

## DISSENTING OPINION BY JUDGE ALVAREZ

[*Translation*]

## I

*Importance of the Colombian-Peruvian Asylum case. Questions which should be considered.*

The dispute between Colombia and Peru concerning asylum is of great importance for the countries of the New World who await the Court's answer with lively interest. This dispute also presents considerable importance for all the other countries, since asylum has been written into the Universal Declaration of Human Rights, which was adopted at the Third Assembly of the United Nations.

To have an exact idea of the case now before this Court, it is necessary to consider, in addition to the facts, the following questions in their broad outlines :

1° Unilateral acts in international law. Their nature.

2° Asylum in Europe. Asylum in Latin America. The social and political environment in which asylum is practised in these countries.

3° Does there exist an American international law? Characteristics of this law, especially at the present time.

4° Does there exist a customary American international law on asylum? Conventional American international law on the subject.

5° The Convention on Asylum which was adopted at the Sixth Pan-American Conference of Havana in 1928 and was ratified by Peru and Colombia. Scope of the provisions of this Convention.

## II

*Unilateral acts in international law. Their nature.*

A distinction must be made in international law between unilateral acts, or acts which are the result of the will of one State alone, and multilateral acts in which the will of two or more States participate.

Unilateral acts occupy an important place and play an important rôle in international law. I shall not expatiate upon this point but shall confine myself to giving three examples of this kind of act : 1° those which concern the freedom of the individual and the sovereignty of States, on the one hand, and the sovereignty of one or more States, on the other ; 2° some acts relating to conventional international law ; 3° certain acts which relate to politics.

Acts under the first head refer particularly to the admission of aliens to a State, immigration, refuge, asylum, extradition, internment and expulsion, etc.

The acts of the second category arise in connexion with certain conventions: the latter may be adhered to, denounced, etc.; moreover, some conventions may contain certain special provisions as, for instance, those excluding from arbitration those questions which related to the vital interests of the parties.

Finally, in the third category are included unilateral acts qualifying certain individuals as *persona grata* or *persona non grata*, desirable or undesirable, etc.

In all the cases mentioned above, the appreciation of the facts or circumstances depends on the will of one of the parties.

In certain cases, this unilateral appreciation may not be disputed; it may at most be criticized. For example, in matters of immigration—an important economic and social phenomenon in the lives of American countries—it is the State in which the immigrants wish to settle which appreciates unilaterally whether they should be admitted and, if so, under what conditions. The result of such an appreciation may be prejudicial to the interests of thousands of persons who wish to emigrate to these countries, as well as to the interests of their national State; but nobody disputes the fact that the government of the receiving country has the right to act unilaterally and that its decisions cannot be disputed.

In other cases, the unilateral appreciation may be challenged by the party concerned; this is precisely what happens in the case of asylum.

All these unilateral acts in their above-mentioned form are the consequence of the *individualistic régime* and the absolute sovereignty of States. To-day, under the new *régime of interdependence*, which is now emerging, this matter must undergo important changes which need not be considered here.

### III

*Asylum in Europe. Asylum in the countries of Latin America. Social and political environment in which asylum is practised in these countries.*

Until the present day, asylum has been considered as a humanitarian and transitory measure intended to protect individuals against angry mobs or even against the abusive actions of the authorities of the State on the territory of which they reside. Asylum has therefore a juridical, political and psychological aspect, and this distinction has not always been properly made.

No precise rules have been laid down in international law in respect of asylum. There has been general agreement, however, on two points: asylum shall be granted only to political offenders and not to persons guilty or accused of having committed a common

crime, and that the State of refuge is competent to appreciate provisionally the nature of the offence committed by the refugee.

Asylum has been practised in Europe ; but since the middle of the nineteenth century it is especially the countries of Latin America which have resorted to asylum because of the frequent revolutions and civil wars in certain of those countries.

In this connexion, it is essential to make a preliminary observation.

In order to understand an institution and to give an adequate solution to the questions which it raises, it is necessary to know the political and social environment which gave it birth, and to consider how the institution has been applied.

The Latin-American environment is very different, in matters of asylum, from the European environment.

The aim of the revolutionary movements which occur in certain Latin-American countries is either to change the existing political order, or to enable a "caudillo" to assume power. The leaders of such movements consider that they will be able, in the event of failure, to seek refuge in foreign embassies or legations and asylum is readily granted to them ; it has sometimes even been granted to leaders of barrack mutinies which had been quickly suppressed.

Asylum, in these countries, is regarded as a consequence of the ex-territoriality of the premises on which it is granted and not as a diplomatic protection ; it is consequently considered that such asylum in no way constitutes an intervention or a limitation of the sovereignty of the territorial State, but rather that it is the legitimate exercise of a prerogative.

Sometimes the government of the territorial State places a police guard over the approaches of premises sheltering the refugee in order to prevent the latter from escaping from the local authorities, should he leave his place of asylum.

Sometimes, also, the diplomatic agent who has granted asylum requests the local authorities to grant a safe-conduct enabling the refugee to leave the country in safety.

In leaving his place of asylum, with or without a safe-conduct, the refugee frequently intends to continue his activities from the country to which he is proceeding ; and it has happened that certain politicians, after returning to the country which they had been forced to leave, have subsequently held very important office there, including even that of head of the State.

During revolutionary disturbances, common crimes or offences are frequently committed, such as murder, looting, arson, etc.

In view of the importance of asylum in Latin-American countries, these countries have followed certain practices and have regulated the matter by conventions. By virtue of this fact, the institution of asylum is part of what is termed *American international law* or rather *Latin-American international law*.

Thus, asylum in Latin America should be considered in the light of the environment to which I have just referred ; it is with this environment in mind that we should interpret the provisions of conventions on asylum, fill any gaps they may contain and examine the tendency which asylum ought to assume in the future.

#### IV

*Is there an American international law ? Characteristics of that law, especially at the present time.*

In the written Pleadings and in the oral statements, reference has been made to American international law and its existence has been recognized ; but opinions have been expressed concerning its nature, content and future, which make a clarification necessary. This clarification is of special importance for America.

In the present case, Colombia has asked that the principles of American international law be applied to the solution of the present case and that the international spirit of the continent be also taken into consideration.

As far as international law is concerned, the States of America have, since their independence, wished to modify that law so as to bring it into harmony with the interests and aspirations of their continent. Pan-American conferences, particularly that of Buenos Aires in 1936 and that of Lima in 1948, proclaimed certain principles as belonging to *American international law*.

This expression "American international law" has been accepted in various ways which need not be mentioned here. This expression does not mean, as may appear at first sight and as many would have us believe, an international law which is peculiar to the New World and entirely distinct from universal international law, but rather the complex of principles, conventions, customs, practices, institutions and doctrines which are peculiar to the Republics of the New World. Certain jurists have sought to call this complex the "peculiarities of international law in America". This is merely a question of terminology. The designation "American international law" has triumphed.

I have referred to the "Republics" of the New World because Canada, which is a British Dominion, and the European colonies in America, did not participate in Pan-Americanism or in the establishment of American international law.

If certain precepts, which are held to be universal, are not accepted by the countries of the American continent, it is obvious that they no longer have that character ; and if American precepts are not recognized by the countries of other continents, they must be applied only in the New World.

A principle, custom, doctrine, etc., need not be accepted by all of the States of the New World in order to be considered as a part of American international law. The same situation obtains in this case as in the case of universal international law.

American international law is binding upon all the States of the New World; it is also binding upon the States of other continents in matters affecting America, such as immigration, the security zone of the continent in time of war, etc.

American international law has its sub-divisions, such as, for instance, Latin-American international law or the law of the Latin Republics of the New World, which is not binding upon the United States.

American international law has exercised a considerable influence over universal international law and has given it its peculiar character; many concepts or doctrines of American origin have achieved or tend to achieve universal acceptance and many concepts of a universal nature have, or tend to have, a special application in the New World. The influence of that law has increased since the last world war. The number and especially the quality of the institutions and principles which have lately appeared in America and which tend to be incorporated in new international law is truly impressive.

Since the last social upheaval, there exist not only an American international law, but also a European international law, and an Asian international law is in the process of formation. And apart from these three international continental systems of law, another important international system of law is emerging—Soviet law.

It has been maintained during the hearing that American international law—and consequently other international continental systems of law—must be subordinated to universal international law, and Article 52 of the United Nations Charter has been invoked in support of this view. Such a statement is not accurate. Article 52 in question refers only to regional agreements relating to the maintenance of peace and not to continental systems of law. Such systems of law are not *subordinate* to universal international law, but *correlated* to it.

Universal international law thus finds itself to-day within the framework of continental and regional law; and all such legal systems adopt new trends in accordance with those indicated in the preamble and Chapter I of the United Nations Charter; such trends reflect entirely American, international spirit.

## V

*Does there exist a customary American international law on asylum ?  
American international conventional law on the subject.*

The institution of asylum is a part of Latin-American international law because that institution is applied in the Latin countries of the New World in a special manner ; it is not part of the continental American international law, since the United States have never admitted asylum.

In view of the fact that asylum is utilized when the political order within a country is disturbed, and inasmuch as the situation resulting from this disorder may vary considerably, there is no customary American international law of asylum properly speaking ; the existence of such a law would suppose that the action taken by the Latin States of the New World was uniform, which is not at all the case : governments change their attitude according to circumstances and political convenience.

But if there is no customary Latin-American international law on asylum, there are certain practices or methods in applying asylum which are followed by the States of Latin America. These may be summarized as follows :

1° Asylum is granted only in cases of *political* offence and not to *common* criminals.

2° Asylum is granted in accordance with the laws and usages of the State of refuge, and it is for the latter to appreciate whether the offence committed by the refugee is a political offence or a common crime.

3° The territorial State may request the departure of the refugee from its territory and the State of refuge may then require the former State to deliver a safe-conduct enabling the refugee to leave the country safely.

4° The State which granted asylum sometimes, with the same end in view, requests that a safe-conduct be issued to the refugee.

In view of the importance of asylum in Latin-American countries, the matter has been regulated in a number of bilateral or multi-lateral conventions.

The Latin-American States have signed in particular : the Bolivarian Agreement on Extradition of July 18th, 1911 ; the Convention on Asylum adopted at the Sixth Pan-American Conference of Havana, 1928 ; the Convention on Political Asylum adopted at the Seventh Pan-American Conference of Montevideo of 1933 ; the Treaty on Political Asylum and Refuge adopted at the Second South-American Congress of International Law at Montevideo in 1939.

As regards the first of these conventions which refers solely to extradition, Colombia argues that it is also applicable to asylum in view of Article 18, which lays down that "aside from the stipulations of the present agreement, the signatory States recognize the institution of asylum in conformity with the principles of international law". I agree with the Court that this claim is unfounded.

## VI

*The Convention on Asylum which was adopted at the Sixth Pan-American Conference of Havana in 1928 and ratified by Colombia and Peru. Scope of its provisions.*

It has been rightly argued that the solution to the present case must be sought especially in the provisions of the Havana Convention of 1928 on Asylum, on the grounds that this Convention was ratified by Colombia and Peru.

Article 1 of this Convention enacts :

"It is not permissible for States to grant asylum in legations, warships, military camps or military aircraft, to persons accused or condemned for common crimes, or to deserters from the army or navy.

Persons accused of or condemned for common crimes taking refuge in any of the places mentioned in the preceding paragraph, shall be surrendered upon request of the local government...."

Article 2 provides :

"Asylum granted to political offenders in legations, warships, military camps or military aircraft, shall be respected to the extent in which allowed, as a right or through humanitarian toleration, by the usages, the conventions or the laws of the country in which granted and in accordance with the following provisions :

First : 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.

Second : immediately upon granting asylum, the diplomatic agent, commander of a warship or military camp or aircraft, shall report the fact to the Minister of Foreign Relations of the State of the person who has secured asylum, or to the local administrative authority, if the act occurred outside the capital.

Third : the government of the State may require that the refugee be sent out of the national territory within the shortest time possible ; and the diplomatic agent of the country who has granted asylum may in turn require the guarantees necessary for the departure of the refugee, with due regard to the inviolability of his person, from the country...."

The provisions of this Convention should be considered in the light of the Latin-American spirit as well as of the social and political environment in which asylum is practised in Latin America.

In respect of Article 1, it must be pointed out that it is the State from which the asylum is requested that must decide whether it wishes to grant it or not. There are certain countries, such as the United States, which never grant asylum.

There was considerable discussion as to the meaning of the word *accusation* referred to in this same article. It was correctly argued that this term must be construed in its ordinary juridical meaning : proceedings instituted before a judicial authority of the country at the request of a third party, or automatically by that authority. But a second condition must be added : the accusation must refer to acts *directly* committed by the accused, and not to acts committed by others in connexion with an insurrection or a revolutionary movement for which the refugee is sought to be held responsible as a leader of that movement.

There was also long debate as to who is competent to appreciate the nature of the offence committed by the refugee. This appreciation must naturally appertain to the State granting asylum ; if it appertained to the territorial State, the institution of asylum would be rendered nugatory, for it would be sufficient for that State to affirm that the refugee was guilty of a common crime and he would then have to be handed over.

There must, however, be no misunderstanding as to the scope of the qualification of the offence made by the State of refuge ; it should not be assumed that the State which makes that qualification has the last word in this respect, and that its appreciation is definitive and irrevocable. This qualification may be questioned by the territorial State, and if agreement cannot be reached in this respect, the case must be submitted to arbitration or to another means of peaceful settlement. Thus, in the last resort, it is a third party, or international justice, which decides on the nature of the offence.

It has been claimed that if Peru had ratified the Montevideo Convention of 1933, Article 2 of which provides that "the judgment of political delinquency concerns the State which offers asylum", that country would be bound by this provision and consequently would be unable to raise an objection to the qualification made by Colombia. That is not so ; even in such a case Peru would be entitled to question the qualification since such a prerogative is not excluded by Article 2 above.

There has also been much debate on the meaning of *political offence*. It has been contended that we should confine ourselves in this connexion to the legislation of the country where the offence was committed. This is inadmissible, for in their legislation, States ordinarily qualify as a common crime certain acts, such as insurrection, which are manifestly political offences. The qualification of



the offence should be made by the international legal authority whose task it is to decide in the matter.

International law contains no precise rules on the subject, but the numerous precedents in existence may serve to provide general directives. It may be said that any act which purports to overthrow the domestic political order of a country must be regarded as a political offence; in that sense even murder may sometimes be termed a political offence. This consequently also applies to military rebellion.

Since the two last world wars, two new categories of offences have been established: *international* offences such as violation of the rights of the individual, genocide, etc., and crimes *against humanity*, the chief one being responsibility for instigating a war.

These two categories of offences cannot be qualified as political.

It is therefore the international judicial authority, as already stated, which decides in the last resort, whether or not the offence is political; and in order to do so, it must be guided not by national legislations, but by the considerations of international justice referred to above. This predominance of international law over national legislations is one of the foundations of the new international law.

In normal times, a State may not grant asylum to an individual for the purpose of removing him from the authorities of his country; but a State is entitled to grant such asylum in abnormal times in the case of a political offence; in such a case protection of the individual and humanitarian considerations come into play.

Article 2 of the Havana Convention has given rise to important discussions on the question of *urgency*.

If an international tribunal may easily give a decision on the qualification of an offence because this matter is a question of law, that is not the case with regard to urgency which is a matter of fact, and which may change according to the circumstances of each case; what is considered urgent by one State need not be considered urgent by another, and what is urgent in some circumstances is no longer urgent in others. Moreover, urgency should not be appreciated retrospectively, long after the events in question; it should be considered from the standpoint of the time at which the events occurred.

The meaning of the term "urgency" should be interpreted in accordance with the nature of asylum in Latin America, i.e., the need to act with utmost speed in a given situation. There is no urgency in a case which involves only the possibility of an individual being persecuted, but there is urgency if he is already being persecuted and consequently faces an immediate danger.

It is for the State of refuge to appreciate whether or not there is urgency to grant asylum at the time it is requested. If the territorial State considers that there was no urgency at the time, it

must immediately present a claim : any delay in the presentation of such a claim is a ground for its rejection, for in such a case the territorial State may be presumed to have admitted that urgency existed.

The same Article 2, "First", provides that asylum must be granted "for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety". This provision does not apply if a dispute has already arisen between the State of refuge and the territorial State concerning the regularity of the asylum ; such a dispute suspends the effect of the provision in question and asylum may then continue until the dispute is settled.

Another very important point referred to in Article 2 is that of a safe-conduct.

It has been claimed that it is only when the territorial State has demanded the departure of the refugee from its territory that the State of refuge may, in turn, require the delivery of a safe-conduct to enable the refugee to leave in safety.

A strict compliance with the terms of Article 2 would be tantamount to a disregard of the nature of asylum, for if the territorial State failed to demand the departure of the refugee, the latter would be compelled to remain indefinitely on the premises where he was granted asylum. Besides, the provision contained in "Third" of Article 2 above, is not exclusive in character ; it does not mean that only the territorial State is entitled to demand the departure of the refugee. If such had been the intention of the authors of that provision, they would have stated so expressly, especially since, in practice, it is frequently the State of refuge that has requested a safe-conduct to enable the refugee to leave the country.

It should be pointed out that the Government of Peru, which puts a restrictive interpretation on "Third" of Article 2, has on several occasions granted safe-conducts at the request of the diplomatic agent to persons who had been granted asylum in foreign embassies or legations. (See Memorial of the Government of the Republic of Colombia.)

There is therefore a gap in Article 2.

The Havana Convention of 1928 has other important gaps. First of all, it does not provide for the case of a refugee who is not a political offender but the head of a State, overthrown by a revolution and seeking protection from persecution at the hands of the victors ; in such a case delivery of a safe-conduct is a necessity.

Nor has the case been provided for in which the diplomatic agent who granted asylum no longer wishes to maintain the asylum, and chooses to provide for the departure of the refugee whilst the territorial State objects to that departure.

Another gap in the article concerns the safe-conduct : no allowance is made for the territorial State to deliver a restricted safe-

conduct, so as to ensure that the refugee would not escape the action of justice in the event of his being subsequently sentenced in the said State for a common crime, or so as to prevent the refugee from seeking refuge in a country whence he might continue his conspiracy.

We shall see how the Court could, in the present case, interpret certain provisions of the Convention of 1928 and fill the above-mentioned gaps, especially with respect to the request for a safe-conduct.

## VII

### A. *First submission of the Application of the Government of Colombia.*

The Government of Colombia, in its Memorial and in its Reply, asks the Court, as a first submission, to adjudge and declare: "that the Republic of Colombia, as the country granting asylum, is competent to qualify the offence for the purpose of said asylum....".

In its judgment, and basing itself on the written and oral arguments furnished by the Government of Colombia, the Court declares that this submission should be interpreted in the sense that Colombia, as the State granting asylum, is competent to qualify the nature of the offence by a unilateral and definitive decision binding upon Peru. This submission is rejected by the Court.

I have previously pointed out that, according to the principles of international law, the qualification of the offence appertains to the country granting asylum, but that such qualification is not definitive; the territorial State may contest it, precisely as Peru has done, and it is then for the Court to resolve the dispute arising from that contestation.

I therefore consider that the Court could have expressly declared that, according to the documents submitted, Haya de la Torre is accused of military rebellion, which is not a common crime but a political offence. The judgment of the Court only contains an implicit declaration to that effect, by rejecting the first submission of the counter-claim of Peru.

### B. *Second submission of the Application of the Government of Colombia.*

I stated previously that there was a gap in the Havana Convention of 1928 with respect to the request by the State of refuge for the delivery of a safe-conduct to the refugee.

To bridge this gap, the Court would actually have had to create the law as it did in its Advisory Opinion of April 11th, 1949, which, indeed, concerned a much more important matter than the present case, since it referred to the recognition of the right of the

United Nations to submit international claims in certain cases—a right which had not been bestowed upon it by the Charter which brought the Organization into existence.

Among the factors which could have guided the Court are especially the ideas prevailing in the New World on the subject of asylum, the fact that, according to Article 2 of the Havana Convention, asylum should be of short duration and that the refugee should be able rapidly to find safety by some other means. But the delivery of a safe-conduct by the territorial State is precisely the means which makes this double purpose possible. An unjustifiable refusal to grant a safe-conduct would force the State of refuge to keep the refugee indefinitely, which would be contrary to the nature of asylum.

But before the delivery of such safe-conduct may be requested, there must be no contestation of the legality of the asylum, or if such a point arose, it should have been previously settled; otherwise the State of refuge would elude the objections raised by the territorial State. In the present case, this legality has been contested by Peru which maintained that the offence committed by Haya de la Torre was not a political offence and especially that no case of urgency existed at the time at which asylum was granted. The Court on that last point found for Peru; in the circumstances Colombia has no reason to request a safe-conduct for Haya de la Torre.

One of the grounds for sometimes refusing to deliver a safe-conduct is the fear that the refugees may continue their political activities abroad. That fear is to-day greatly diminished because the view is emerging according to which one of the obligations of States is to prevent conspiracies being directed from their territories against another State. The "Declaration of the great principles of modern international law", which has been adopted by several important learned societies, provides this obligation in its Article 25 (C). A similar provision is embodied in the Declaration of the rights and duties of States which was drafted by the Codification Commission of the United Nations.

Should the former refugee participate in such conspiracies while in a foreign country, the State against which they are directed may require the government of the foreign State to take the necessary measures in this connexion.

In any case, if Peru wishes spontaneously to deliver the safe-conduct which has been requested, it may do so in such a manner that Haya de la Torre is unable to escape the sentence that may be pronounced against him by the Peruvian authorities, and that he may be extradited from the country in which he then finds himself.

## VIII

*The counter-claim of Peru.*

The counter-claim of Peru is based on two grounds.

The first is the violation by Colombia of Article 1, paragraph 1, of the Havana Convention. The Court has rejected that claim, probably because it considers that the offence of which Haya de la Torre is accused is not a common crime.

The second reason invoked by Peru is that Colombia granted asylum to Haya de la Torre in violation of Article 2, paragraph 2, of the Havana Convention, according to which "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".

I have previously pointed out the scope of this provision in so far as urgency is concerned.

At the time at which Haya de la Torre requested asylum, he was in a most critical situation, and he was by no means in safety. In the written Reply, the Government of Colombia has explained the nature and magnitude of the danger which threatened Haya de la Torre.

It is in the light of that situation that the diplomatic agent of Colombia decided to grant asylum. I consider that he was able to appreciate exactly, and better than anyone else, the urgency for such action.

The fact that several foreign embassies and legations had granted asylum in Peru to various persons who had participated in the same revolutionary movement as Haya de la Torre, further confirms this urgency. Moreover, Peru has only recently invoked the absence of urgency.

As regards the last part of the counter-claim of Peru, submitted on October 3rd, 1950, and relating to the unlawfulness of the maintenance of asylum, I cannot consider it well founded, since there existed a dispute concerning the lawfulness of asylum, and that such a dispute warranted the maintenance of the asylum.

(Signed) A. ALVAREZ.