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The Ambiguity in Terminology use of Asylum and Refuge in the Latin American and Caribbean Region

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Another factor that contributes to migration is climate change, among others; however, the most serious reason nowadays is the armed conflict in Syria, which has resulted in more than five million international refugees.

We are now living a human tragedy that exceeds the magnitude of the wars from the past. This has resulted in the frequent use of legal terms for international protection in the region, such as asylum and refuge. They are both used indistinctly, often in a vague and even confusing way, especially in the Latin American and Caribbean region.

In fact, we see that in Latin America and the Caribbean (depending on the country or regional regulation) both terms are inaccurately used in internal legislations, sometimes referred to as synonyms.

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Catalina Magallanes [α] & Kelly Jaimes [σ]

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We are now living a human tragedy that exceeds the magnitude of the wars from the past. This has resulted in the frequent use of legal terms for international protection in the region, such as asylum and refuge. They are both used indistinctly, often in a vague and even confusing way, especially in the Latin American and Caribbean region.

In fact, we see that in Latin America and the Caribbean (depending on the country or regional regulation) both terms are inaccurately used in internal legislations, sometimes referred to as synonyms. Such indistinct use is incorrect, as we will try to demonstrate in this work. Finally, as a conclusion, we will detail our proposals for terminology unification and differentiation of both legal protection concepts.

For that matter, we have analyzed different Latin American regulations and regional legislations, such as the Brazil Plan of Action, and have stressed their inaccuracies. Furthermore, we have introduced two Advisory Opinions (AO) of the Inter-American Court of Human Rights. First, we have AO-21/14, which is the case of Pacheco Tineo family vs. the Plurinational State of Bolivia, dated November 25, 2013, about an alleged inaccuracy committed by two organisms while trying to define asylum when it was a refuge case. Second, we have AO-28/18 upon the request of the Republic of Ecuador, where the Inter-American Court of Human Rights tried to conceptualize and differentiate both terms through an inclusive and enlightening classification of each of them.

I. Introduction

The international community is currently living a human tragedy of a huge magnitude, which has resulted in the frequent use of the words asylum and refuge by legal organisms for international protection. Both terms are used in an indistinct, often vague, and even confusing way, particularly in the Latin American and Caribbean region.

In Latin America and the Caribbean (depending on the country or regional regulation) both terms are used inaccurately in internal legislations, sometimes as synonyms. Such indistinct use is incorrect, as we will try to demonstrate in this work.

The analysis looks into different regulations of Latin American countries and regional legislations, such as the Brazil Plan of Action, highlighting its inaccuracies. This article also discusses the verdict of the Inter-American Court of Human Rights regarding the case of Pacheco Tineo family vs. the Plurinational State of Bolivia, dated November 25, 2013, about an alleged inaccuracy committed by two organisms while trying to define asylum when it was a refuge case.

The aim of this work is to draw the attention of the region's legal community, since this indistinct use is a concerning matter that shows lack of training or awareness when drafting legislations.

This misuse of both legal terms endangers the rights of people in need of international protection and reveals the lack of interest or seriousness in the treatment of these issues. It is not possible to refer to a refugee with the word asylee, and you cannot use asylum as a synonym for refuge, at least not in Latin America. Subsequently, we will clarify the differences between them by reviewing a number of international, national and regional legislations, in order to highlight its inaccuracies.

Finally, we will present two proposals at regional level for the correct treatment of both legal terms.

II. Asylum

As an introduction, we will explain the origins and definition of the word asylum, which dates back to the Greek word *Asylum* (1700 B C) and subsequently into the Latin word *Asylom*[1] that became popular in the newly emerging and emblematic city of Rome at the time.

Asylum is a legal concept, which means, according to ancient scriptures: "what cannot be taken, in the sense of an inviolable place that provides

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[1] Cabanellas de Torres, 2008.

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protection to a person who is untouchable, and shall now be considered as a sacred subject."

Its religious origin defines it as a divine place that may not be violated by external aggression.

Even if we look into its most remote origins, we see that it is a concept that originated "in the brotherly love for the neighbor, coming from a religious mandate." Its beginnings were purely religious and its first steps were oriented to protect the neighbor in Israel.

Besides "asylum", the words used in its most remote origins were "to provide refuge," "cities of refuge," "to provide cover," and "shelter." All shared the same sense or meaning: solidarity between human beings.

History tells us that Hebrew peoples created the term. It is said that Yahweh (God) ordered Moses to create cities of refuge for the persecuted and for those who had committed not intentional murder. They would be refugees until their cases were taken to the Council, who would decide their fate.

Those who could receive asylum throughout the six "Hebrew cities of refuge" were Israelites and the foreigners who came across them.

According to the ancient scriptures of Joshua, the first Hebrew cities of refuge were Kedesh, Shechem, Kirjath-arba (Hebron), Bezer, Ramot, and Golan Heights. The terms asylum and refuge were used throughout these six cities.

Hebrews used to consider that people who deserved refuge were the unfairly persecuted. However, the fact of being persecuted is sufficient foundation in Greece nowadays.

In Greece, asylum becomes a wide resource, as guilt is out of consideration, and refuge is granted to all those who flee (without having to provide foundation), including slaves who fled from their masters, fugitives, heretics, etc.

The hosting was extended and transferred to local shrines, which were altars, tombs of the heroes, sacred mountains and its surroundings, and certain cities, among others. *"Danaus... may he come in peace or in arms, with angry and cruel intentions, it is best that we protect ourselves on this hill consecrated by the gods of the city. An altar is worth more than a fortress: it is a shield that nobody can trespass...*[2]*"*

Some of the most well-known places at that time were Minerva and Pales in Athens, Diana in Ephesus, Apollo at Miletus, among others. These cities were considered sacred, and the gods would punish people who profaned them.

Asylum is then institutionalized and the word began to prevail over 'refuge,' 'cover,' and 'shelter' (used by Hebrews), as 'asylum' became more popular.

The Romans inherited the term 'asylum' from the Greeks and they developed it by establishing restrictions, conceptualizing it, and giving it legal value with both political and temporary nature.

In principle, the term was used to attract the necessary workforce to contribute the growth of the new city of Rome... *"a city-sanctuary was opened, called the Temple of the God Asileo, where they welcomed and protected everyone, they would hand back none, nor the servant to his master, nor to the debtor to the creditor, nor the murderer to the hands of the judge,"* explains Plutarco. Once the need for city growth was fulfilled, asylum was seriously restricted[3].

It was in the age of Constantine, the first Christian Emperor, when asylum became universal and strengthened by its religious nature, unlike the Greeks, who considered asylum had superstitious origins and a large religious hint.

In the Middle Ages asylum became a merciful source, i.e., protection for divine mercy.

In the 14th century, religious asylum starts to lose strength and its humanitarian nature became more popular, a theory that not only holds the State accountable for providing protection but also encourages it to enforce a normative regulation.

History then showed us the first steps of regulatory intentions in the treaties of Westphalia in 1648, Münster and Piricos, which marked another chapter for asylum and refuge. Different regulations took place afterwards, including the Convention on Asylum (Havana, 1928[4], the Convention on Political Asylum (Montevideo, 1933)[5] and several treaties on asylum in Latin America that defined diplomatic and territorial asylum.

Asylum in Europe gained strength during clashes between the ecclesiastical and civil power. The term asylum transcended until the French Revolution, a historical moment in which it was incorporated to the Constitution of 1791. The caption reads as follows: *"asylum is granted to foreigners who have been expelled from their homeland by reason of freedom..."* Since then, Europe incorporated political asylum, meaning protection to the victims of political persecution, something widely developed in Latin America, leading to terminological confusion in the region.

Since its inception, the purpose of asylum, like refuge, was to provide protection. However, its evolution in Latin America has stated and specified that both

[2] Aeschylus, the suppliants, quoted by Serrano, Fernando, Political Asylum in Mexico, op. cit. p. 23. Aeschylus (Greece h.525 - 0406 BC) Greek playwright, founder of Greek tragedy, born in Eleusis, near Athens, he unveils Greek mythology and its heroes on his works. +The Suppliants were written around 400 BC.

[3] The right to asylum became more legal, serious and restricted. Judiciary Encyclopedia OMEGA, 1976.

[4] http://www.oas.org/es/sla/ddi/tratados_multilaterales_interamericanos_A-37_asilo_politico.asp

[5] http://www.oas.org/es/sla/ddi/tratados_multilaterales_interamericanos_A-37_asilo_politico.asp

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terms are not synonyms. The only thing they have in common is protecting someone who is being persecuted. In spite of that, some legal texts use both concepts as synonyms, such as the Brazil Action Plan.

III. Refuge

It is a universal legal form, both conventional and non-political. Its aim is to protect the life or health of a person through the principle of *non-refoulement* (non-refoulement to the country that pursues them or endangers their life or integrity).

Its most remote origins come from Jean Henry Dunant's book *'A Memory of Solferino,'* a narration about the memories of the battle of Solferino (June 24, 1859) that left thousands of deaths and wounded. This situation resulted in the creation of the Red Cross. The book proposed a regulation in order to neutralize the conflict and provide protection and assistance to the victims of the war, as well as the medical staff. Those were the first steps to establish a legislation that later would be a part of the regulations on victim protection, relief organizations, and assistance agencies.

Then, the tragedies of the Second World War forced the international community to organize meetings in order to consider the protection of the victims. It is then when the Geneva Convention of 1951 is created, which internationally regulates the form of refuge.

It was established that refuge applied for those pursing international protection, such as victims of events that are usually linked to violent situations and human or natural disasters. The foundation of the application shall be persecution or any of the causes listed in the Geneva Convention on the Status of Refugees of 1951 and its New York Protocol of 1967[6], which was further developed in Latin America by the Cartagena Declaration on Refugees[7] of 1984, providing greater protection in the region.

The reason of persecution may be religious, racial, nationality-related, for being member of a particular social group, etc., and their rates are set forth in the Convention[8] on the Status of Refugees and its Protocol[9].

The basis of persecution is what prevents the return without assessing the request, and it is sufficient for granting temporary refuge as long as it is effectively founded and until the case is resolved.

Although each State regulates the process of granting refuge, according to their own criteria and the Geneva Convention on the Status of Refugees of 1951 and its New York Protocol, the Latin American and Caribbean region lacks uniformity in meeting the minimum requirements. That includes the time of submission of the application since the arrival to the country, the time to appeal the decision, and the agencies in charge of the application or appeal. It is possible to see that in countries like Costa Rica[10], Colombia[11], Brasil[12] and Argentina[13]. They possess different times to settle applications and resources, as well as the different organizations in charge of deciding upon applications, except for the UNHCR which assists all countries.

For instance, while Argentina may grant a temporary residence to the refugee, it is permanent in Costa Rica and Brazil (see legislation attached in the footer of this section).

[6] http://www.acnur.org/el-acnur/historia-del-acnur/la-convencion-de-1951

[7] http://www.acnur.org

[8] "Article 1. Definition of the term "refugee". For the purposes of this Convention, the term "refugee" shall apply to any person:1) who has been considered as a refugee under the Arrangements of May 12, 1926 and June 30, 1928, or the Conventions of October 28, 1933 and February 10, 1938; or under the Protocol of September 14, 1939 or the Constitution of the International Refugee Organization.
The decisions of non-eligibility taken by the International Refugee Organization during its activity period shall not prevent the recognition of refugee status to persons who fulfil the conditions established in paragraph 2 of this section.
(2) who, as a result of events occurring before January 1, 1951 and owing to well-founded fears of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of their nationality and is not able to or, because of such fears, does not want to benefit from protection of such country; or, because of not having the nationality and finding themself, as a result of such events, outside the country where they previously had their habitual residence, is not able to or, because of such fears, is unwilling to return to it. For people with more than one nationality, 'in the country of their nationality' shall refer to any of the countries they possess nationality of; and a person shall not be considered lacking protection from the country of their nationality that, without a valid reason related to their founded fears, has not played host to the protection of any of the countries they possess nationality of."

[9] Protocol on the Statute of Refugees: signed in New York in 1967: The States Parties to the Protocol, Considering that the Geneva Convention on the Status of Refugees on July 28, 1951 (hereinafter referred to as the Convention) covers only those who have become refugees as a result of events occurring before January 1, 1951, Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention, Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline January 1, 1951, agree as follows: Article 1 General provisions 1. The States Parties to the Protocol undertake to apply Articles 2 to 34 of the Convention to refugees as hereinafter defined. 2. For the purpose of the present Protocol, the term "refugee" shall, except as it appears on paragraph 3 of this article, mean any person within the definition of Article 1 of the Convention. "As a result of events occurring before January 1, 1951 and..." and the words "...as a result of such events," in article 1 A (2) were omitted. 3. The Protocol shall be applied by the States Parties hereto without any geographic limitation, unless there are existing declarations made by States Parties to the Convention in accordance with article 1 B (1) (a) of the Convention, shall, unless extended under article I B (2) thereof, apply also under the this Protocol.

[10] http://www.migracion.go.cr/institucion/leyes%20migratorias/reglamentos/Reglamento%20Refugio.pdf

[11] http://www.acnur.org/t3/fileadmin/Documentos/BDL/2014/9437.pdf

[12] http://legislacao.planalto.gov.br/legisla/legislacao.nsf/Viw_Identificacao/lei%209.474-1997?OpenDocument

[13] http://www.acnur.org/t3/fileadmin/Documentos/BDL/2006/4658.pdf

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The regional will is manifested in Brazil Action Plan[14], a tool that intends to reach uniformity in basic criteria regarding the requirements for establishing refugee status and international protection procedures, as well as humanitarian assistance with long-term solutions and promote the resettlement and the guarantee of safe return.

IV. Latin America and the Caribbean

Latin America is the region that has developed political asylum the most, particularly diplomatic asylum, due to historical events that has linked it to political persecution. There are two types of asylum in this context: territorial asylum and diplomatic asylum. Asylum in current national regulations (depending on the country) can be differentiated from refuge; however, it can also be used as a tool of international protection, like a synonym for refuge.

In Latin America, the legal concept of asylum comes from the Montevideo Treaty on International Penal Law of 1889, signed by Argentina, Bolivia, Paraguay, Peru and Uruguay, which has a specific chapter on the topic. Subsequently, the Havana Convention on Asylum of 1928 took place, signed by Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, and Paraguay.

Five years later, the Montevideo Convention on Political Asylum and Refuge (1933) included some changes to the previous Havana Convention of 1928.

In 1939, Paraguay and Uruguay signed the Montevideo Treaty on Political Asylum and Refuge.

The most important convention and point of reference on asylum is the Caracas Convention of 1954. It defined the rights and obligations on diplomatic asylum for the States parties, and it is known as the Convention on Diplomatic Asylum.

Initially, the States parties were Brazil, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela.

We should not forget that asylum started to gain popularity in Latin America at a turbulent time in which dictatorships were spreading on a large part of the territory. Therefore, its political name gained strength due to its relationship with ideological persecutions of that time.

This is the context in which diplomatic and territorial asylum assume greater importance. The diplomatic asylum case with the biggest historical importance in Latin America and the one that confirms its name is the case of doctor Hector Campora who requested asylum in the Embassy of Mexico in Buenos Aires.

Even though the case was surpassed by the asylum of the Australian Julian Assange in the Embassy of Ecuador in London (that took more than four years), the case was one of the longest in the history of the region. The person spent three years at the Embassy of Mexico in Argentina's capital.

Doctor Campora was sent to Mexico through the authorization of a safe-conduct by Argentina. Years after, he passed away in 1980 in the city of Cuernavaca.

As noted previously, Latin America recognizes two modes of asylum: diplomatic asylum and territorial asylum.

Territorial asylum is when protection is provided within the territory of the country where protection was requested. Thus, the case of doctor Campora turned into a territorial asylum when arriving in Mexico.

On one hand, *territorial asylum* is granted by the authorities of the country where protection is requested and the person then travels to such country. This mode can be mistaken for refuge, as it has sometimes being called territorial asylum (the Law of Human Mobility of Ecuador highlights the difference between territorial asylum and diplomatic asylum, view link[15]).

On the other hand, *diplomatic asylum* is requested solely and exclusively before the diplomatic legations, at the Embassy, consulate or consular office of the country which calls for protection. It also applies for protection in military ships or aircrafts, which are inviolable places found inside the place of the flight or danger.

Currently, as aforementioned, we have an interesting and worthy-of-analysis case, which is the case of the Australian Julian Assange. He is currently in the Embassy of Ecuador in London, where diplomatic asylum was granted on June 19 2012 up to 2018. The power to move to Ecuador was refused, as well as the laissez-passer by the British Government (since Europe does not recognize this type of protection).

The authorities of Ecuador then requested the safe-conduct to immediately move him to Ecuadorian territory. Their foundation was the excess time, as prolonged closure accelerates the deterioration of the person's health and puts his life at risk.

Even though the United Nations Working Group on Arbitrary Detention requested the British and the Swedish States to "put an end to the deprivation of liberty" of the founder of WikiLeaks, in a legally binding

[14] http://www.acnur.org/cartagena30/declaracion-y-plan-de-accion-de-brasil/

[15] http://www.refworld.org/pdfid/58a41f864.pdf Article 95.- Diplomatic Asylum. Diplomatic asylum is the power of the Ecuadorian State through the highest authority of Foreign Affairs to grant international protection or shelter in their diplomatic missions or consular offices, the foreigner whose life, liberty or integrity is in danger because of political persecution, generated in their State of origin or any other State. Article 96.- Territorial Asylum. Territorial asylum is the power of the Ecuadorian State to grant protection or shelter in the national territory to the foreigner whose life, liberty or physical integrity is in imminent danger because of political persecution generated in his country of origin or any other State.

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ruling[16]. This decision is not in accordance with London and Stockholm regulations, as they do not recognize the asylum and allege the rating is incorrect since Julian Assange breached a common conviction of the British State.

There are two sides regarding the subject. One qualifies political asylum as correct and the other one does not. Eventually, time will determine what will happen with this legally interesting discussion.

As the use of the legal terms 'asylum' and 'refuge' is often vague and confusing in the regulations of the different Latin American countries, we will then try to show this lack of uniformity and accuracy, as well as the synonym treatment both terms get.

1. *In Ecuador,* the new legislation on human mobility states the following in the chapter under the heading of International Protection: *it is a State's duty that has the aim of guaranteeing the applicants' rights for protection are as equal as Ecuadorians', and those recognized as refugees, asylees or stateless persons are considered to be subjects of international protection.* The text shows evidence of the distinction of three different figures, yet it does not clarify the difference.

In the 2008 National Constitution of Ecuador, Article 41 establishes that *the rights of asylum and refuge are recognized in accordance with the law and international human rights instruments. The person in condition of getting asylee or refugee status shall have special protection guaranteeing the full exercise of their rights.*

The State shall respect and guarantee the principle of non-refoulement, as well as humanitarian and legal emergency assistance. Exceptionally, when circumstances require it, the State will recognize a collective refugee status in accordance with the law.

We see that Ecuador's laws, both in its Constitution and national legislation, treat asylum and refuge differently.

Its legislation specifies who can be a beneficiary of international protection in Article 117:

1. People recognized as refugees.
2. People recognized as asylees.
3. People recognized as refugees or asylees.

Article 119 of Human Mobility Law showed a defined perspective regarding the fact that there are two different terms for international protection, and that *the Ecuadorian State recognizes the right to asylum and refuge.*

The legislation provides a clear definition and categorization of asylum, by specifying that it shall be granted in case of emergency and for the time needed to get the asylum outside of that country, *in order to protect that person's life, liberty and integrity.*

The law also establishes two modes of asylum: active and passive diplomatic asylum.

a. *Active diplomatic asylum* is the one that is granted in diplomatic headquarters.
b. *Passive diplomatic asylum* is the assistance provided by the Ecuadorian State by facilitating a safe-conduct to the State that provided protection to an asylee at diplomatic headquarters, in Ecuador's territory.

When referring to refuge, there is a definition and steps on how to ask for protection and the details of the acknowledgment process.

The Ecuadorian legislation makes it very clear that refuge and asylum are two different instruments for international protection; however, it does not mention the characteristics of the potential beneficiaries of this protection.

As we keep analyzing unclear or inaccurate treatment of both terms/legal figures, let us see how the Ecuadorian State has another inappropriate use for both terms. In Ecuador's fact sheets on the procedure for the determination of the refugee status published on the State's official website[17], if we see in section *a) Registry of applications... asylym seeker...* we will find another setback.

2. *Uruguay* accurately determines in a separate legislation the right to refuge under Law 18.076, called Right to Refuge and Refugees, establishing the State's obligation to provide this protection to applicants.

For this country, refuge is an obligation in terms of protection by the State. However, asylum is a right of the State and is therefore discretionary; the State is not obliged to provide it[18].

3. *Argentina* treats refuge as a main figure and specifies asylum is included in it, even though, historically, asylum has always come first due to its consolidation (since the times of dictatorship until democracy) in 1983 with the Presidency of Raul Alfonsin.

Refuge is regulated under the General Law 26.165[19], known as General Law of Refugee Recognition and Protection, which was sanctioned on November 8, 2006.

[16] http://www.laprensa.com.ni/2016/02/05/internacionales/1981409-onu-falla-a-favor-de-julian-assange

[17] http://www.acnur.org/t3/fileadmin/Documentos/RefugiadosAmericas/Ecuador/2012/Procedimiento_para_la_determinacion_de_la_condicion_de_refugiado_en_Ecuador.pdf?view=1

[18] http://www.oas.org/es/sla/ddi/tratados_multilaterales_interamericanos_A-46_asilo_diplomatico.asp Article II Every State has the right of providing asylum, yet it is not obliged to provide it or to explain its denial.

[19] http://www.acnur.org/t3/fileadmin/Documentos/BDL/2006/4658.pdf

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The regulation refers to the principles ratified by the Convention on the Status of Refugees of 1951 and its New York Protocol of 1967. It clearly details the principles of protection to the refugee, the one of non-refoulement, which is the most beneficial to the person and their family, as well as all the countries that have ratified the above-mentioned Convention.

Article 7 reads as follows, with regard to the refugee: "the applicant for asylum is *included in this term"* (an inaccuracy to take into account).

Then we see how the legislator treats both terms as equal, knowing that the refugee application prevails over the asylum request. The law puts it like this: *Article 14. The filing of an application for recognition of refugee status shall have suspensive effect on the operation of a decision, authorizing the extradition of asylum seekers until the refugee status procedure has been completed by a firm resolution.*

It is here when we see the Argentinian legislator creating confusion again, since he separates these two forms of international protection. He specifies the conditions to benefit from refugee protection and leaves asylum opened to others possibilities, as nothing has been said in this regard; and after specifying in Article 7 that asylum is included in refuge.

A part of the doctrine holds that *external or territorial asylum is similar to political refuge*[20].

After highlighting the inaccuracies, we see that it is essential that national and regional legislations explain the differences between both terms, or at least indicate in detail if they work as synonyms or not, as in the case of the Ecuadorian legislation that specifies each of the figures and makes it clear that asylum and refuge are not the same.

4. *Brazil's legislation* has a broad concept of refuge, although foreign policy supports political asylum. Article 4 of the Federal Constitution reads: Regarding international affairs, the Federative Republic of Brazil is governed by granting political asylum.

It regulates refuge under Refugee Act No. 9474/97 and maintains the guidelines established at the Geneva Convention on Refugee Status of 1951 and its New York Protocol of 1967.

The application can be submitted before any immigration authority, even though they have created a body responsible for the management of refugee applications: the National Commission for Refugees (CONARE), which works with the Ministry of Justice, and has Caritas as a civil society representative. Brazil stands out in the region for its management of tripartite participation in asylum requests.

Since its creation, the agency has managed requests until the decision for approval or denial is made. The UNHCR is an auxiliary organism allowed to make suggestions to streamline the procedures.

5. *Chile,* through Law 20.430/10 and its regulation, Decree 837/10, lays down provisions on refugees' protection. This law is devoted to refuge applicants who are in the country.

We find that specifying the fact of *being in the country* is an interesting issue. It means that the foreigner fleeing from any type of persecution set forth by the Convention can first access the State and the bureaucratic management.

Like other countries in the region, Chile pursues the principles established in the Geneva Convention of 1951 and its Protocol.

As a remarkable principle, the country introduces the principle of the best interests of the child, specified in law regulations and the status of a stateless person in order to apply for refuge. However, Chile has not ratified the conventions related to the stateless.

6. *Peru,* through Legislative Decree of migration No. 1236, launched on September 26, 2015 and within the same legislative body that establishes in chapter II that *asylum and refuge (article 46.1) are legal forms granted by the Peruvian State for legal protection of persons in need of protection.*

Article 46.2. Specifies that *asylum* and *refuge* are applicable in immigration matters, the provisions contained in the rules or international instruments which Peru is a party, and special regulations in force.

Article 50. Establishes the following: "Duty of protection. the Ministry of Foreign Affairs and the Ministry of Internal Affairs should take the necessary protective measures to ensure the safety of asylum and refuge seekers in national territory, in accordance with special regulations in force".

This legislation defines both terms as legal statutes, and says they shall be applied according to provisions of the international standards to which Peru is party. We see that the terms are not synonymous, as the law is clear in that aspect. The country speaks of them as two different forms, but does not clarify the difference, like most of the aforementioned legislations.

Also is important to mention that with the migration of Venezuelan citizens to Peru, the State introduce the Figure of PTP, a provisional permission that allowed the Venezuelan citizens, that enter to Peru before October 31st of 2018 in a regular way, to work and stay in Peru for a year.

7. *Dominican Republic* recognizes the right of asylum in its Constitution... (Article 46.2) "Everyone has the right to apply for asylum in the country, in the event of persecution for political reasons. Those who have asylee status enjoy protection, which guarantees the

[20] Rizzo Romano, *International Public Law*, p. 508.

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full exercise of their rights, in accordance with the agreements, norms and international instruments signed and ratified by Dominican Republic. Political crimes, terrorism, crimes against humanity, administrative corruption and transnational crimes are not considered.

Even though Dominican Republic does not include refuge or asylum seekers in its immigration law, its Decree 2330 of September 10, 1984 names CONARE as responsible for the processes of refuge applications.

8. *Venezuela* makes a clear distinction of both terms in its Constitution... "(the country) *recognizes and guarantees the right of asylum and refuge.*" As we can see, the terms are mentioned separately, which makes it clear that they are not synonymous.
9. In its Constitution, *Paraguay* recognizes the right of *diplomatic* and *territorial asylum* to anyone being persecuted for *political reasons or offences*, or *offences related to those reasons*, as well as for their opinions or beliefs.

This country, like Ecuador, treats asylum separately and classifies its modes: territorial and diplomatic.

Article 25 of Migration Law 978/96 regulates the quality of temporary residency to refugees and asylees, a status given by the National Commission for Refugees (CONARE) in accordance with the agreements and international treaties.

Article 27. States that political asylees and refugees are governed by agreements and treaties signed by the Republic and relevant legislation.

The General Law on Refugees 1938 assures attention at all times for refugee and asylum claimants, like Uruguay.

V. Inter-American Court of Human Rights: Inaccuracies in the use of the Words Asylum and Refuge in the Case Pacheco Tineo Family vs. the Plurinational State of Bolivia

The inaccurate use within the region also reached the Inter-American Court of Human Rights, which was seen in the judgment of the case Pacheco Tineo family vs. the Plurinational State of Bolivia in 2013. International protection was denied to the family by the State of Bolivia, and the Court used the terms 'asylum' and 'refuge' indistinctly, so both words could be either seen as synonyms or different, yet without a clear approach[21]. *The Court noted that, under the terms of Article 22.8 of the Convention, the Inter-American system acknowledges the right of foreigners, and not only of asylum or refuge seekers, to improper non-refoulement when their life, integrity and/or freedom (including other related forms of law) are at risk.*

We can see that, although the Court clarifies that refuge is the guarantee of non-refoulement, other countries may refer to asylum and refuge separately by using the disjunctive conjunction "or".

In this paragraph the Court committed a serious inaccuracy or error, since it includes asylum within the principle of *non-refoulement,* when it is not, according with the Conventions of Havana[22], Montevideo[23] and Caracas[24]. It is the State who qualifies the nature of the crime and the prosecution, as stated in *Article IV.* of the Convention of Caracas of 1954: *In order to grant asylum, it is the State responsibility to qualify the nature of the crime or the foundation of persecution*[25]*.* This was a mistake made by the Court since these people qualified for refuge, and therefore the principle of non-refoulement, which is real protection, given that asylum is a right of the State and the person can be put at risk.

For the case of other Latin American countries, they usually link asylum to political persecution. Asylum is a right of the State, thus the State is not obliged to provide it (Caracas Convention of 1954, Article II).

The State has full discretion regarding its decision, so is not linked to the principle of non-refoulement, which is typical in refuge cases.

As we have mentioned before, refuge is a right for people and the State is then obliged to provide protection, in accordance with the Geneva Convention of 1951 and its New York Protocol, as long as the applicant meets the conditions for refuge.

In terms of treating or defining the elements of the principle of non-refoulement as a cornerstone of international protection for *refugees* or *asylees* and people requesting *asylum,* the Convention not only failed in qualifying or defining refuge, but also used both terms interchangeably and created a feeling of both words being synonyms. This puts at risk unprotected people in need of being protected by refuge.

At some point, the Court stated that the family was protected by a *specific mode of asylum,* in accordance with Article 22.1 of the Convention of 1951 and Article 33.1 of the Protocol of 1967. The Court then made another mistake, *as the word refuge is used throughout the Convention.*

After that, we saw that the "*asylum* procedure" was mentioned and then "if the *refugee status* is not recognized…" The right to seek and receive asylum was

[21] <http://www.corteidh.or.cr/docs/casos/articulos/resumen_272_esp.pdf>.

[22] http://www.oas.org/es/sla/ddi/tratados_multilaterales_interamericanos_A-37_asilo_politico.asp

[23] http://www.oas.org/es/sla/ddi/tratados_multilaterales_interamericanos_A-37_asilo_politico.asp

[24] Convention on Diplomatic Asylum, Caracas 1954, Article II. Every State has the right to provide asylum, yet it is not obliged to provide it or explain its denial. http://www.oas.org/es/sla/ddi/tratados_multilaterales_interamericanos_A-46_asilo_diplomatico.asp

[25] http://www.oas.org/es/sla/ddi/tratados_multilaterales_interamericanos_A-46_asilo_diplomatico.asp

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established in Article 22.7 of the American Convention, along with Articles 8 and 25 of the same Convention about the applicant for refuge has the right to be heard by the State and receive the appropriate guarantees throughout the process.

In this case, we see how the Court uses the terms asylum and refuge indistinctly, leading to confusion. One legal figure is mentioned and then another one. At the end, the Court did not specify neither of them, so we could say the Court considers both terms to be synonymous.

In our opinion, they are not synonyms, particularly in the Latin American and Caribbean region.

VI. Advisory Opinion AO-25 Dated May 30 2018 of the Inter-American Court of Human Rights: Differences between Diplomatic Asylum, Territorial Asylum and Refuge

In July 2018, the Court decided to reopen the conversation through the AO-25 dated May 30, 2018 requested by the Republic of Ecuador. The country requested the clarification for asylum and its recognition as a human right in the system Inter-American protection. The Court attempted to define diplomatic asylum, territorial asylum and refugee status, conducting a brief analysis of them. On this issue, we can highlight the following observations:

The Court states that once the Council of the Organization of American States adopted a disposition which stated that the right of asylum was a "legal principle in the Americas" within international conventions and was included as a fundamental right in the American Declaration[26].

That is how the Inter-American Court sees asylum, remembering it is called "the Latin American tradition of asylum[27]." That is intimately linked to the clause of non-extradition for political offences or reasons, which is the scope of this protection, as an element to fight impunity[28] in criminal matters, and it is only used in the Latin American region, and the States subject to these regional agreements are free to decide if they provide protection or not. They are not forced to specify the reason for its denial, in accordance with their sovereignty.

Furthermore, the Court[29] highlighted that the countries of the region that agree that diplomatic asylum is not a human right, but a State's prerogative.

On one hand, we can see the different criteria used by some countries of the region, such as Argentina, Belize and Bolivia. They consider that is not a State's right or obligation to grant diplomatic asylum, as it is a prerogative of the State to maintain its sovereignty. However, they do recognize the act of seeking asylum as an individual human right.

On the other hand, the Republic of Ecuador considers asylum to be a human right: "seeking asylum is a right, to receive it is a prerogative of the State in question and, not to return the refugee or asylee is an international erga omnes legal obligation." This is the perspective held by the Court in its conclusion.

Not all of the States members of the Inter-American system govern diplomatic asylum; some of them refer to it through conventions[30].

The Court Manifested the Following in Par. 110: "Even though refugee status, territorial asylum and diplomatic asylum are forms of protection for individuals who suffer persecution, each of them operates in different circumstances and has different legal connotations in international and national law, thus they are not analogous.

This means that specific conventions or domestic laws govern each legal scenario, as they establish a list of rights and duties of protection seekers according to several modes.

We see how they are seen as non-equal scenarios as each of them is governed by different regulations, with different connotations. We highlight the phrase *"different modes".*

In the analysis of diplomatic and territorial asylum, the Court[31] concluded that according to Article

[26] See OAS, Files, vol. 3, No. 2, 1951, p. 119, quoted in the Report of the General Secretary of the United Nations to the General Assembly on *Diplomatic Asylum*, September 22, 1975, Part II, par. 74.

[27] *See Pacheco Tineo Family Vs. Bolivia, supra*, par. 137, and Advisory Opinion AO-21/14, *supra*, par. 74.

[28] *See Goiburú et al.Vs. Paraguay. Merits, reparations, and costs.* Verdict, September 22, 2006. C-Series No. 153, par. 132; *Mapiripan Massacre Vs. Colombia. Verdict accomplishment supervision.* Inter-American Court of Human Rights Decision, July 8, 2009, recital 40, and *mutatis mutandi, Wong Ho Wing Vs. Peru. Preliminar Exception, Merits, Reparations and Costs.* Verdict, June 30, 2015. C-Series C No. 297, par. 119.

[29] Par. 108 Advisory Opinion AO-25 of the Inter-American Court of Human Rights

[30] Eight OAS members draw distinctions for siplomatic asylum and territorial asylum in their legislations: Brazil, Costa Rica, Ecuador, Paraguay, Peru, Mexico, Dominican Republic and Venezuela. These nations particularly regulate diplomatic asylum, either by an express regulation or by referral to the Convention on Diplomatic Asylum of 1954. Dominican Republic specifically refers to the Convention on Political Asylum of 1933. Although this country does not have a clear regulation regarding what steps to follow to process diplomatic asylum requests, there is the quoted referral to the Convention of 1933. It is important to mention that Dominican Republican is also part of the Convention on Diplomatic Asylum of 1954.

[31] AO-25 of Inter-American Court of Human Rights, par. 154. The Court considers the express intention of not including diplomatic asylum within the scope of the Inter-American system of human rights could be based on will expressed in the procedure framework (*supra* par. 108) of seeing diplomatic asylum as a State right, or as a state prerogative in order to keep its discretional power regarding its acceptance or denial in concrete situations.

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22.7 of the American Declaration of Human Rights and Article XXVIII of the American Convention on Human Rights, people are entitled to request and receive territorial asylum. However, they did not mention diplomatic asylum. Thus the Court concluded that territorial asylum is a fundamental or human right protected by the Declaration and the Convention in question, yet diplomatic asylum is a sovereign right of the States members of the Inter-American system and it is not a human right, as it is not a right of the individual, but a decision that fully depends on the will of the State host. In fact, it is a regional tradition[32] subject to interstate agreements and national regulations that has not been updated and are still governed by the initial conventions from several decades ago.

The Court also stated that diplomatic asylum, territorial asylum and refuge are three different forms of protection, based on the several international instruments that regulate them, although all of them are subject to the principle of non-refoulement[33] as it is a erga omnes right.

The Court concluded the advisory opinion with the following perspective on territorial asylum and diplomatic asylum: diplomatic asylum is not protected by the American Declaration of the Rights and Duties of Man, neither by the American Convention on Human Rights. Thus they are regulated in accordance with inter-State conventions and domestic rules.

To sum up the Court's position, we highlight the fact that the Court considers the principle of no-refoulement as a common element among the three forms of protection, which are different legal categories to protect the persecuted who have their integrity or life at risk. In contrast, diplomatic asylum must always have the foundation of being politically pursued.

VII. Statement of Brazil and Brazil Action Plan[34]: Inaccurate and Confusing use of Asylum and Refuge

In line with the inaccurate or ambiguous use of the terms "asylum" and "refuge," we can briefly analyze the situation at regional level with Brazil Action Plan and Brazil Declaration. Both have used the terms synonymously or indistinctly: *"We recognize that the specific characteristics and contexts of the Caribbean require a place for dialogue with the aim of adopting a subregional strategy for the progressive development of asylum systems."*

We can clearly see the vague use of "asylum" and "refuge" in *Brazil Declaration,* sometimes refer to as synonyms: *"We emphasize the importance of establishing a balance between the legitimate security concerns of States and the needs of protection of refuge and asylum seekers (…) tripartite mechanisms among the country of origin, the host country and the UNHCR, and considering the participation of the refugees as a good regional practice.*

We see how they mix the terms and separate them in some cases, and some sections refer to asylum when it is actually refuge.

The following inaccuracies regarding the ambiguous use of both terms can be seen in *Brazil Action Plan:*

"The strengthening of national bodies for the determination of *refugee* status... and the greater engagement of *asylum* authorities (...) the on-time identification of *asylum* seekers and other persons with protection needs…"

The plan has a program called *quality asylum,* and one of its priorities is... "to detect gaps in the normative framework and procedures for the determination of *refugee status* since the submission of the request until the final decision (…) extend the definition of refugee (...) and to strengthen national systems for the determination of *refugee status*."

"The right of *asylum* seekers to obtain a properly informed decision in writing."

"The development of protocols or procedures (…) to *asylum or refuge* seekers."

At this point, we can clearly notice the separation of each term. This leads the reader to think they are, in fact, not synonymous. Then, the text covers their next goal: "*Voluntary repatriation* support in quality *asylum* systems (…) to get *asylum and refuge* seekers population profiles (…) to help asylum and refuge seekers (…) b) to actively continue the binational cooperation between host countries and the country of origin of *asylees* and *refugees*."

[32] AO-25, par. 156. In conclusion, the Court states diplomatic asylum is not ruled under Article 22.7 of the American Convention, nor Article XXVII of the Declaration of Argentina. The right to request and get asylum is considered, in the framework of the Inter-American system, as the human right of requesting international protection and receiving it in foreign territory. This also applies for getting a refugee status according to the relevant instruments established by the United Nations or the national legislation. For territorial asylum, it depends on the plethora of Inter-American conventions on the subject.

[33] AO-25, par.188. The Court also acknowledges that Article 22.8 of the Convention does not establish geographic boundaries, which precedes the general criteria of jurisdiction (i.e. it has a wide application range). Subsequently, in terms of implementing the principle of non-refoulement in the Convention and Declaration framework, it is relevant for us to establish territorial or personal jurisdiction, *de jure* or *de facto*. In sum, the Court considers that the protection aspect against refoulement is not restricted to the person located in State territory. This is because it also gives other States an extra-territorial obligation, as long as authorities exercise their functions or effective control on such people. That is something that can happen in some situations due to its own nature, when they are in another's State territory with the State's consent.

[34] http://www.acnur.org/cartagena30/declaracion-y-plan-de-accion-de-brasil/

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We could continue analyzing the Brazil Plan of Action and find many other examples; however, we would like to keep the article brief.

VIII. Considerations

It is possible to say that even though Latin America treats asylum and refuge as two forms of international protection that share the same goal, they have different origins, causes of protection, procedure and legislation.

Asylum has clearly political origin in the region, as the context gave rise to diplomatic asylum, which became popular around the 1950s due to dictatorships that were spreading in the region at that time.

Asylum is a *right*[35] granted by the State. Therefore, it is not obliged to provide the required protection, and it may remain silent regarding its decision.

On the other hand, refuge has its origin in the Geneva Convention and is clearly related to conflicts of war, armed conflict, internal or external violence and other types of attacks or persecution the person is involved in.

Refuge is a human right, thus the State is *obliged* to study the refuge application and provide protection if the case fits the regulations of the Geneva Convention and its Protocol. This obligation starts when the State ratifies the Convention, as protection denial is linked to specific assumptions that exempt it, and are detailed in the Geneva Convention. We need to remember protection is strongly related to the principle of non-refoulement.

IX. Some Major Differences

Asylum can *only* be granted in embassies, diplomatic legations, warships, aircraft or military camps[36]. The application for asylum is studied and granted by a diplomatic agent or the aircraft or boat commander.

Refuge it is not granted in diplomatic missions, as it must be requested on borders and the administration offices of the country where it is requested. According to each country, refuge is processed and authorized by officials nominated by the State. The Ministry of Foreign Affairs is usually the one in charge.

Asylum: It is granted for political reasons or offences related to them. It starts as diplomatic asylum and then becomes territorial when the asylee is transferred to the State guard. It must be done quickly so the person can be immediately moved to the territory of the country of protection.

Refuge is granted to persecuted people for several[37] reasons, as long as they demonstrate founded fear of having their integrity, health or life at risk. There are plenty of reasons, as more cases were added with the Cartagena Declaration of 1984.

Refuge must be requested at border checkpoints or specific administration offices of the country offering protection. The person then gets a refugee status, even though they can get an indefinite status in some countries of the region. The majority of national legislations clearly specify the places for submitting the application and clarify that you cannot apply in diplomatic missions.

The approach used to identify inaccurate or ambiguous terminological use of asylum and refuge can also be applied to the Treaty of Montevideo of 1933. Article 11 says... "*Refuge* is granted in the territory of the High Contracting Parties..." even though its title refers to asylum and political refuge. The Treaty then refers to asylum, except for Article 11 that exclusively mentions *refuge,* and does not mix the terms. This leaves a halo of terminological confusion.

X. Conclusion: Suggestions at Regional Level

a) Differentiation Theory

The region should set forth both legal concepts in order to establish the differences between them and promote a common use of both legal concepts and their accurate representation.

Thus, the countries of the region should establish the origin of each legal term, enact an accurate definition, determine the administrative procedure and requirements for each of them, and the causes for the need of protection. Furthermore, establishing the administrative body in charge of the request, the period of time given for protection, and the effects and benefits of protection.

The *differentiation theory* could work for Ecuador, Paraguay, Peru, Dominican Republic, Uruguay, and Venezuela, which are nations that show clear differences between both terms in their immigration legislation or Constitution.

b) Unification Theory

Our second proposal would be to adopt the European approach where asylum leads to the refugee status. In this case, both terms are put together: asylum is then understood as a concept that leads to refuge or vice versa, and diplomatic and territorial asylum are specified as particular types of refuge.

The *unification theory* could work for international instruments that treat both terms as synonyms, such as the Convention on Asylum of 1928 in Havana, the Convention on Asylum and Refuge of 1930

[35] Article 2, Convention on Diplomatic Asylum, Caracas 1954.
[36] Article 2, Treaty on Political Asylum and Refuge (Montevideo, 1933).
[37] Geneva Convention of 1951 and its New York Protocol of 1957.

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in Montevideo, Brazil Declaration and Plan of Action, the Inter-American Court, and Argentina. Nonetheless, we could include some other countries that were not part of the analysis due to economic reasons.

After stating the differences and similarities between them, we could say that asylum and refuge are, in fact, different by the nature of persecution and the powers of the host state taking the request. We should also take into account that asylum offers the right to make a decision where the State does not require you to explain your situation, regardless the nature of the offence. Nevertheless, in the case of refuge, the state is obliged to receive the request while the decision of providing protection is being discussed, and to state a reasonable cause of denial, if applicable.

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