THE COLOMBIAN-PERUVIAN ASYLUM CASE AND PROOF OF CUSTOMARY INTERNATIONAL LAW

The Judgment of November 20, 1950, of the International Court of Justice in the *Colombian-Peruvian Asylum Case* [1] provides a noteworthy illustration of the judicial technique employed in making a determination as to the existence or non-existence of a rule of customary international law in a particular case.

Article 38, paragraph 1, of the Statute of the International Court of Justice directs the Court to "apply . . . (b) international custom, as evidence of a general practice accepted as law." The curious drafting of this clause tends to distort the well-established distinction between practice or usage, which is not obligatory, and customary international law, which is what the Court actually applies. Thus Judge Manley O. Hudson writes:

> It is not possible for the Court to apply a custom; instead it can observe the general practice of States, and if it finds that such practice is due to a conception that the law requires it, it may declare that a rule of law exists and proceed to apply it. The elements necessary are the concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time. The appreciation of these elements is not a simple matter, and it is a task for persons trained in law.[2]

In his Working Paper on Article 24 of the Statute of the International Law Commission, Judge Hudson expressed the elements required for the establishment of a principle of customary international law as follows:

> 11. Seeking with Brierly [Law of Nations, 4th ed. (1949), p. 62] "a general recognition among States of a certain practice as obligatory," the emergence of a principle or rule of customary international law would seem to require presence of the following elements:
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> (a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
> (b) continuation or repetition of the practice over a considerable period of time;
> (c) conception that the practice is required by, or consistent with, prevailing international law; and
> (d) general acquiescence in the practice by other States.
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> Of course the presence of each of these elements is to be established (*doit être constaté*) as a fact by a competent international authority.[3]

[1] I.C.J. Reports, 1950, p. 266; this JOURNAL, Vol. 45 (1951), p. 179.

[2] Manley O. Hudson, The Permanent Court of International Justice, 1920–1942—A Treatise (1943), p. 609. *Cf.* J. L. Brierly, The Law of Nations (4th ed., 1949), pp. 60 ff.; Hans Kelsen, The Law of the United Nations (1950), p. 533.

[3] U. N. Doc. A/CN.4/16, March 3, 1950. This paragraph was omitted from the Report of the International Law Commission covering its Second Session, 1950, U. N. Doc. A/1316; this JOURNAL, Supp., Vol. 44 (1950), p. 105.

Theoretical difficulties involved in the determination of these elements or of the methods and procedures by which customary rules of international law are created or evolve from non-obligatory practice often receive more attention than the fact that in a given case courts have relatively little difficulty in determining whether or not an applicable rule of customary international law exists.[4] Max Sørensen observes that the most characteristic feature of customary international law is that it is established not by acts directed expressly towards the creation of international law but by an appreciation (*un raisonnement*) based upon observation of the conduct of states, which, by deriving a general rule from conduct, is the inverse of the traditional method by which courts apply a general rule to specific conduct.[5] The evidential value of a particular appreciation as to the existence of a rule of customary international law is itself a matter of appreciation. Yet there is a well-recognized practical hierarchy of "law-determining agencies."[6] The *imprimatur* given to a customary rule of international law by the International Court of Justice would suffice to clinch its recognition in most cases. However, it would seem that a customary rule of international law may exist because of the presence of the requisite elements, *i.e.*, because of the behavior of states and a conclusion therefrom, without their establishment as facts by "a competent international authority." The behavior is certainly a phenomenon not limited to the observation of an international court; and the conclusion as to the legal significance of the behavior may properly be drawn by a national court (*cf. The Paquete Habana*) or by a foreign office or by the writer of a treatise, with, of course, varying degrees of authoritativeness.

Of the elements required for the creation or emergence of a customary rule of international law, the so-called "material" elements present fewer difficulties than the "psychological" elements. Observations of the practice of states in given international situations permit conclusions as to whether conduct is concordant, general, and consistent over a period of time. The periods of time required may vary: the establishment of customary rules of international air law can have no temporal equivalent to the "immemorial customs of the sea."[7] Variations from the concordance, generality, or consistency of a practice are grist for judicial appreciations. The evidential value of abstentions, as distinguished from positive acts, with reference to the establishment of customary rules of international law is dealt with in *The Paquete Habana;* and, in *The Lotus Case,* the Court observes

[4] See, for example, *The Scotia* (1871), 14 Wall. 170; *The Paquete Habana* (1900), 175 U. S. 677; *The Lotus* (1927), P.C.I.J., Ser. A, No. 10.

[5] Max Sørensen, *Les Sources du Droit International* (1946), p. 85.

[6] See Georg Schwarzenberger, International Law, Vol. I (2d ed., 1949), pp. 8 ff.

[7] *Cf.* Helen Silving, "'Customary Law': Continuity in Municipal and International Law," 31 Iowa Law Review (1946), pp. 614, 625.

that "only if such abstention were based on their [states] being conscious of having a duty to abstain would it be possible to speak of an international custom."[8]

The existence of a conception that a practice is required or forbidden before a customary rule of international law may be said to exist—the *opinio juris sive necessitatis*—is one of the psychological elements which has created more difficulties in theory than in practice.[9] Theoretically, it appears to involve a circularity of reasoning to speak of law as existing when it is required by law. However, it is conduct or abstention which is required by law and the proper way to express the process by which customary international law is created is to say that a particular pattern of state conduct, hitherto legally discretionary, has acquired obligatory force through its general acceptance by states as a legal obligation.

The practical procedure by which the presence or absence of the material and psychological elements requisite for a determination as to the existence or non-existence of a particular customary rule of international law is admirably illustrated in *The Paquete Habana* and the *Colombian-Peruvian Asylum Case.* In the former the United States Supreme Court concluded:

> This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war. . . .[10]

In the *Colombian-Peruvian Asylum Case,* the International Court of Justice observed in part:

> The Colombian Government has finally invoked "American international law in general." In addition to the rules arising from agreements which have already been considered, it has relied on an alleged regional or local custom peculiar to Latin-American States.
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> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on

[8] P.C.I.J., Ser. A, No. 10, p. 28. See, generally, on custom, Lazare Kopelmanas, "Custom as a Means of the Creation of International Law," British Year Book of International Law, 1937, pp. 127–151; Charles Rousseau, *Principes Généraux du Droit International Public,* Vol. I (1944), pp. 815–862; Sørensen, *op. cit.,* pp. 84–111.

[9] See Sørensen, *op. cit.,* pp. 105 ff.; Silving, *loc. cit.,* pp. 622 ff.; Paul Guggenheim, "*Les deux éléments de la coutume en Droit international,*" in *La Technique et les Principes du Droit Public—Études en l'Honneur de Georges Scelle* (1950), Vol. I, pp. 275 ff.

[10] (1900), 175 U. S. 677.

the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law."

In support of its contention concerning the existence of such a custom, the Colombian Government has referred to a large number of . . . treaties [which the Court considered to be irrelevant to the issue before it].

. . .

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

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

. . .

For these reasons, the Court has arrived at the conclusion that Colombia, as the State granting asylum, is not competent to qualify the offence by a unilateral and definitive decision, binding on Peru.[11]

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[11] *Loc. cit.*, pp. 276–278. *Cf. The Lotus Case, loc. cit.*, where, examining the practice of states in exercising criminal jurisdiction over foreigners and noting the absence of protests by states against the exercise of such jurisdiction, the Permanent Court of International Justice had little difficulty in concluding that the evidence failed to prove the existence of the *opinio juris* required for the establishment of a customary rule of international law in the sense contended for by the French Government.