging a political party, the American People's Revolutionary Party, with having prepared and directed the rebellion. The head of the Party, Victor Raul Haya de la Torre, was denounced as being responsible. With other members of the party, he was prosecuted on a charge of military rebellion.

As he was still at liberty on November 16th summonses were published ordering him to appear before the Examining Magistrate. He was sought out by the Peruvian authorities, but without success and after asylum had been granted to the refugee, he qualified as a political offender, to leave the country. The Peruvian Government refused, claiming that Haya de la Torres had committed common crimes and was not entitled to enjoy the benefits of asylum.

On January 3rd, 1949, he was granted asylum in the Colombian Embassy in Lima. On January 4th, 1949, the Colombian Ambassador in Lima informed the Peruvian Government of the asylum granted to Haya de la Torre; at the same time he asked that a safe-conduct be issued to enable the refugee to leave the country.

On January 14th, he further stated that the refugee had been qualified as a political refugee. The Peruvian Government disputed this qualification and refused to grant a safe-conduct. On October 27th, 1948, a Military Junta had assumed power in Peru and had published a decree providing for Courts-martial for summary judgment in cases of rebellion, sedition and rioting; but this decree war; not applied to the legal proceedings against Haya de la Torre and others, and it has been declared before the Court that this Decree was not applicable to the said proceedings. Furthermore, during the period from October 4th to the beginning of February, 1949, Peru was in state of siege.

A diplomatic correspondence ensued which terminated in the signature, in Lima, on August 31 1949, of an Act by which the two Governments agreed to submit the case to the International Court of Justice.

ISSUES RAISED BEFORE THE COURT:

- Is it legal for Colombia, as the country that grants asylum, to qualify an offence for asylum purposes unilaterally under treaty law and international law?
- Was Peru, as the territorial state, obligated to provide an assurance of safe passage in this case?
- Did Colombia breach Articles 1 and 2 (2) of the 1928 Havana Convention on Asylum when it provided asylum, and is the asylum a violation of the treaty?

RULES APPLICABLE AND CONTENTIONS OF BOTH PARTIES:

Is it legal for Colombia, as the country that grants asylum, to qualify an offence for asylum purposes unilaterally under treaty law and international law.

Colombia maintained before the Court that, according to the Convention in force

- The Bolivian Agreement of 1911 on Extradition,
- The Havana Convention of 1928 on Asylum,
- The Montevideo Convention of 1933 on Political Asylum

and according to American International Law, she was entitled to qualify the nature of the offence for the purposes of the asylum. The proceedings in the case that Colombia claimed the right of unilateral and definitive qualification binding upon Peru.

The first of the Treaties which it invoked-**The Bolivarian Agreement**¹, which is the treaty on extradition-confined itself in one article to recognizing the institution of asylum in accordance with the principles of international law. But these principles do not entail the right of unilateral qualification. On the other hand, when the Bolivarian Agreement established extradition rules, it was impossible to draw inferences about diplomatic asylum from them. If the refugee were given asylum, he would be on the territory of the State of refuge, and such a decision would not infringe on the sovereignty of the States where the crime was committed. In the case of diplomatic asylum, on the other hand, the refugee was on the territory of the State in which he had committed the crime: the decision to grant asylum overruled the territorial State's sovereignty and removed the offender from its jurisdiction.

As for the second treaty invoked by Colombia-**The Havana Convention**²-it did not recognize the right of unilateral qualification either explicitly or implicitly.

The third treaty-**The Convention of Montevideo**³-had not been ratified by Peru and could be invoked against that country. as regarded American international law, Colombia had not proved the existence, either regionally or locally, of a constant and uniform practice of unilateral qualification as a right of the State of refuge and an obligation upon the territorial State.

Colombia failed to prove the existence of a regional custom because it failed to show persistent and uniform adoption of the alleged custom by relevant States, according to the Court. The court further stated that following a particular State custom for political reasons rather than because of a perception that the practise is binding on the State by way of a legal obligation (opinio juris) is harmful to the establishment of customary law. The Court held that even if Colombia could prove that such a regional custom existed, it would not be binding on Peru, because Peru *“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.”*

¹ 1911

² 1928

³ 1933 (Political Asylum)

The facts submitted to the Court disclosed too much contradiction and fluctuation to make it possible to discern therein a usage peculiar to Latin America and accepted as law therefore followed that Colombia, as the State granting asylum, was not competent to qualify the nature of the offence by a unilateral and definitive decision binding on Peru.

Was Peru, as the territorial state, obligated to provide an assurance of safe passage in this case.

Colombia also maintained that Peru was under the obligation to issue a safe-conduct to enable the refugee to leave the country in safety. The Court, setting aside for the time being the question of whether asylum was regularly granted and maintained, noted that the clause in Havana Convention which provided guaranties for the refugee was applicable solely to a case where the territorial State demanded the departure of the refugee from its territory: it was only after such a demand that the diplomatic agent who granted asylum could, in turn, require a safe-conduct. There was, of course, a practice according to which the diplomatic Agent immediately requested a safe passage which was granted to him but this practice, which was to be explained by reasons of expediency, laid no obligation upon the territorial State.

In the present case, Peru had not demanded the departure of the refugee and was therefore not bound to deliver a safe-passage

In a counter-claim, Peru had asked the Court to declare that asylum had been granted to Haya de la Torre in violation of the Havana Convention, first, because Haya de la Torre was accused, not of a political offence but of a common crime and, secondly, because the urgency which was required under the Havana Convention in order to justify asylum was absent in that case.

Having observed that Peru had at no time asked for the surrender of the refugee, the Court examined the first point. In this connection, the Court noted that the only charge against the refugee was that of military rebellion, which was not a common crime. Consequently, the Court rejected the counter-claim of Peru on that point, declaring it to be ill- founded.

On the question of urgency, the Court, having observed that the essential justification of asylum lay in the imminence or persistence of a danger to the person of the: refugee, analysed the facts of the case.

Three months had elapsed between the military rebellion and the grant of asylum. -There was no question of protecting Haya de la Torre for humanitarian consideration against violent and uncontrolled action of irresponsible elements of the population. The danger which confronted Haya de la Torre was that of having to face legal proceedings.

Did Colombia breach Articles 1 and 2 (2) of the 1928 Havana Convention on Asylum when it provided asylum, and is the asylum a violation of the treaty

Article 1 of the Havana Convention states that “It is not permissible for States to grant asylum... to persons accused or condemned for common crimes... (such persons) shall be surrendered upon request of the local government.”

Article 2 (2) of the Havana Convention states “Asylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety.” “An essential pre-requisite for the granting of asylum is the urgency or, in other words, the presence of “an imminent or persistence of a danger for the person of the refugee”.

The Havana Convention was not designed to shield a person who planned against his country's institutions from normal legal proceedings. It was not enough to be accused of a political crime to qualify for refuge; asylum could only intervene against the action of justice in circumstances where arbitrary action had replaced the rule of law. It had not been proven that the circumstances in Peru at the time suggested that justice would be subordinated to the government or that judicial safeguards would be removed. For example, if the Havana Convention had wished to provide general protection to all persons prosecuted for political crimes during revolutionary events solely because such events are presumed to interfere with the administration of justice, this would result in particularly offensive foreign interference in the domestic affairs of States.

Whilst declaring that at the time at which asylum was granted, on January 3rd, 1949, there was no case of urgency within the meaning of the Havana Convention, the Judgement declared that this in no way constituted a criticism of the Colombian Ambassador. His appreciation of the

case was not a relevant factor to the question of the validity of the asylum only the objective reality of the facts was of importance.

The Court therefore came to the conclusion that the grant of asylum was not in conformity with Article 1 & 2, of the Havana Convention 1928.

JUDGEMENT

The court held that the Government of Columbia proclaimed its intention of protecting Hay de la Torres in spite of existence of proceedings instituted against him for military rebellion. It has maintained this attitude and protection by continuing to insist on the grant of safe conduct even when the Minister of foreign affairs of Peru referred to the existence of a “judicial prosecution, instituted by the sovereign power of the state”⁴

The two submissions of Colombia i.e. claims to justify its unilateral qualification of the refuge and demand for safe conduct with a view to permitting departure of refugee based on international obligation binding on Colombian government. These claims were rejected, The first- insofar the right of Columbia, as the country granting asylum to qualify the nature of the offence by a unilateral and definitive decision binding on Peru by fourteen votes to two (Judge Azevedo and M. Caicedo, Judge *ad hoc*), As for the counter-claim of the Government of Peru “that in any case the maintenance of the asylum constitutes at the present time violation of the treaty” it was rejected by fifteen votes to one (Judge Caicedo). In so far as it was founded on a violation of the Article 1 of the Havana Convention providing that asylum shall not be granted to persons accused of common crimes.

The counter-claim was allowed by ten votes to six- the grant of Mr. Victor Raul Haya De La Torres was not made in conformity with the Article 2, paragraph 2 of the Havana Convention 1928. (Judges Alvarez, Zoricic, Badawi Pasha, Read and Azevedo and M. Caicedo. Judge *ad hoc*.)

⁴ Notes of the Minister for foreign affairs of Peru of March 19th, 1949; of the ambassador of Columbia of March 28th 1949.

CONCLUSION

Asylum is an essential form of protection granted through states in international law that helps a person grant solace from a place where he/she fear persecution. The asylum case of Peru v Columbia 1950 deals with international laws relating to diplomatic asylum, pre-requisites of such asylum, safe passage for the asylum seeker to leave the territory they fear persecution residing in the state through a different state embassy. Extradition and asylum are two parallel concepts and cannot exist together.

Various extradition treaties signed between the parties i.e. The Bolivian Agreement of 1911 on Extradition, The Havana Convention of 1928 on Asylum, The Montevideo Convention of 1933 on Political Asylum are also interpreted to examine if safe passage can be granted or whether there is breach of such treaties. The International Court of Justice held a key point in this case i.e. No individual can seek asylum from legal proceedings of the state without imminent threat to life. The asylum seeker Mr. Victor Raul Hayo de la Torres was a political refuge and did not fall under common crimes such as (theft, forgery etc) under Article 1 of the Havana Convention 1928 and was granted asylum by Columbian Government 3 months after uprising caused by his political party, The American People's Revolutionary Alliance. Here it was held that Havana Convention was breached as there was no urgency nor danger to life in relation to article 2 paragraph 2 of the Havana Convention, 1928 the only threat was legal proceeding by the state, the defence of being a political refuge does not suffice and under such pretence cannot interfere in a states domestic affairs. The Court held that Colombia did not establish the existence of a regional custom because it failed to prove consistent and uniform usage of the alleged custom by relevant States. The fluctuations and contradictions in State practice did not allow for the uniform usage. This principle of legal fluctuations in state policy was laid down much later in the Nicaragua Case⁵. The court also reiterated that the fact that a particular State practice was followed because of political expediency and not because of a belief that the said practice is binding on the State by way of a legal obligation (opinio juris) is detrimental to the formation of a customary law. The concept of opinio juris is cleared and elaborated much later in the case of North Sea Continental Shelf Case⁶.

⁵ Nicaragua v. United States, ICJ GL No 70, 1984.

⁶ Germany v. Denmark, ICGJ 149 (ICJ 1986).

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