DISSENTING OPINION BY M. CAICEDO CASTILLA

[*Translation*]

1. Diplomatic asylum is an institution which is characteristic of Latin America. As a result of the frequency with which political upheavals occur (civil wars, *coups d'état*, etc.), and of the intensity of the struggle between the various parties or groups, the aim of asylum in that part of the world is twofold. Firstly, to protect the life, liberty and safety of persons prosecuted for political offences by the local authorities, taking this expression in its wider meaning to include the various organs of the government. In accordance with this aim, diplomatic asylum has rendered great services, for, generally speaking, it is statesmen, politicians, intellectuals and outstanding personalities who request asylum. Asylum protects the persecuted individual, whose merits may be recognized later on, thus enabling him to render outstanding services to his country and to the American continent. In Latin America we have not such an abundance of men of ability and culture that we can afford to contemplate with an indifferent eye their sacrifice on the altar of unbridled political passion. One glance at the list of persons to whom asylum has been granted will show no less than twenty heads of States. The list of writers, journalists, parliamentarians and jurists who have at one time or another sought refuge could be prolonged indefinitely, which goes to show that by protecting this category of persons the State granting asylum is rendering a valuable service to the territorial State in that it prevents biased legal proceedings, unjust persecution or a decision based on the result of a triumphant revolution from creating irreparable situations and sowing the seeds of future discord and implacable hatred between the nationals of the same State.

The second aim of asylum is in keeping with the ideal which has always inspired Latin America, that of ensuring respect for fundamental human rights.

In spite of governments which have, on more than one occasion, violated these rights, the ideal aspiration has always been the establishment of a democratic and republican régime in all American States. For this reason, asylum has always been accepted on the international plane as a means of guaranteeing political liberty.

2. An obvious conclusion may be drawn from the preceding considerations: in studying the problems of diplomatic asylum and in reaching a decision, account must be taken of the Latin-American spirit and environment, as well as of the special interpretation of American international law regarding asylum, which is very different from the European interpretation.

3. The Judgment of the Court refrains from considering the institution of asylum as it appears in Latin America. Basing itself

on such grounds, the Judgment of the Court was necessarily bound to arrive at very debatable conclusions with which I cannot agree.

Indeed, the Judgment imposes such limitations on the institution of asylum that its practice becomes difficult, if not impossible. Thus, for instance, the recognized right of the territorial State to question the qualification made by the State granting asylum implies a legal insecurity concerning the grant of asylum as well as the possibility of lengthy litigation. With the theory of urgency, it would be impossible to justify asylum ; with such an interpretation, none of the hundreds of cases of asylum which occurred in America during the last few years would be justified. With an interpretation that the State of refuge may request the necessary guarantees enabling the refugee to leave the country only if the local government has requested his departure, asylum may be indefinitely prolonged and this would obviously be prejudicial to both countries.

4. The Court rejects the contention of Colombia that the State granting asylum has the unilateral and definitive right to qualify the nature of the offence of which the refugee is accused. At the same time, the Court agrees that Colombia was entirely right in her qualification of M. Haya de la Torre as a political offender.

This last point is of great importance, for the whole dispute between the two Governments, as will be seen from a mere reading of the diplomatic correspondence between the Ambassador of Colombia in Lima and the Minister for Foreign Affairs of Peru, referred to the insistence of the Peruvian Government in considering that well-known intellectual and eminent political leader, M. Víctor Raúl Haya de la Torre, as a vulgar common criminal. In spite of the fact that, during this case, the Peruvian Government brought new and abundant evidence in an attempt to prove its views, the Court unanimously decided that it has not been established that M. Haya de la Torre was a common criminal.

It is thus evident that the attitude of Colombia was unimpeachable, since she gave asylum to a political refugee. In accordance with the legal principles and the jurisprudence in force in America, the Colombian Ambassador could not act otherwise.

5. In my opinion, the State which grants asylum must have the right to qualify unilaterally and definitively the nature of the offence of the refugee. I base this view on :

(1) the Havana Convention of 1928 and the Bolivarian Agreement of 1911, both in force and binding upon Colombia and Peru ;

(2) the very nature of the American institution of asylum;
(3) the obligations deriving from the international custom existing in the American continent.

6. The Havana Convention provided that asylum was to be determined by the laws of the country of refuge. This is clearly stated in Article 2 of the Convention, and may be also deduced from the history of that Convention.

The draft was prepared at the 1927 meeting of jurists in Rio de Janeiro and submitted as a basis of discussion at the Havana Conference. Article 2, however, was modified with the definite aim of referring to the customs, conventions and laws of the country granting asylum.

The documents of the Havana Conference and of its Second Committee enable us to follow the various steps in the elaboration of the Convention. As the United States delegation opposed the right of asylum, the Mexican delegate, Dr. Gonzalez Roa, undertook to find a formula which would enable all American States, including the United States of America, to sign the proposed Convention in spite of their different views regarding the right of asylum and the extent of its application. In this formula of the Mexican delegate, which became Article 2 of the Havana Convention, two main points stand out:

(1) No effort is made to find a definite basis for asylum from the legal point of view, so that some contracting States may consider asylum as an institution based strictly on law, whilst others may consider it as a custom or merely a humanitarian toleration. Within the framework of the Havana Convention, this point is of no interest.

(2) Apart from the provisions laid down in this Convention, the conditions of asylum are also determined by the law of the country of refuge.

The United States, nevertheless, did not accept the Havana Convention, which did not achieve the desired unanimity. Article 2, however, retained the definitive form proposed by the Mexican delegate with the scope and extent already mentioned. By virtue of this article, according to the explanation given by the Mexican delegate in his report to the Mexican Government, "contracting States remain free to pursue their own policy in matters of asylum". It is for this reason that the Argentinian writer, M. Bollini Shaw, maintains in his important work on the right of asylum that the Havana Convention is restrictive in that it does not lay down one general rule but refers to the particular legislation of each of the signatory States.

In view of the scope of Article 2 of the Havana Convention, the Rapporteur of the 1939 Montevideo Convention was able to state

in a document as important as the Official Report, that in the Havana Convention "asylum was left to the customs, conventions and laws of the country of refuge".

The author of this Report is the Chilean professor Julio Escudero Guzmán, former member of the Inter-American Legal Committee, and the Report, before being submitted to the Montevideo Congress, was approved by all members of the Committee on which all the countries attending the Congress were represented, including Colombia and Peru.

I have no intention of claiming that this document lays any legal obligation whatever on the Parties in the present case, but I strongly maintain that it is of acknowledged importance for a proper understanding of the interpretation and extent of Article 2 of the Havana Convention. For this is a document that was drawn up and approved by well-known American legal advisers, who had no dispute to settle and no special case before them, but whose intention it was to prepare a report of an exclusively legal nature.

This interpretation of Article 2 of the Havana Convention is so obvious that both Parties in the present case accept it—Colombia explicitly in all its allegations, while Peru, in spite of attacking it in several places, does in fact accept it in its statement regarding its interpretation of the Havana Convention. It is asserted on page 10 of the Peruvian Rejoinder: "Henceforth an asylum would not be considered regular, and consequently would not have to be respected if it were proved that the diplomat who granted it, or the government which directed him to maintain it, was not acting in conformity *as a minimum* with the prescriptions of their domestic law, whether customary or conventional."

This interesting opinion set forth in the Rejoinder in such positive terms amounts to a statement that henceforth asylum will be considered regular and must consequently be respected, once it is proved that the diplomat who granted it or the government which directed him to maintain it was acting in conformity, as a minimum, with the prescriptions of their domestic law, whether customary or conventional.

7. The Havana Convention does not require all three factors, custom, convention and law, since it refers to customs or conventions or laws, which means that the existence of one of these factors is sufficient. However, as regards Colombia, the three factors are equally in favour of unilateral qualification.

In the case of asylum in Colombian embassies or legations, that country has always claimed and obtained the right to qualify. In the course of this case, numerous examples were mentioned to prove this fact; I do not think that there is any need to repeat

again. In cases of asylum in foreign embassies or legations, the Colombian Government has always respected the qualification of the respective diplomatic agents.

Colombian usage has been amply proved. Almost twenty cases of asylum occurred since 1928 in the foreign embassies and legations accredited in Colombia. In all these cases, asylum was respected and safe-conducts granted. There were eleven cases in which the Colombian Government did not agree with the qualification made by the foreign diplomatic agent, but in all these cases the Government yielded to the unilateral qualification. All these cases have been listed in detail either in the Written Pleadings or in the oral statements (see Memorial of Colombia, p. 82 ; Rejoinder, p. 34 ; Oral Statements, p. 44).

I do not think that it is possible to submit more complete or more convincing proof without a single contradictory case and without it being possible to argue that the countries concerned were signatories of the Montevideo Convention of 1933 ; for several of these cases of asylum involved Venezuela, which has not ratified either the Havana or the Montevideo Convention and, consequently, has no bond with Colombia other than that derived from the Bolivarian Agreement of 1911 and from the principles of American international law.

8. As regards Colombian laws and conventions, we must quote law No. 15 of 1936 approving the 1933 Montevideo Convention on political asylum. This Convention contains an article under which "the judgment of political delinquency concerns the State which offers asylum".

Law No. 15 of 1936 is a Colombian law enacted with the same formalities as the ordinary laws, it was approved by the Chamber of Deputies and the Senate of the Republic, and duly confirmed by the executive organ of the government. It proves the adherence of Colombia, of the executive and legislative organs of Colombia to the theory of unilateral qualification.

9. In an effort to invalidate the views expressed above, reference has been made to a report by M. Raimundo Rivas, which was approved by the Committee of Legal Advisers to the Ministry for Foreign Affairs. It should be pointed out in this connexion that the Committee in question is merely a consultative body and that its opinions are not binding on the Government which may well depart from them. The Committee's opinion is at most a piece of information supplied to the Government. By requesting it, the Government did not pledge itself in advance to approve it. Consequently, M. Rivas's report merely expresses the private opinion of a writer and can in no sense be considered an official Colombian document. Furthermore, some of the information it contains is false, as, for example, his reference to the Spanish Civil War when he states that

Colombia did not grant asylum to one single person, whereas, on the contrary, she granted it on several occasions. On the other hand, on page 182 of the Counter-Memorial may be found a fragment of a declaration by the Colombian Government showing the attitude and opinion of Colombia in the case of Spain, which were in absolute agreement with the generous and liberal views so brilliantly defended by Chile at the time.

10. There is another aspect of the question. The right to qualify the nature of an offence must necessarily lie with the State granting asylum, otherwise the very institution of asylum could no longer exist. For asylum is granted precisely to protect those persons who are prosecuted by the local government, usually at difficult moments in the life of the country, moments of great upheaval when political passions lead to the diminution or disappearance, even in very highly cultured statesmen, of that serenity of mind which is indispensable for an impartial judgment of political opponents. To recognize the right of the local State to qualify the nature of the offence would be equivalent to allowing this qualification to depend upon the opinion of the government, whose interests would urge it to act against the refugee. Asylum in these circumstances would be absurd. Unilateral qualification is in fact inherent in the very nature of the asylum itself ; it is essential for the continued existence of this institution as it is understood in Latin America.

In this respect there can be no better quotation than a passage from Professor Scelle in his commentaries on cases occurring in South America in 1911, which appeared in the *Revue générale de Droit international public*.

The first case was the dispute between the Argentine Republic and Paraguay, and Professor Scelle wrote, *inter alia :*

> "The Treaty of Montevideo (of 1889) states that the list of refugees should be submitted to the local government before asylum may definitely be granted and the refugees transported to foreign or neutral territory. This does not signify that the local authority has the right either to oppose this transfer or to insist that such and such a refugee should be surrendered to it, for this would render the right of asylum illusory. In doubtful or disputed cases, a definitive decision can only be made by the authorities granting asylum [1]." (*Revue générale de Droit international public*, 1912, pp. 623-634.)

The conclusions could not be more final or more opportune : asylum would be illusory if the territorial State could demand the surrender of the refugee or oppose his departure from the country ; in case of doubt the decision can only be made by the authorities granting asylum.

[1] Translation by the Registry.

In his analysis of the dispute which arose in 1911 between the Governments of Ecuador and Great Britain regarding the asylum granted to a number of refugees on board a merchant ship (the case in which the Minister for Foreign Affairs of Ecuador, Dr. Tovar, attempted to assimilate internal and external asylum), Professor Scelle makes the following general observations on the problems of asylum :

> "This assimilation of external and internal asylum made by the Minister of Ecuador was rather clever. It is juridical, and, in practice, it would appear that asylum on territory properly speaking is more difficult to grant than diplomatic asylum. It would also appear that the examination of political refugees is usually much more thorough in the case of external asylum, and this is understandable as it is easier. In both cases, however, the right of decision lies entirely with the government granting asylum [1]."

Professor Scelle's opinion is categorical. As regards the examination of political refugees, whether in a case of territorial asylum or in a case of diplomatic asylum, "the right of decision lies entirely with the government granting asylum".

11. Similarly I can refer to the Dutch writer, M. Savelberg, cited in the Counter-Memorial of Peru as an authority in matters of American international law. M. Savelberg has, in several passages of his book, insisted on the need for unilateral qualification. He says that this qualification "is necessary in order to prevent a State which recognizes the right of asylum on its territory from rendering its exercise impossible by means of an arbitrary interpretation of the expression 'political offence' [1]" (p. 359). He says elsewhere that unilateral qualification "is indispensable, since the State in which asylum has been granted, having received the qualification of the political offence, could by an arbitrary interpretation of that expression render illusive any exercise of that right". (P. 284.)

12. As regards practice, I would point out that it has been favourable to unilateral qualification and that the Havana Convention has been constantly interpreted in this manner. This is not a personal statement, it is an assertion by one of the most authoritative international jurists of America, M. Hildebrando Accioly. This eminent Brazilian author and diplomat who is at present his country's representative on the Council of the Organization of American States, writing on the question of "who shall decide whether the motives justifying the asylum are purely political or whether they contain an element of common criminality" states that "in practice and, as is only reasonable, the solution was left to the discretion of the diplomatic agent granting

[1] Translation by the Registry.

asylum, just as, in the case of extradition, it is the requested State which has the right to determine the nature of the fact which justifies extradition". (Accioly, Vol. II, p. 351.)

13. As for the tendencies of American law, an eloquent illustration is provided by the fact that twelve countries ratified the two Conventions of Montevideo which expressly confirm the rule of unilateral qualification, namely, Brazil, Colombia, Chile, Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, the Dominican Republic and Uruguay. Three countries which had ratified the Havana Convention, namely, Costa Rica, Cuba and Ecuador, also accepted the above rule, by means of declarations of a public character. Finally, two countries, the Argentine Republic and Venezuela, which did not ratify the treaties, also recognize the above rule. In all, seventeen out of twenty Latin-American countries are in favour of unilateral qualification. The Colombian view is thus the very expression of American law.

14. The theory according to which the qualification should be made jointly, that is, provisionally by the State of asylum and then ratified or rejected with objections by the territorial State, practically amounts to this : that qualification would be the attribute of the territorial State. For with this joint qualification, the territorial State can at will prevent the institution of asylum from functioning. It would be strange, but true, that on the pretext of avoiding unilateral qualification we should arrive at a confirmation of that practice—in favour however of the territorial State.

It may be argued that in the event of a difference of opinion the States concerned must resort to arbitration or to legal proceedings. That would mean that each case of asylum would become a lawsuit, a lengthy lawsuit, for it is understandable that international proceedings should require several months to examine and decide upon a case. Asylum would then become an inexhaustible source of litigation and hence of dispute among States, with the result that the two countries would have to examine the domestic situation of the territorial State, thus rendering the dispute bitter and embarrassing and probably giving rise to a disagreement which would hamper and weaken understanding between the two countries.

15. On the other hand, what is there to justify the conclusion that the Havana Convention recognizes such a prerogative as appertaining to the territorial State ? Nowhere is this stated in the Havana Convention. It has been said that we should abide strictly by the letter of the texts ; where are such texts to be found which speak of two qualifications, one provisional and one final, or which provide that the right of qualification must be exercised both by

the territorial State and by the State of refuge ? On the contrary, instead of express rules, there is a reference to the usages, conventions and laws of the country of refuge. This reference, which completely supports the Colombian view, is an express and literal reference contained in the Convention.

16. Peru has on several occasions accepted the American practice as obligatory, including the principle of unilateral qualification.

In 1936, during the Spanish Civil War, the Peruvian Government, in an official declaration by its Minister for Foreign Affairs, expressed its solidarity with other American countries, stating that it was "in entire agreement with the theories maintained in Madrid by diplomatic representatives of the Argentine Republic, Chile and other countries".

But the theories put forward by these countries were precisely the legality of diplomatic asylum, the right of the State granting asylum to qualify the nature of the refugee's offence, and the duty of the territorial State to give the necessary guarantees to enable the refugees to leave the country freely.

Explaining the attitude of the Latin-American States towards Spain, the Chilean delegate to the League of Nations summed up the opinions of the said States in these words :

> "All refugees, at least those in embassies and legations of Latin-American States, have been received in accordance with the rules regarding the right of asylum laid down by the 1933 Montevideo Convention."

On October 26th, 1948, the Peruvian Government published an official statement on asylum, from which we shall quote the following paragraph :

> "Under the relevant international conventions in force, the State granting asylum is competent to qualify the act which has motivated asylum, either to decide that it is a criminal offence, or that it is a political offence.... For its part, Peru has previously claimed that, when a diplomatic representative refuses to surrender a refugee because he does not consider him as a common criminal offender, extradition is granted only when the refugee has left the country, and according to the procedure established by international agreements on the matter. This thesis is accepted and recognized by all American States." (Memorial of the Government of Colombia, p. 28.)

An analysis of this statement shows that :

(1) The Peruvian Government agreed by virtue of treaties in force in America, including the Havana Convention, that the right to qualify the nature of the offence belonged to the State granting asylum.

(2) Peru had already maintained on previous occasions that, if a diplomatic agent did not surrender a refugee on the grounds

that he was not a common criminal, the Peruvian Government would respect the decision of the foreign diplomatic agent, reserving its right to request extradition once the refugee had left Peruvian territory. In other words, Peru had already declared itself in favour of unilateral qualification by the foreign diplomat and the obligation to provide a safe-conduct without, however, prejudicing its rights to make a subsequent request for extradition.

(3) According to the official statement, the foregoing doctrine is at the present time not merely a Peruvian doctrine but has been accepted and recognized by all American States.

The foregoing declaration is not that of a mere official but of the Peruvian Government itself. Moreover, it was made after the October revolution, precisely with the object of defining the attitude of the Peruvian Government towards the numerous cases of asylum which had arisen. It was in force on January 3rd, 1949, as the expression of the rules which the Government of Peru accepted at that date in matters of asylum. In such circumstances, the declaration has a very definite legal significance.

17. Apart from the Havana Convention of 1928, there exists another agreement binding on both Colombia and Peru, namely, the Bolivarian Agreement on Extradition of 1911, Article 18 of which recognizes the institution of asylum in conformity with the principles of international law.

The argument that, because the Caracas Agreement is an extradition treaty, it has nothing to do with the regulation of asylum, has a certain force which I cannot deny in so far as there is any intention to apply the rules of a treaty on extradition to the institution of asylum. But it is quite inadmissible to seek to deny the value of Article 18. For the argument that asylum and extradition are different institutions leads precisely to the conclusion that Article 18 has a very definite significance, namely that it makes it quite clear that, apart from the stipulations regarding extradition, the contracting States have agreed to recognize another institution, asylum, and have admitted that that institution should be governed by legal principles. Thus the Agreement regulates two institutions—extradition in all clauses of the Agreement except one, and asylum in one clause, Article 18. It may be argued that it is inconvenient and unusual to regulate two different institutions in the same treaty; but this criticism, even if it were valid, would not deprive Article 18 of its legal value or render it inapplicable. On the other hand, it is obvious that the plenipotentiaries of 1911 were of opinion that the two institutions were similar and that they could, consequently, be included, from a formal point of view, in a single treaty. This view may be criticized, but it must in any case be respected; it was after all adopted by the said plenipotentiaries. Furthermore, it had already been adopted in the Treaty of Montevideo of 1889, which included both institutions in the same treaty under different headings.

To contend, as the Rejoinder does, that the article is devoid of effect because it confines itself to an obvious statement—a simple allusion to international law—amounts to a unilateral denial of a contractual obligation. Article 38 of the Statute of the International Court of Justice says that the latter will apply the general principles of law ; it cannot be argued that, because these principles have not been determined and because the article makes a simple reference to law, this provision of the Statute is null and void. Yet this is practically the claim that is made regarding Article 18 of the Bolivarian Agreement.

The most reasonable thing to do would be to examine Article 18 of the agreement and ascertain what juridical effects it could have. It would then be found, in the first place, that the signatory States recognize asylum as a right ; it is not a practice, neither is it a simple act of humanitarian toleration, but an institution governed by the principles of law. In the second place, this institution is recognized in accordance with the principles of international law ; namely, in accordance with those principles accepted by American States, both in their international conferences and in their collective declarations. These principles of international law cannot be other than those which have been stated in the various treaties on asylum which were concluded in America, whether or not they were ratified by the "Bolivarian" countries ; for we are not concerned with the determination of a contractual obligation, but with the determination of those principles which are generally adopted in America in matters of asylum. For example, according to the Bolivarian Agreement of 1911, asylum may only be granted to political offenders. Why ? Simply because this is the principle that is generally accepted in American international law. The same thing should hold good as regards the qualification of the offence. This qualification appertains to the State granting asylum, since the principle is specially mentioned in the Montevideo Convention of 1933 ; according to the Havana Convention, it is applied when the law of a country granting asylum recognizes it ; and furthermore, this constitutes the practice of American States.

A further conclusion may be drawn from this article, namely, that acceptance of the application of the principles of international law entails a recognition of principles which may be derived from international custom. If this is the case, this article in the Bolivarian Agreement has a special meaning as regards custom in matters of asylum, namely, that it demonstrates the existence in both Colombia and Peru of one of the elements which are necessary for the existence of a custom—the psychological element, the *opinio juris sive necessitatis*. The Bolivarian Agreement recognizes asylum, recognizes the value of the principles applied in America ; hence

it includes these principles as binding. Consequently, their acceptance by governments or by one individual government implies their acceptance by that government as "being the law", that is to say, that they are the applicable law.

This is a matter of the utmost importance, since the psychological element of custom, which is always so difficult to prove, is here entirely proved.

18. In my opinion, diplomatic asylum is an international custom of Latin America.

American Republics have practised asylum, have respected the unilateral qualification exercised by the State granting asylum, and have furnished the indispensable safe-conducts to enable the refugees to leave the territory.

The custom has been continuous since it arose as early as the middle of last century. Thus we see that we are dealing with a custom one century old and consequently much earlier in date than any treaties that exist on the matter.

The custom was general; all the Latin-American Republics recognized and practised diplomatic asylum and all exercised the right to unilateral qualification of the offence when circumstances required it. Mexico, the Republics of Central America, Cuba, and the South American Republics are all in the same position.

Finally, by recognizing the practice of asylum, the American Republics accepted it as obligatory. Nothing is more remarkable in this respect than the case of the Republic of Venezuela. It offers asylum in its embassies and legations and respects asylum in foreign legations and embassies without having ratified either the Montevideo Convention or the Havana Convention. That is to say, it recognizes asylum as an American right, as a practice which is obligatory throughout the continent. In the same way, it also accepts the unilateral qualification of the offence.

There is a recent case in which several countries were involved and which demonstrates the general feeling of American countries regarding the obligatory character of asylum. With reference to the asylum of ex-President Bétancourt in the Colombian Embassy at Caracas, the Chilean Government, supported by the Guatemalan Government, lodged a protest with the Council of the Organisation of American States against the Venezuelan Government "for its delay in delivering the safe-conduct". Thus we see that a country like Chile, which had no treaty with Venezuela regarding asylum, considered that it had the right to lodge a complaint against the latter in order to obtain the necessary guarantees to enable the refugee to leave Venezuelan territory. This is not all! Chile then claimed that the refugee in question was at the embassy of a third State. Such a claim could not have been made by a country so highly respected in America as Chile, had it not been for the conviction that the practice of asylum, with its various consequences, is juridically obligatory. It must furthermore be noted

that in the incident in question, the Republic of Venezuela did not put forward as an excuse or as a reply to the Chilean protest the non-existence of treaties on asylum. Neither did it deny the juridical obligations resulting from this custom. On the contrary, it proved that it had respected American practice and American law by showing that the safe-conduct had already been granted when the complaint was lodged. Thus we have the example of three American States, Chile, Guatemala and Venezuela, recognizing the practice of asylum as obligatory, together with its consequences, such as the qualification by the country granting asylum and the right of the said country to demand a safe-conduct for the refugee.

Another American country noted for its outstanding culture, Uruguay, has also maintained the opinion in question on several occasions. It will be sufficient to mention the memorandum presented by the Uruguayan Embassy in Lima to the Peruvian Minister for Foreign Affairs and Public Worship regarding the asylum granted to MM. Manuel Gutierrez Aliaga and Luis Felipe Rodriguez. One of the paragraphs of the Memorandum states :

> "In accordance with the preceding facts, the Acting Chargé d'Affaires received instructions from his Government to impress upon the Peruvian Government the necessity for a speedy delivery of safe-conducts which cannot be delayed on the pretext of an alleged implication of the refugees in common crimes or political offences related thereto, by virtue of the principle by which the country granting asylum has the right to decide whether the offence is of a political nature or is a common crime."

In the case of Paraguay of 1922, other countries, the Argentine Republic, Brazil, Uruguay, Bolivia, Cuba and even Peru collectively drew up the following declaration as a rule of conduct and embodied it in an official document :

> "Any person who shall request asylum in the residence of a foreign delegation for reasons of a political nature shall make a statement of the facts which led him to request asylum, and the appreciation of the circumstances shall be left to the head of the legation."

In the case of Spain, the Argentine and Dominican Republics maintained that Spain, in spite of the fact that it had no treaties regarding the right of asylum, should nevertheless respect this practice, and also that the head of the legation or embassy had the right to qualify the offence and to request the delivery of safe-conducts in every case.

The Government of Cuba declared in a recent statement :

> "The principle that the qualification of the offence concerns the State granting asylum is a general rule of law confirmed by custom."

In Chile, the instructions of the Ministry for Foreign Affairs to its diplomats of November 26th, 1935, say :

> "The right to qualify the political offence appertains to the State granting asylum." (Quoted by Antokoletz.)

In a recent declaration, Costa Rica has expressed itself in favour of the theory according to which the State granting asylum has the right to qualify the nature of the offence.

Ecuador also has very definitely stated its opinion as follows :

> "The Government of Ecuador considers that Article 18 of the Bolivarian Agreement and Article 2 of the Convention on Asylum of February 20th, 1928, which are valid instruments for Ecuador, should be interpreted as meaning that the qualification of the nature of the offence appertains to the country granting asylum.... The Government of Ecuador bases this view on the very nature of the institution of asylum : this institution would lose all value if the local government were granted the right to qualify the nature of the offence, thus rendering inoperative the international agreements on the matter. On the other hand, American customary law also attributes the right of qualification to the country granting asylum. This interpretation was expressly confirmed by the Convention on Asylum signed at the Seventh American International Conference at Montevideo in December 1933 [1]."

19. As regards the question of a safe-conduct, the Judgment maintains that Article 2, § 3, of the Havana Convention should be interpreted as meaning that the State granting asylum may only request the necessary guarantees to enable the refugee to leave the country, after the territorial State has requested the refugee to leave the national territory.

I cannot accept this interpretation for several reasons, but chiefly because I believe that the Havana Convention recognizes two separate rights :

(*a*) firstly, the right of the territorial State to require the removal of the refugee from the territory as rapidly as possible, that is to say that, as asylum is a transitory situation which cannot be prolonged indefinitely, the State granting asylum should respect this request. This is an obligation on the State granting asylum. The sojourn of the refugee on national territory cannot be prolonged against the will of the territorial State ;

(*b*) the second right is that, which is conferred by the above-mentioned text upon the State granting asylum, to require that the refugee should leave the country with the necessary guarantees. This right is a necessary consequence of asylum.

The unanimous practice of American States is in accordance with this interpretation. In all cases of asylum, the diplomatic agent has requested and obtained the departure of the refugee

[1] Translation by the Registry.

without waiting for the territorial government to take the initiative. This practice has been amply proved in the documents annexed to the Pleadings of this case. They include a note dated October 20th, 1944, from the Minister of Peru in Guatemala to the Honourable Members of the Revolutionary Junta of Guatemala ; another, dated October 28th, 1948, from the Peruvian Legation in Panama to the Minister for Foreign Affairs of Panama, and two other communications, dated November 2nd and 5th, 1948, respectively, from the Uruguayan Embassy in Lima to the Minister for Foreign Affairs of Peru. All these notes announce the grant of asylum and simultaneously request the delivery of safe-conducts ; in none of these cases has the State of refuge waited for the territorial State to express any wishes on the subject.

It would be impossible to quote a single diplomatic communication contrary to this practice. And as far as Peru is concerned, apart from the above-cited documents of the Peruvian Legations in Guatemala and Panama, there is an official Government communiqué of October 12th, 1948, which states : "The Government, respectful of its international agreements and of the established practice, has granted the respective safe-conducts." In other words, the Peruvian Government admits that, in accordance both with the treaties in force and with American practice, it is compelled to deliver safe-conducts.

It has also been maintained that American practice is contrary to the text of the Convention and that, consequently, it cannot prevail. It should be argued in reply :

(1) that authors such as Accioly consider that the Convention conforms with practice on this point ;

(2) that practice shows what interpretation has been put upon the Convention by the countries which signed and ratified it.

If there has been no other interpretation, why search for an interpretation of the Havana provision outside American custom ?

On the other hand, why disregard the interpretation which had been accepted by Peru ? It may be said, to meet this argument, that States are entitled to change their minds. I recognize that right as far as purely political questions are concerned, but as regards legal questions, such as the interpretation or application of treaties, a change of opinion is scarcely admissible except for the future. Otherwise an element of uncertainty would be introduced into international relations. It is hardly admissible in law that a country, after maintaining a given interpretation of a treaty and making it known to other contracting parties by declaring its intention to apply that interpretation to cases involving given circumstances, should be able to disregard its own interpretation in cases and circumstances arising whilst that rule was still considered to be in force.

Any other practice would create a new element of insecurity in international relations.

Furthermore, there have been cases in which the opinion of the State granting asylum prevailed. We may, for example, quote the case of the parliamentarian Rodriguez Araya, who took refuge in the Uruguayan Embassy in Buenos Aires in 1949. The Argentine Government declared that the local authorities were not prosecuting him and that the latter enjoyed all necessary guarantees to reside freely on the national territory. In spite of this declaration by the territorial State, Uruguay insisted that the refugee should be allowed to leave the territory of the Argentine Republic. In face of this insistence, the Argentine Republic, which has so many noble juridical traditions in matters of asylum, immediately granted the necessary safe-conduct.

Consequently, it must be admitted that the interpretation put by Colombia upon Article 2 of the Havana Convention is entirely in accordance with the general principles of law, as well as with the spirit of the text and the provisions of the Convention taken as a whole. Colombia has thus respected the uniform and continuous practice of the American nations, including Peru.

20. In my opinion the second basis of the counter-claim (case of urgency) of the Government of Peru presented on March 21st, 1950, does not come within the jurisdiction of the Court and is not directly connected with the subject-matter of the Application. My grounds for this opinion are that Peru, during the controversy which preceded the signature of the Act of Lima, made no claim whatsoever concerning the existence of urgency ; and consequently, this consideration was not a part of the existing dispute ; it was not referred to by Colombia in connexion with the question of the grant of a safe-conduct, the latter question being based upon the essentially political nature of the offence attributed to the refugee, the grant of the safe-conduct constituting an obligation for the territorial State. There was no other subject of dispute between the Parties.

21. As regards the condition of urgency, it is sufficient to recall that M. Haya de la Torre was threatened in his life or liberty due to the fact that he was being prosecuted for political reasons, and this consideration justifies the conclusion that he was entitled to invoke in his favour the institution of diplomatic asylum in Latin America.

Furthermore, there is abundant evidence to show that at that time Peru was passing through an abnormal situation. One of the first decrees promulgated by the Military Junta was that of November 2nd, 1948, under which "the Military Junta of the Government assumes all the powers which the Constitution of the State confers upon the executive and legislative branches of the Government" [1].

[1] Translation by the Registry.

In other words, the *de facto* military government conferred upon itself the right to make new laws and modify or abrogate existing laws, without regard to the rules of the Constitution. In the exercise of the rights which it had conferred upon itself, the Junta enacted decrees as grave as that of November 4th, which provided for Oral Courts-Martial and authorized the application of the death sentence, whilst suspending appeal to the Supreme Court against the judgment. The decree-law fastened those accused of military rebellion, such as M. Haya de la Torre, in a grip of iron : the members of the Courts-Martial were soldiers who depended upon the government, the defence for the accused was to be appointed by the government, the penalty imposed might be death, which was not accepted under the Code of Military Justice, and there was to be no appeal against the judgment ; all the foregoing measures superseded the Peruvian Code of Military Justice which had provided for an appeal to the Supreme Court on the grounds of nullity, naturally restricted to alleged irregularities of form.

Subsequently, on November 17th, a new decree-law was enacted concerning the composition of the Supreme Court of Justice, which stated as follows :

> "1. Law No. 9654 of November 13th, 1942, is abrogated : the positions which are at present provided on the Supreme Court of Justice of the Republic under law No. 9654 are vacant as from the date of the present decree.
>
> 2. The vacancies resulting from the application of the present decree as well as the positions of Judges and General Advocates of the Supreme Court of Justice shall be filled by direct appointment of the Military Junta of the Government [1]."

It is true that the Agent of the Government of Peru declared that the decree of November 4th does not have retroactive effect. But this declaration in no way modifies the problem in so far as M. Haya de la Torre is concerned. For this problem must be envisaged as it existed on January 3rd, 1949, the date of the grant of asylum : at that time the decree was in force and there was no reason to believe that it would not have retroactive effects for : 1) no declaration had been made by the Government in this connexion, 2) there existed at that time a *de facto* Government whose powers were founded, not on constitutional provisions but on the success of a *coup d'état* : and that Government had conferred upon itself the right to promulgate laws regardless of the Constitution, and 3) it was not known how this decree would be interpreted by the Oral Courts-Martial.

On the other hand, the Peruvian Government during those same days of October and November 1948 had promulgated decrees of a retroactive character, such as that of October 4th

[1] Translation by the Registry.

concerning the outlawing of the Aprist Party which established the collective criminal responsibility of the Aprist leaders for the events of October 3rd. In other words, there was established *ex post facto* a penal responsibility attributable to a whole category of persons. A further retroactive decree was that of the Military Junta concerning the suspension of proceedings for military rebellion which had been instituted against Colonel Llosa and others for the abortive revolution of July 1948. This decree intervened in the operation of military justice, and suspended the action of the latter.

In making these remarks, I in no way intend to criticize the Peruvian Government, for it is evident that it could judge, better than anyone, what measures should be taken for the country. My sole reason for referring to all these laws is because, in my opinion, they prove clearly that there existed an unstable domestic situation characterized by political disturbances, precisely the kind of situation constituting the urgency of diplomatic asylum.

This abnormal situation is confirmed by the existence of a state of siege. By a supreme decree of January 2nd, 1949, published on January 3rd, i.e. the very day asylum was granted to M. Haya de la Torre, the state of siege was extended for 30 days. In its recitals, the decree states that "the reasons which have led to the decree providing for the suspension of individual guarantees, continue to exist....". In other words, the abnormal situation continues to exist. The decree adds "that it is necessary that the authority should have extraordinary powers in order to maintain public order and tranquillity[1]".

It has been pointed out that Haya de la Torre sought refuge only on January 3rd, whereas the revolution had occurred on October 3rd. For me, the time factor has no importance, for the important question here is whether on January 3rd the abnormal situation still existed : and irrefutable proof of this fact is furnished by the above-quoted decree. On the other hand, if the Callao revolution occurred on October 3rd, it was only at the end of that month that the military uprising occurred which aggravated the situation of M. Haya de la Torre, since the second revolution which led to the fall of President Bustamante took place with the avowed intention of punishing Apra. Consequently, the policy of the new government consisted of the exclusion and repression of Aprism (note of February 22nd, from the Peruvian Minister for Foreign Affairs : "It was for that reason that the armed forces of the Republic, by a unanimous impulse, took action to put an end to all this crime and wickedness, and to save Peru." P. 150 of the Counter-Memorial). Furthermore, M. Haya de la Torre, prosecuted as a criminal, his personal assets having been sequestrated, and in the face of a declaration of a state of siege which

[1] Translation by the Registry.

facilitated search without a warrant from a competent judge, and at a time when foreign embassies and legations were under the surveillance of the police, M. Haya de la Torre, we say, was not really in a position to choose the date of his asylum. It might be said that he sought refuge when he could.

The existence of the condition of urgency was so evident that it was accepted without hesitation by the Diplomatic Corps accredited in Lima. For, following the revolution of October 3rd, M. Haya de la Torre was not the only person obliged to seek asylum. There were many refugees who had sought and obtained asylum in eight embassies; all of them were Aprist leaders involved in the same proceedings as M. Haya de la Torre. It is possible to deduce from the foregoing that the Ambassadors considered that there existed a situation implying serious danger for the security of the refugee Aprist leaders. The case of M. Haya de la Torre is identical with that of the other refugees.

On the other hand, it must not be forgotten that M. Haya de la Torre was reputed to have given orders for the extermination of his adversaries. There is no proof of this order, but the rumour was spread (Counter-Memorial, p. 7). In moments of such confusion and passion when a complete change in the political situation had just taken place, it was quite conceivable that there should be some danger of reprisals against the Aprists, and more especially against their leader. The leaders of a victorious revolutionary movement, even when they have assumed total power, are not always able to control the activities of the extremist elements among their subordinates and supporters. The very fact that the Colombian Embassy in Lima has been provided with a continuous police guard, is evidence of the anxiety of the local authorities lest the political opponents of Haya de la Torre might take action to seize him and endanger his life. If that happened while he was in the Embassy, how much greater would the possibilities have been and how much greater the danger for his personal safety, had he been in another place.

Furthermore, in judging the conduct of the Ambassador, we must consider:

1. That the two official communiqués of the Peruvian Government—one of the 12th and the other of 26th October 1948—accepted the existence of a situation which might justify the urgency of asylum, as well as the principle of unilateral qualification and that of the grant of a safe-conduct. These communiqués were in force on January 3rd, 1949, for it was only in a note of February 22nd, that the Peruvian Government showed any desire to change its attitude.

2. The Ambassador had granted asylum to M. Pulgar Vidal, an Aprist deputy, who obtained a safe-conduct on November 29th, in other words, after the summons had been issued regarding

M. Haya de la Torre and his friends, and without any remarks being made by the Peruvian Government on the matter of urgency. Thus, in the case of M. Pulgar Vidal, the theories set forth in the two official communiqués were put into application.

3. Other Ambassadors had granted asylum without any observations being made by the Peruvian Government.

4. Official declarations by the Head of a State, published in the official gazette *El Peruano* on January 3rd, 1949, recognizing that the situation of the country at the time was abnormal.

5. The *de facto* situation which has already been described actually existed.

Having regard to the foregoing elements of fact and of law, I consider that the Colombian Ambassador acted correctly : he could not do otherwise than grant asylum ; he conformed to international law and American practice ; he granted the asylum in strict conformity with the stipulations of the Havana Convention.

22. Finally, we have further recognition by Peru of the abnormal nature of conditions existing in January 1949, namely, the modification of her counter-claim. To maintain that present conditions are different from those that obtained in 1949, amounts to an admission that the conditions in 1949 were abnormal, that is, if it is claimed that present conditions are not abnormal.

23. Asylum, such as is recognized in America, has never been regarded as a form of intervention. It is not intervention in the sense that a government may interfere in the domestic affairs of a country by favouring the members of a certain party ; indeed, asylum has always been exercised generously and nobly, in favour of all types of persons without discrimination and regardless of the political views of the refugee. This point must be stressed because it is to the credit of the Latin-American countries.

In the case of Colombia and Peru, it is sufficient to point out that the same Ambassador granted asylum, first to M. Julio C. Villegas, who, as Minister of the Interior, wrote the letter providing for the application of certain measures in the proceedings against M. Haya de la Torre, and later, to Haya de la Torre himself.

24. Nor is diplomatic asylum contrary to the principle of non-intervention, which is fundamental in American law. The historical origins of this principle are to be found in the relations between the United States of America and the Latin-American nations, and it was put forward by the latter as an affirmation of their independence against interventions, even armed interventions, which had occurred but which need not be recalled here. At the Montevideo Conference of 1933, the principle was accepted by the United

States of America following the development of the policy of President Franklin Roosevelt ; and pursuant to the confirmation of the juridical equality of American States, their subsequent mutual relations developed in an atmosphere of complete solidarity, for the feelings of distrust which had existed theretofore now disappeared.

That is why it has never been believed in America that asylum is related to intervention or to non-intervention. These are entirely different situations which have never been confused. That is why countries like the Argentine Republic and Mexico which have always most enthusiastically supported non-intervention, have also supported with the same enthusiasm the institution of asylum. In so doing, they were not being inconsistent, but were rather taking American reality into account.

25. The Havana Conference of 1928 had before it the institution of asylum which was intended to assist political refugees in the event of domestic disturbance. The Conference never chose at any moment to modify the essential character of the institution of asylum, but sought rather to maintain and strengthen it. Nor did it express a desire to put an end to alleged abuses in the matter of asylum. The precedents of the Convention are very clear in this connexion. The principal one was the meeting of jurists at Rio de Janeiro in 1927, whose purpose was merely to attempt to codify public international law and private international law in accordance with the systems adopted by the Fifth Pan-American Conference of Santiago (Chile) of 1923, namely, the elaboration of a code of private international law and the preparation of partial agreements for public international law. The criterion applied in selecting the questions of public international law at Rio was that preference should be given to questions in which there were no wide divergencies of view, and upon which there was general agreement. These were so to speak subjects which were ripe for insertion in a treaty following a generally favourable consensus, a kind of juridical conscience that had already been formed in this respect among the American countries. We may therefore assume that if the subject of asylum was chosen at Rio it was because this was doubtless a question which enjoyed general support and sympathy, a matter in which agreement was possible, as was the case for the other topics adopted on that occasion (diplomatic officials, consuls, treaties, literary copyright, etc.).

The same spirit may be noted in the acts and deliberations at Havana. There was no resistance to asylum except the opposition in principle of the United States of America. With this exception, the matter presented no difficulty and raised no objections.

26. The grant of asylum and the maintenance of asylum are different phenomena. The former is instantaneous, the latter extends in time. This was Peru's understanding in presenting its

counter-claim concerning the grant of asylum as well as the addition, which was not examined by the Court, concerning the maintenance of asylum. For this reason I believe that all that relates to the grant of asylum can only be examined by considering one date and one date alone, January 3rd, 1949.

To pass judgment on the maintenance of asylum is to go beyond the limits of the Peruvian claim as it was expressed by that Government, and in my capacity as Judge, I consider that I must confine myself to resolving the questions which have been put by the Parties.

Nevertheless, the maintenance of asylum is fully justified in the case of Colombia on the following grounds :

1. At no moment has Peru requested the surrender of the refugee.

2. Peru opposed the asylum on the grounds that M. Haya de la Torre was a common criminal, a fact which Peru has not been able to establish.

3. On the very day after the grant of asylum, namely January 4th, 1949, Colombia requested a safe-conduct to enable M. Haya de la Torre to leave Peru with the necessary guarantees, thus bringing the stage of diplomatic asylum to a close.

4. This request on the part of Colombia was not entertained.

5. Following the Act of Lima, the question is *sub judice* and the two countries have agreed upon their obligations to respect the existing situation.

27. It has been stated that Colombia, following the day on which the counter-claim was presented and during the oral proceedings, chose to transfer her defence to a plane on which the Havana Convention could provide it with no foundation. This refers to the fact that the spokesmen for Colombia have examined the circumstances in which proceedings were instituted against M. Haya de la Torre. In my opinion, this examination did not depend upon the will of Colombia, but rather upon the policy adopted by Peru in presenting a counter-claim which, in contrast to the Colombian Application, does not submit purely legal questions to the Court but rather questions of fact and accusations against the conduct of the Colombian Ambassador in Lima. Throughout the diplomatic correspondence, Colombia has consistently refused to enter into a discussion concerning Peruvian politics or the domestic situation in Peru. This refusal is to be found in all the Colombian notes, in spite of the repeated invitations of the Peruvian Minister for Foreign Affairs. But confronted with the counter-claim, Colombia was obliged to change her attitude and to examine the documents and facts which were raised in that counter-claim.

Evidence of the change which was introduced by the counter-claim is found in the fact that the point which was most discussed in the last stage of the proceedings was the condition of urgency, a question which had not even been mentioned during the diplomatic discussions.

Among the documents presented by Peru, the letter of October 5th, 1948, from the Minister of the Interior, M. Villegas, who subsequently sought refuge in the Colombian Embassy, is worthy of special attention. It has been contended that this letter constitutes a denunciation, although it does not fulfil the requirements of Peruvian legislation in this respect. This letter is a very serious document because it orders the Examining Magistrate to follow a certain procedure in respect of M. Haya de la Torre, which procedure that judge actually adopted. This constitutes irrefutable evidence of the influence and intervention of the Government in military justice.

28. In view of the foregoing considerations, it is possible to conclude that the conduct of Colombia was beyond reproach. It must further be emphasized that it is abundantly clear from the whole proceedings that the Colombian Ambassador at Lima had urgent grounds to grant asylum to M. Víctor Raúl Haya de la Torre, and it is equally clear that the refugee is a political offender. This proves that Colombia's actions were inspired by the most respectable considerations.

Colombia has not sought to defend a particular interest, but rather the legal principles which are generally accepted in Latin America. Colombia has considered that, as a member of the American community, she is bound to work for the integrity of these principles which, along with many others, are effectively in force on the American continent, thus ensuring that international relations in that part of the world develop on the basis of noble doctrines and not on grounds which are purely utilitarian or materialistic. In this case Colombia has remained faithful to her own traditions as well as to the juridical traditions of the continent. In stating resolutely and unselfishly the tendencies which are common to the other American Republics, Colombia actually becomes the spokesman of the free peoples of America.

In defending a political refugee, Colombia defends a fundamental human right, and in so doing not only honours her contractual obligations, but also undertakings of another order, the force of which cannot be disregarded.

I am referring to the essential principles which have inspired not only the Charter of the United Nations, but also the declarations which have been adopted by the IXth Pan-American Conference, and by the General Assembly of the United Nations.

(Signed) JOSÉ JOAQUÍN CAICEDO CASTILLA.