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A Direct Acknowledgement of the Positivist Theory of International Law - Colombia V. Peru, [1950] ICJ Rep 266

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ABSTRACT

The nature of International Law is often divided into the Naturalist and the Positivist worldviews. The former professes the supremacy of the Law of Nature, whereas the latter champion the will of the sovereign State. Jurists have often exchanged arguments fervently supporting their causes for either side in attempts to present a realistic approach towards the chief characteristics of International Law. In the Asylum case, as it is now famously known, the International Court of Justice gives weight to the independent will of the defendant by endorsing its demurral towards Customary Law despite it being considered as a source of International Law.

Keywords: *International Law, Positivist, Convention, State, Custom.*

I. INTRODUCTION

Formerly known as the 'Law of Nations' before its rechristening by Jeremy Bentham, International Law is the set of rules, norms and standards generally recognised as binding between nations. The precursor term, Law of Nations, was blazoned by Emmerich De Vattel in his eponymous book as the science of rights existing between nation, state and nation-state[2]. Vattel proposed that the sovereign state was a collective of free persons in the Hobbesian state of nature. Taking this argument further, he said that a nation always remains subjected to the laws of nature[3]. This bit is essential as naturalisation plays an important part in the context of understanding International Law.

The modern interpretation of International Law slightly differs from Vattel's own as it encompasses a broader meaning. The Law of Nations merely attempts to explain the behaviour of sovereign states. International Law deals with the relations between states. The term Law of

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[2] EMER DE VATTEL, LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 55 (Sixth American ed., T. & J.W. Johnson, Law Booksellers 1844) (1758).
[3] Id. § 5.

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Nations can be considered to be a misnomer due to this difference. J.L. Brierly defines International Law as[4] –

"*the body of rules and principles of action which are binding upon civilised states in their relationship with one another.*"

The Romans categorised International Law into '*jus gentium'* (law of nations) and *'jus inter gentes'* (agreements between nations). The latter maxim is heralded as the blue-eyed boy of the modern epoch as sundry fields of what is now called 'public' international law is recognised in the context of relations between States. International Law also comprises international organisations within its sphere as they have been subject to multilateral treaties, for example, the United Nations. Organisation numero uno within the grand scheme of inter-state affiliations, the United Nations is the spiritual successor to the defunct League of Nations, which ceased to operate in the backdrop of World War II. It aims to maintain international peace and security, foster friendly relations among nations, and act as a beacon for harmony in a world riddled by material problems primarily "to save succeeding generations from the scourge of war".

The concept of International Law, which the United Nations aims to uphold, has two theories that seem to function as mutually exclusive substrates. The Grotian theory of Natural Law claims International Law to be a part of itself. The naturalists such as Puffendorf subscribed to this theory which states that natural law is an independent source of International Law. It prescribes the free will of the State as a political actor. This theory is often rubbished by jurists who prefer the Positivist interpretation.

The Asylum Case acknowledges the Positivist interpretation of International Law as one more suited in the context of conventions.

II. BACKGROUND

The two cardinal terms with which one is familiarised within this judgement are Positivism and International Customs. It is essential to understand both as they form the crux of the International Court of Justice's decree.

The theory of *'jus voluntarism'* (Positive Law) achieved prominence in the Age of Enlightenment. Au contraire to the naturalists, positivists such as Van Bynkershoek based this theory on the actual practices of the States. This opposite view stems from the critique of the naturalist clubbing of '*pacta sunt servanda'* (Agreements must be kept) with '*jus gentium'*.

[4] J.L. BRIERLY, THE LAW OF NATIONS 1 (Humphrey Wadlock ed., Oxford University Press 1924) (1928).

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Rather than assert the dominance of the state of nature, positivists espouse the free will of the States as a source of International Law. The binding nature of International Law is rooted in the consent of the States as it is deemed to have a personality of its own. By virtue of a unitary or tripartite system of government, the State declares its zeal. It demarcates its territory, curates laws for its residents, defends its borders against adversaries, et cetera. In all, Positivism acknowledges the forms of government set up by nation-states, be it democracies or monarchies. Of all the positives this theory offers, it is to be noted that this theory is fundamentally opposed to the Vienna Convention of 1969, which states[5]:

'*Every treaty which is in force is binding upon the parties to it and must be performed by them in good faith.*'

Another critique of Positivism is that whereas consent has its own fair share of importance, International Law need not be based on it. Customary law might serve as a potential basis for International Law. This principle is recognised by the Statute of the International Court of Justice. It recognises four sources of International Law[6]:

a. international conventions;
b. international custom - evidence of general practices accepted by law;
c. the general principles of law recognised by civilised states;
d. judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for determining rules of law.

A custom is a habitual course of conduct. It can be defined as a rule that the States community has since long recognized as the right rule of conduct. For usage to be a custom, there are two factors:

i. Usage needs to be constantly and uniformly practised by the States.
ii. *'Opinion juris sive necessitatis'* – the State must feel legally obligated to follow it.

The Montevideo Convention on the Rights and Duties of States, 1933, codifies the declarative theory of Customary International Law[7]. The qualifications for statehood that have been accepted as an accurate statement of Customary International Law are[8] -

a) a permanent population;
b) a defined territory;

[5] Vienna Convention on Law of Treaties art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.
[6] Statute of the International Court of Justice art. 38, *opened for signature* June 26, 1945, 33 U.N.T.S. 993.
[7] SIR HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 419 (Cambridge University Press 1947).
[8] Montevideo Convention on the Rights and Duties of States art. 1, *opened for signature* Dec. 26, 1933.

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c) government; and

d) the capacity to enter into relations with fellow states.

Now that these two terms have been delineated, they shall be looked at from the context of the Asylum case.

III. FACTS OF THE CASE

The nation of Peru issued an arrest warrant against political leader Victor Raul Haya de la Torre, head of the American People's Revolutionary Alliance, for instigating a civil war on the 3rd of October, 1949. Three months after the failed coup d'état, Torre fled to the Colombian embassy in Lima, seeking shelter and safe passage out of the country. The Colombian Ambassador confirmed that he was granted asylum under Article 2(2) of the Havana Convention on Asylum, 1928. Subsequently, the Ambassador also stated Colombia had found Torre to have satisfied the grounds of qualification for the term refugee under the Montevideo Convention on Political Asylum, 1933. Peru, however, refused to accept unilateral qualification and refused to grant safe passage to Torre.

Bolivia remained recalcitrant towards Peru's dismissal and remanded the Nation for not observing *pacta sunt servanda*. Inevitably, this reached the doors of the International Court of Justice.

IV. JUDGEMENT

2 out of the three questions laid before the ICJ were:

1. Is Colombia competent to unilaterally qualify the offence for the purpose of asylum under treaty law and international law?
2. In this specific case, was Peru, as the territorial State, bound to give a guarantee of safe passage?

Answering the first question, the Court held that there was no expressed or implied right of unilateral and definitive qualification of the State that grants asylum under the Havana Convention or relevant principles of International Law. The Convention, which Colombia relied on, was not ratified by Peru, and the low number of ratifications of the provisions by the other States could not reflect International Customary Law. It also refuted Colombia's claim of local customs supporting qualification as decreeing that the burden of proof on the existence of Customary Law lies on the party making allegation, in this case, Colombia.

The Court's raison d'etre was due to the failure of Colombia to establish the existence of said regional Custom due to lack of uniform usage of this custom led it to dismiss this issue. It

further noted that even if said Custom existed, Peru would not be entangled in it due to its intransigence towards the Montevideo Convention.

To respond to the second question, the Court held that Peru was not obligated to grant safe passage to Torre by touching down on the expediency factor. As the supposed practice of Customary Law was disproved by the Court while answering the first issue, Colombia's petition went on the blink.

V. ANALYSIS

The declaration of the ICJ, while not binding, due to the blasé nature of International Law, is nevertheless an important one while determining the importance of Customs. It is an acknowledgement of the lack of Peruvian consent to the Montevideo Convention and, therefore, an endorsement of the Positivist worldview. This shows a lack of prescience on part of the naturalists. International Law is only effective as long as the parties to it are willing to abandon obduracy and concede a teaspoon worth of their sovereignty to conform with international charters and agreements.

This can be seen in the 1986 Nicaragua case where the Court held the United States to be guilty of sponsoring terror activities by the Nicaraguan Contras which led to human rights violations and instability in the region[9]. The United States refused to participate in the proceedings and blocked the enforcement of the judgement by the United Nations Security Council (UNSC), thereby preventing Nicaragua from obtaining meaningful compensation.

Similarly, in 1951, the UN Military Observer Group stationed in Kashmir failed to conduct successful mediations between India and Pakistan. Since the passing of the UN Resolution of 1949, which called for demilitarisation of both countries from the region, there have been three wars along their borders in 1965, 1971 and 1999, multiple ceasefire violations *inter alia*. The nature of these conflicts and the validity of the parties are not what is being mooted here. The lack of abeyance shown by some of the world's most powerful countries without any meaningful consequences reflects the positivist thinking, and this ossifies the significance of the United Nations and International regulations in general.

VI. CONCLUSION

To this day, International Law is a very vague concept as it is hard to circumscribe a set amount of concepts and clauses within its gamut and declare it definitive. If one looks at the epistemic framework engendered by jurists and nations, it can be seen that variegated opinions and

[9] Nicaragua v. United States of America, 1986 I.C.J. 14.

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metrics have slowly influenced what is today considered to be the scope of International Law. Between the positivist and the naturalist frames of mind, the former is clearly superior in terms of laying down a more codified approach to the purview of International Law, although it isn't necessarily a very comforting one. The Asylum case is a clear indicator of the hypothesis that the Law of Nations is most effective when the magnanimity of a State allows for it to be a willing participant keeping aside its own whims.

At the end of the day, Positivism is a peculiar mirror image of the reality of global unity and a frightening effigy if one were to ponder about the potential damning implications of the lack of State consent.

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