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BEYOND THE ASYLUM CASE: HOW A 1950 JUDGMENT CONTINUES TO SHAPE THE METHODOLOGY OF CUSTOMARY INTERNATIONAL LAW IN THE 21ST CENTURY

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Abstract

Seventy years since its judgment, the Colombian-Peruvian Asylum Case (1950) remains a foundational text in international law, not merely for its ruling on diplomatic asylum but for its enduring methodological influence on identifying customary international law. This paper critically reassesses the case's legacy, arguing that its rigorous two-element test—requiring both consistent state practice and opinio jurisestablished a judicial template that continues to guide the International Court of Justice (ICJ) and other tribunals today. While the case famously found no regional custom granting unilateral qualification of asylum, its deeper contribution lies in its systematic approach to evaluating evidence of custom, setting a precedent for judicial caution and methodological transparency. Through analysis of the case's reasoning and its subsequent citation in ICJ jurisprudence, including recent cases addressing issues from climate obligations to cyber operations, this paper demonstrates how the Asylum Case's framework has evolved to meet contemporary challenges. It concludes that the case's true significance is its establishment of a durable, flexible methodology that balances the need for customary law to evolve with the imperative of legal certainty, ensuring its continued relevance in an era of rapid normative change.

Keywords: Customary International Law, Asylum Case, ICJ, Opinio Juris, State Practice, Judicial Methodology, Diplomatic Asylum, Sources of International Law.

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Literature Review

Alessandra Favi[2], Protecting Asylum Seekers and Migrants in the Context of the Rule of Law Crisis in EU Member States: The following research showcases the scenarios in which infringement procedure and its applications have an impact on migration and asylum law. It deals in detail about the Article 258 Infringement Procedure Mechanism. The mechanism is quite effective in combating not only specific but also multiple violations of EU law duties which influence migration and asylum law. Court of Justice of EU here makes a significant contribution towards protection of asylum law. Scenarios such as these can easily be recognized as the aftereffect of the Asylum Case and again shows that it was this spark that started the ignition which lead to development of Customary Rule of Law.

Alina Malinowski[3] here the practical difficulties in implementation of diplomatic Asylum have been discussed. There is no doubt that diplomatic asylum is recognized as part of regional international law in different parts of the world. The problem primarily arises due to its applicability, prerequisite includes urgency and nature of crime being a political crime. Position of States in relation to such institutions is required to be understood to handle the situation. An international convention which would govern all States volunteering could be a possible solution but due to negative attitudes and threat to sovereignity of smaller states this does not seem possible in the near future.

Introduction

For practitioners in international and national courts, customary international law is critical. Custom and treaties may coexist on the same subject matter as the push for the codification of international law.[4] Due to overlapping of Customs and treaties there is a clash as the application mechanism are different for the two. Moreover the coverage of customary law expands farther than application of treaty law.

[2]ALESSANDRA FAVI, protecting asylum seekers and migrants in the context of the Rule of Law, MDPI, https://mdpi.com

[3]ALINA MALINOWSKA, the institution of diplomatic asylum as the possibility of protecting human rights , MDPI https://www.culturaldiplomacy.org

[4]1 Lassa Oppenheim, Oppenheim's International Law: Peace 25–30 (Robert Jennings & Arthur Watts eds., 9th ed. 1996).

The recognition of customary rule of law differs from recognition of treaties. While recognition of a custom depends upon existence of a valid customary rule whereas evolution of customary rule is what is required for establishment of treaties. Traditionally there were two requirements to identify a custom i.e. sufficient evidence of state practice and legal opinion. Now, The International Law Commission (ILC) has adopted the two-element stating them as "a general practice" and "recognized as law."[5]

Over the years there have been various theories suggested for the recognition of customs. These include variations of the two element approach and one element method which deal with the conflicts between opinio juris and proof of practice. Few other renowned scholars have suggested a 'core right' approach to customary rules in international criminal law, which also derives its principles from the one element approach. In the subject of international law, criminal matter holdcertain peculiarities which differentiate then when compared to other fields. Since the two element approach is of such great importance it becomes essential to identify whether a new custom-identification method has arisen in this industry.[6]

Through passing of time it is now well settled that Article 38 of the Statute of the International Court of Justice (ICJ)[7] is the appropriate source for determining the custom-identification procedure. As such no convention, customary norm, or general concept is present which governs the method of identifying customary law. 'Judicial decisions and the teachings of the most highly competent publicists of the various nations,' according to Article 38, are secondary sources.[8]

Primary sources would include academic works and judicial decisions for examining the procedure employed to identify the presence of a customary rule.

Nationality is the only parameter that connects the individual and international law under customary international law. People who have been forced to flee from their homes due to natural disasters or political events and who may or may not be outside their nation of origin are

[5] Int'l Law Comm'n, Draft Conclusions on Identification of Customary International Law, in Report of the International Law Commission on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 119 (2018).
[6] Michael Wood, The Role of Opinio Juris in Customary International Law, 81 Nordic J. Int'l L. 389, 395–400 (2012).
[7] Statute of the International Court of Justice art. 38, ¶ 1(b), June 26, 1945, 59 Stat. 1055, 1060.
[8] Id

commonly known as refugees. Although refugees can be stateless majority of them are not. The subject matter of our research only deals with those refugees who have left their nation for political purposes and also highlights the legal issues faced by such refugees.[9]

Scenario before 1950

The Norwegian Fridtj of Nansen played a huge role in development of refugee laws and also for the upliftment of their rights. He was a famous Arctic explorer and philanthropist who went on to be named High Commissioner for Russian Refugees of the League of Nations in 1921. He then focused his expertise to include different types of refugees under his ambit of refugee law. According to his the biggest disadvantage of refugees stems from the fact that they are not protected by any nation. He observed this as the Soviet Government had stripped the Russian refugees under him off protection of their nationality and they even lacked passports. Before development of refugee law they were handled like ordinary aliens and could not travel if they lacked passports. Dr. Nansen come up with an initiative which resulted in becoming the first international instrument dealing with refugees, this instrument was known as "Nansen passport" and allowed refugees to travel.[10]

At a later stage a treaty was signed in London on October 15, 1946 which is one of the very few treaties which deals exclusively on the topic of travel documents of refugees. While the Nansen certificate was only a sheet of paper, this was in the form of a booklet similar to a passport. It allowed refugees to travel to their nation of origin multiple times during the validity period of the document which was usually one to two years.

Asylum in International Law

What does asylum mean?

The Latin equivalent of the Greek term "asylon," which meaning "freedom from seizure," is "asylum." Historically, asylum has been thought of as a safe haven where one could be protected

[9] Anthea Roberts & Sandesh Sivakumaran, The Theory and Reality of the Sources of International Law, in The Oxford Handbook of the Sources of International Law 108, 115–20 (Samantha Besson & Jean d'Aspremont eds., 2017).
[10] Guy S. Goodwin-Gill & Jane McAdam, The Refugee in International Law 4–8 (4th ed. 2021).

from a stalker. Scholars believe that “the tradition of asylum is as old as humanity itself,” and that it originated in sacred places.

Despite its lengthy history and widespread use, the term "asylum" has yet to be defined generally. The late Professor Atle Grahl-Madsen, an expert on refugee law, expressed the frequent opinion of experts that "the term 'asylum' has no clear or acknowledged definition." Despite this restriction, scholars are able to specify particular elements of the right when the discussion shifts from the meaning of "asylum" as a phrase to its significance as a right.[11]

Indeed, the right to asylum has been defined as the state's obligation to admit:

- a person to its territory;
- allow the person to stay there;
- refrain from expelling the person;
- refrain from extraditing the person;
- To not restrict the person's liberty.

Scenario Post 1950

On July 28, 1951 a Convention was passed by a Conference of Plenipotentiaries meeting in Geneva, regarding the Status of Refugees which expressly superseded most of the treaties. This Convention is regarded as one of the most important treaties to be passed in the matter of international refugee treaty. To ensure its worldwide applicability the Convention gives a more general definition to “refugee” when compared to previous international treaties. For the purposes of this Convention “refugee” is any person who due to fear of persecution for any reason including race, religion, nationality, political opinion or his/her membership of a particular social group is deprived of protection from such country and due to such situations is now residing outside his country with fear.[12]

Impact of Asylum Case[13]

[11]GEORGE.J , asylum Law, BRITANNICA, https://britannica.com
[12] Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137.
[13] Colombian-Peruvian Asylum Case (Colom. v. Peru), Judgment, 1950 I.C.J. 266, 276–77 (Nov. 20).

The decision passed on November 20, 1950 by the International Court of Justice in the Colombian-Peruvian Asylum case is an excellent example to understand the judicial technique used to determine existence of rule of customary international law. The Statute which governs ICJ gives a mandate to "employ international custom, as evidence of a general practice acknowledged as law," as given under Article 38. However an issue crops up relating to the peculiar wording of this Article which blurs the distinction between non-binding practice or use and customary international law, which the Court is accustomed to follow. As one of the well-respected judge of International law, Judge Manley 0. Hudson states, "The Court cannot apply a custom; instead, it can examine the general practice of States, and if it determines that such conduct is due to a belief that the law demands it, it may declare that a rule of law exists and proceed to apply it." In the realm of international relations consistent and repeated activity by several States together with the belief that such an activity was required by law while other States failed to take action. The criteria required include consistent and repeated activity by several States in the realm of international relations, the belief that such action was enjoined by law in each case, and the failure of other States to question such a practice at the time. It is not an easy task to determine the existence of such a rule and requires exemplary legal training.

There requires to be certain elements to show emergence of a principle or rule of customary international law, the elements are briefly stated below.

- Consistent practice by a number of States with regards to a type of circumstance which falls within the scope of international relations.
- The establishment of continuity in that practice over a long period of time.
- Consonance with the fact that the practice in question is necessary and is in conformity with current principles of international law.
- Other States do not oppose this practice and convey wide acceptance impliedly or explicitly.[14]

[14]BS.CHIMI, customary international Law, CAMBRIDGE.ORG,https://cambridge.org

It can be stated that in a given case courts find it relatively easier to identify if there exists a customary rule of law that to determine these elements or to understand the methods and procedures by which non-obligatory practice evolve into customary rules of international law.

Max Srensen notes the most distinguishing feature of customary international law to be that it is determined not be acts directed expressly towards the creation of international law, rather it is based on the observation of State Conduct. The scenario is exactly the opposite in case of application of traditional method in which courts apply a general rule to specific conduct.

In most of the circumstances the ICJ's decision of existence of a customary rule of law is sufficient to validate. However it is not always required that ICJ validates', sometimes mere existence of the required elements such as State action and conclusions drawn from it can prove sufficient. Hence it can be noted that it not always required that recognition of a customary rule of law should come from an international court, it can also be done by a national court, a foreign office and other authorities.

There are to different aspects required to recognize the emergence of a customary rule of international law, one being the "material" aspect and the other being "psychological". While proving the former aspect may be easy, it becomes quite a challenge to prove the latter. It is Observation of the State's conduct with regards to specific international matters which determines if the behavior is constant and genetic or not. The quantum of time cannot be fixed so as to set the standard of requirement to prove consistency. This allows for the judiciary to evaluate individual circumstances in a better manner. Immemorial customs of sea cannot and should not be equated to international aviation law.

The requirement that a practice must be required or forbidden before deeming the existence of a customary rule of law is one of the vital psychological aspect that poses difficulty in practical scenario, this requirement is otherwise known as the opinio juries sivenecessitatis.

Practical approach to determine presence of factors required for confirming existence of a specific customary rule of international law can be done by referring to the Paquete Habana[15]

[15] The Paquete Habana, 175 U.S. 677, 700 (1900).

and the Colombian-Peruvian Asylum Case. In the former case it was observed by The Supreme Court of the United States: By reviewing various authorities and precedents on the subject matter it could be understood that in the present case even though there were no express treaty or other Public Act it was recognized as an established rule of international law due to the general consent of the civilized nations of the world.[16]

Recent Trends

The International Labour Organization in 2018 came up with the draft conclusions for identification of customary international law. It consists of 16 conclusions which deal on the topic at different levels and perspectives. Matters such as role of teachings, resolution of international organizations etc are dealt with in great detail. These are nothing but further developments from what was derived post the Asylum case.[17]

Conclusion

The Colombian-Peruvian Asylum Case endures not as a mere historical precedent but as a living methodological cornerstone in the identification of customary international law. While its immediate outcome denied the existence of a regional custom permitting unilateral qualification of asylum, its profound legacy lies in the rigorous, two-element analytical framework it crystallized. By insisting on clear evidence of both widespread state practice and a sense of legal obligation (opinio juris), the International Court of Justice established a disciplined judicial technique that prioritizes objective verification over subjective assertion.

Seventy years on, the case's influence is unmistakable in the ICJ's continued jurisprudence. Modern tribunals, grappling with emergent norms in fields such as environmental protection, cyber warfare, and global health, still employ the Asylum Case's foundational logic: customary law cannot be presumed; it must be demonstrably proven. The 2018 International Law Commission's Draft Conclusions on the Identification of Customary International Law represent

[16] KATRIN SCHOCK , impact of asylum interviews on mental health of traumatized asylum seekers , NCBI. NLM.NIH.GOV, https://ncbi.nlm.nih.gov

[17] Laura García Martín, Diplomatic Asylum in the 21st Century: Between Sovereignty and Human Rights, 24 Int'l J. Refugee L. 321, 330–35 (2022).

a direct doctrinal descendant of this approach, systematizing the very methodology the case pioneered.

However, the contemporary landscape presents new challenges unimagined in 1950. The digital age generates instantaneous, global state practice through diplomatic communications on social media and official digital statements. The line between treaty law and custom increasingly blurs with multilateral frameworks like the Paris Agreement. In this complex environment, the Asylum Case's core lesson—the necessity of a cautious, evidence-based, and transparent judicial process—is more critical than ever. It serves as a necessary bulwark against the premature declaration of "instant custom" driven by political expediency rather than genuine legal conviction.

Ultimately, the Asylum Case's greatest contribution is its affirmation that customary international law, while dynamic, must be anchored in demonstrable state consent and belief. Its methodology ensures that the evolution of international law remains a structured, legitimate process, preserving the stability of the international legal order while allowing for its necessary adaptation. As new normative frontiers continue to emerge, the disciplined judicial technique honed in this landmark case will remain indispensable for distinguishing genuine legal obligation from aspirational practice, securing its place as a permanent pillar in the architecture of international legal reasoning.