

A PECULIAR LEAP IN THE PROTECTION OF ASYLUM SEEKERS: THE INTER-AMERICAN COURT OF HUMAN RIGHTS' JURISPRUDENCE ON THE PROTECTION OF ASYLUM SEEKERS

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Abstract: This article pursues to clarify the crucial contribution of the Inter-American Court of Human Rights to protect the rights of refugees and asylum seekers. It debates that the Court has instituted its renewed jurisprudence in the sphere of refuge throughout its case-law and advisory opinions associated with the safeguard of refugees, specifically the Court's direction towards affirming on the extended principles affiliating to asylum. The Inter-American Court went further than its European counterpart in interpreting regional and international asylum law. However, the actual protection of asylum seekers promoted by the Court is established on some controversial concepts like *jus cogens* norms and obligations *egra omnes*. Furthermore, the Court has an unclear vision concerning asylum and refuge. This may, therefore, curb the impact of a stronger human rights-based approach to the protection of asylum seekers in Latin America.

Keywords: Inter-American Court of Human Rights, Latin America, refugees, asylum seekers, non-refoulement, detention.

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1. INTRODUCTION

Latin America's asylum seekers face uncountable troubles in seeking a better haven. Regardless of the consistently increasing number of refugees flows (IOM 2018,

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78-80), The Inter-American Court of Human Rights (“the Court” or “the IACtHR”) has to particularly ensure their rights as humans. On the occasion of the 40th Anniversary of the American Convention on Human Rights (ACHR), the Court states:

“The Court has brought attention to acon nd protected persons and groups in situations of vulnerability that have historically been neglected. The Court has established standards of particular relevance for the protection of the rights of children and adolescents; the rights of women; the rights of elderly persons; the rights of indigenous people and tribes; the rights of people with disabilities; the rights of Afro-descendants and the rights of LGBTI people. There is also comprehensive Inter-American jurisprudence in favor of migrants, refugees, asylum seekers, persons deprived of their liberty, forcibly displaced people, human rights defenders, journalists and people in poverty....” (IACtHR 2018, 7-8).

The IACTHR’s proactive position has not pertained to a specific vulnerable category only; as its sphere of competence has extended interestingly to the protection of refugees, asylum seekers, and irregular migrants (Pasqualucci 2013, 8). Consequently, the Court’s doctrine has incorporated a decisive approach to protect refugees through the rights’ advocacy stipulated in its regional basic documents (OAS 2009a). and the international customary law. It becomes evident, after the court’s precedents, that the Court stressed the obligations of non-refoulement, non-discrimination in the context of protecting asylum seekers (Yundt 1989, 201-218).

Expressly in the *case of the Pacheco Tineo v. Bolivia* (2013), the Court has adopted the *PRO PERSONA* approach to fortify the intrinsic rights of refugees and asylum seekers and other propinquities. This article illustrates the capability of the IACTHR to crystalize the asylum and embalm a wide-range of elementary rights for those impotent people in Latin America.

It is noticeable that there is a positive tendency from the part of the Court obviously declared in its latter’s advisory opinion *OC-25/18* (2018), in which the Court has underscored that even if diplomatic asylum is not included in The ACHR nor The American Declaration of the Rights and Duties of Man (ADRDM), but state parties must abstain from return the individual to a territory where there might be a danger or risk on his/her life or liberty. Nevertheless, there is still ambiguity in the Court’s vision about the state’s adherence when there is a violation for the granted diplomatic asylum.

In light of the above, this article endeavors to assess and explain the contribution of the Court to the protection of asylum seekers’ and refugees’ rights in Latin America (Phillips, 2014). It aims to explore whether the IACTHR is capable of promoting international protection and whether this protection matches with the de facto practices. Moreover, Moreover, compared to the European Court of Human Rights (ECtHR), it shows the scope of the rights and values adopted by the Court and its stunning doctrine on refugees.

Therefore, the IACTHR’S legal framework in the context of refugees’ protection will be discussed in the second section. The third section investigates favorably the

establishment of the IACTHR'S jurisprudence on the right to seek and receive asylum. It is believed that the Latin American states have a big impact on the Court doctrine, this what the Court named "Latin American tradition of asylum". The Fourth section assesses if the Court's approach handles the recent states' exercises of non-refoulement (Marques 2017, 9), in accordance with its tenet about *Jus cogens, and obligations erga omnes*.

The fifth section illustrates the Court's expanded jurisprudence to ensure comprehensive protection of asylum seekers, such as the provisional measures that the IACTHR issued in an already-decided case to provide with health care needed during the COVID-19 pandemic. The sixth section reveals the inconsistency in the Court jurisprudence like the overuse of *Jus cogens*, despite the doctrinal controversy over the nature of these norms . (Linderfalk 2016). Besides, the court has fallen through the gap of confusion between asylum and refuge in its latter advisory opinion. Eventually, the article concludes the novel features of the IACTHR's judicial protection of refugees and asylum seekers in Latin America.

2. ESTABLISHMENT OF THE IACTHR'S JURISPRUDENCE ON THE PROTECTION OF REFUGEES AND ASYLUM SEEKERS

Basically, The Court not only considers requesting asylum as a human right derived from Inter-American Basic documents, but it also has fortified the right of asylum with the other regional and international conventions and declarations, specifically the UN Convention relating to the Status of Refugees 1951, its 1967 Protocol.

2.1. The IACTHR'S Legal Framework in the Context of the right of asylum:

On the one hand, Inter-American Human Rights Law consecrated the right to asylum and granted the international protection of persecuted persons. Both the American Declaration of Rights and Duties of Man 1948 and the American Convention on Human Rights 1968 have included the recognition of territorial asylum (OAS, 2009b).

Article 27 of ADRDM states that "*Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.*"

The same right reiterated in Article 22(7) of the ACHR; "*Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued political offenses or related common crimes.*"

The ACHR's provision limits strictly the right of asylum for political offenses or related common crimes only; nonetheless, both articles refer to domestic and international law. Asylum in Latin America has been construed accordingly to historical treaties related to asylum as, international asylum law, international and regional human rights treaties (Tibi v. Ecuador, para 144). The Court has wisely rationalized the type of crimes that enable the individual to seek asylum, it determined that a foreign State cannot grant 'direct

or indirect' international protection to those accused of crimes against human rights (Goiburú v. Paraguay, para 232).

2.2. Other Regional Subsidiary Declarations in (moyen auxiliaire):

Although these declarations do not create a legal obligation, they could assist in crystallizing particular international customary law. With the miserable situation of central America from the 1970s, a lot of people requested international protection. For that aim, in November 1984, the Colloquium on the International Protection of Refugees in Latin America adopted the non-binding agreement "Cartagena Declaration on Refugees". The most prominent feature of that declaration is the recommendation to the refugee's definition of the 1951 Convention and the 1967 protocol, as it expanded the area of protection, comparatively with the ACHR and ADRDM (Fischel 2019).

In 2004, Latin American countries gathered in Mexico on the occasion of the 20th anniversary of the Cartagena Declaration to set up a series of measures to identify sustainable and innovative solutions for refugees in the region. They proclaimed the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America (2005).

Furthermore, redressing in Latin American Asylum system, the countries of Latin America and the Caribbean adopted Brazil Declaration in 2014 to strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean. That declaration has emphasized the Court's doctrine in promoting the protection of asylum seekers and refugees in the region (Cintra and Pureza 2020).

2.3. The Judicial and Advisory Jurisdiction on Asylum:

The IACtHR reinforced important benchmarks relating to the protection of refugees and asylees' rights using its jurisdictional and consultative functions. Its origins can be traced back to the first asylum ruling in the *case of Pacheco Tineo Family v. Bolivia* (2013), which refers to expel Pacheco and his family from Bolivia to Peru as a consequence of rejecting their request for recognition of refugee status in Bolivia. It is alleged that the rejection practiced in a summary manner violating various due process guarantees, following with the deportation to Peru. The Court declared that Bolivia committed fatal prima facie violations, especially for the right to seek and be granted asylum (Article 22.7), non-refoulement obligations (Article 22.8), rights of the family and the child (Articles 19 and 17), and right to judicial protection (Article 25) of the ACHR (UNHCR 2013).

It is necessary to note that the Court has emphasized that refugees and asylum seekers are vulnerable to entitle to their rights. As a result, they are eligible for comprehensive protection; for instance, the Court mentioned that in the *case of Dorzema v. the Dominican Republic* (2012, para 159) relating due process, the *Case of Vélez Loor v. Panama* (2010, paras 170-171) relating to non-discrimination and detention, and the *Case of Wong Ho Wing v. Peru* (2015, para 127) relating to non-refoulement and expulsion. This judicial tenet on refugees' protection has been principally matured through its advisory functioning.

In 2018, significant progress has been achieved by the Court in embalming the right to asylum, when Ecuador requested the Court for an advisory opinion (submitted in 2016) about various aspects of asylum institution with a special emphasis on diplomatic asylum and the attitude of third States towards the granted asylum, as a political ground of asylum granted to *Julian Assange* in its London embassy. The Court issued the *Advisory Opinion OC-25/18 “The Institution Of Asylum And Its Recognition As a Human Right In The Inter-American System Of Protection”*. Although the Court refused to answer for all questions, especially for questions referred to States that are not members of the OAS (OC-25/18, para 19), the Court concluded that asylum is a human right. Moreover, it is compulsory to the member states to ensure seeking and receiving territorial asylum in the context of international corpus juris on asylum, and it stressed that non-refoulement is a peremptory norm, so it is a non-derogable obligation (OC-25/18, paras 98-99).

The Court has already issued additional advisory opinions in which it included particular protection for asylum seekers, like the *Advisory Opinion (AO) 18/03*, addressing the recognition of undocumented migrant workers. The Court has expanded the right to work under the principle of non-discrimination- to all, irrespective of his/her regular or irregular migratory status (OC-18/03, paras 133-134). Similarly, the *Advisory Opinion (AO) 21/14* on the Rights and Guarantees of Children in the context of migration and/or in need of international protection. This latter one has been issued on the determination of state obligations on child migrants’ rights under the ACHR, the ADRDM and the Inter-American Convention to Prevent and Punish Torture. The Court has cited the crucial aspect of protecting refugee child and family unity, stressing the principle of the best interests of the child (OC-21/14, para 272).

3. THE RIGHT TO SEEK AND RECEIVE ASYLUM IN AMERICAS:

The IACtHR has defined asylum in general that the international protection offered by a state to persons forced to flee their country of nationality or habitual residence (OC-25/18, para 65). The Court categorized asylum into two modalities according to the place where asylum is granted; first: territorial asylum which is provided in the state territory for persons who are persecuted for political reasons or other related ordinary crimes; second: diplomatic asylum which is provided for persons for the same foregoing reasons but in State’s legations, warships, military aircraft, and camps. Effectively, the Court expands the definition of asylum in accordance with international and regional instruments (OC-21/14, para 67).

The Court interpreted the right to seek and receive asylum under Article 22.7 of the ACHR and Article 27 of ADRDM is so-called Latin American Tradition of Asylum (OC-21/14, para 96) that refers to territorial and diplomatic asylum provided to persons persecuted for political crimes, for a political purpose, typically pertaining to the non-extradition clause for political offenses. The Court deemed, regardless of the confusion between political asylum and diplomatic asylum, without any de facto prejudice of Latin American states practices, the diplomatic asylum is not a particular or regional customary law because of the absence of *opinio juris* and there is not a uniform situation in Latin America on diplomatic asylum, and hence it is just a mere state’s prerogative (OC-21/14, para 93).

In regard to interpreting the Latin American tradition of asylum under Article 22.7 of the ACHR and Article 27 of ADRDM, The Court expressly affirmed both the ACHR and ADRDM include only territorial asylum, excluded diplomatic asylum. Additionally, Article 14.1 of The Universal Declaration of Human Rights refers only to the territorial asylum and refugee status, not diplomatic asylum. Therefore, the OAS's legal instruments are only for seeking and receiving asylum at the territory of the state, irrespective of political asylum or refugee status (Ricke 2020, 351).

The Court has adopted the right to “seek and receive asylum” derived from the American Declaration and the American Convention, which contain broader obligations rather than the right to “seek and enjoy asylum” enshrined from Article 14.1 of the Universal Declaration. It asserted that the words “seek” and “receive” cannot be separated. It also stated that “the configuration of the law incorporates both components and it is therefore not permissible to adopt positions that seek to disintegrate their normative strength” (Fuentes and Vannelli 2019, 31).

This vision deals with the Inter-American regime of refugees' protection, which conceptualizes asylum as twofold notions; the state's right to grant asylum and the individual's right to seek and receive asylum respectively. Still, literature differentiates between the right to seek asylum and the right to receive as to separated concepts, each of them can be practiced independently. As a consequence of this hermeneutical direction, the asylum can be seen as the right to be grant and receive asylum, supporting their belief that there is no specific adjudicative body specialized in asylum and refugee issues to enforce asylum against the state (Yildiz 2020, 315).

In the advisory opinion *OC-25/18*, the Court vaguely mentioned the difference between asylum and refuge, by its approval to Opinion of the Inter-American Juridical Committee on the relations between asylum and refuge. According to that opinion, the nuances between asylum and refuge vary for the time it was legitimated and the region applied in. For Latin American, asylum relates to political issues, and it may grant diplomatic or territorial asylum, but refuge relating to the protection provided to the persecuted individual for racial, religious, social, sexual, affiliating to a social group or political opinion reasons, therefore, each system has its own features and specificities in procedures, application as well. It is argued that asylum, according to Latin America tradition of asylum, is an initial compulsory phase before identifying refugee status. This can be proven when the Court has instituted fundamental obligations on states to apply the right to seek and receive asylum, as it mentioned the potential to allow seeking asylum at first, then followed with the availability of due process for refugee status determination (*OC-25/18*, para 99).

3.1. Asylum is a Human Right with two distinct legal obligations:

Generally speaking, asylum is not a rule of universal or particular customary international law (*Colombia v Peru*, p. 277 & 286). Even the 1951 convention does not explicitly encompass the right of asylum as an apparent right, but it could be inferred from its context (*Pacheco v. Bolivia*, para 138).

Actually, the Court has frequently reiterated that diplomatic asylum is not an individual right, but pertained to the state's sovereignty- granted virtue of its obligations upon diplomatic asylum conventions or by considerations to protect humanitarian issues on a case-by-case basis (OC-25/18, para 108). That result has been achieved after the Court found that there is a discrepancy in practicing diplomatic asylum in OSA member states, especially the USA which does not recognize diplomatic asylum (Rogin 2012), particularly in the aftermath of Julian Assange's case (Värk 2012, p 249). However, the Court stressed the compliance of the non-refoulement principle as *jus cogens*. (infra 4)

Typically, the Court has assured that territorial asylum is a human right, and there is no legal obligation on the state to provide persons with protection. On the other hand, OSA's states have expressed their *opinio juris* (OC-25/18, para 162) to the accessibility of asylum through the ratifications on asylum instruments, and this approval was reconfirmed eventually at the Declaration and Plan of Action of Brazil in 2014. As a result, the Court has set legal obligations for each "seek" and "receive" asylum independently (OC-25/18, para 98).

Therefore, the Court has bounded the right to seek the non-refoulement principle which is inevitably unbleached (Pacheco v. Bolivia, para 139), and hence, states have to allow requesting asylum, either within its territory or when in anywhere or way under its jurisdiction, respecting principles of non-discrimination and equity. Hence, the obligation to ensure requesting asylum has two main characteristics- as stated by the Court- extraterritorial and compulsory. Besides, the third States may not refrain - by actions or legalities - asylum seekers to reach asylum procedures (OC-25/18, para 220).

Coherently, the right to receive asylum accomplishes when the asylum state grants international protection once the individual fulfills refugee status criteria either under the 1951 convention or the extended refugee status of the Cartagena Declaration (OC-25/18, para 123). This is not limited to the obligation to provide protection if the person meets refugee status of 1951 or Cartagena Declaration conditions, but also ensuring maintenance and continuity of the status (Pacheco v. Bolivia, paras 148-150) and interpreting the exclusion clauses restrictively.

3.2. The Margin of State Discretion and Asylum:

Substantially, the right to seek and receive asylum- under Article 22(7) of the ACHR and Article 27 of the ADRDM - is not absolute, it is executed according to domestic legislation and international conventions (Pacheco v. Bolivia, paras 137-140). In the context of the international aspect, the Court cited that member states can broaden the extent of protection. On the contrary, they cannot restrict it beyond the minimum standards instituted by the regional and international asylum rules. Furthermore, the interpretation of international conventions may not limit the right further what is settled in the Convention itself (OC-25/18, para 140).

As for the aspect of "in accordance with the law of each State" (art 22(7) of the ACHR & art 27 of the ADRDM), the Court grants the state parties a discretionary power to

decide the proper approach to exercise the right (OC-7/86, paras 13, 24 and 28). Therefore, the expression of “in accordance with the law of each State” means that the state has a margin of appreciation to carry out duly core procedures referring to respect and guarantee for the right of asylum. Moreover, those states do not yet integrate domestic asylum legislation nor members to other international treaties involving obligations on asylum have to adopt urgent measures to guarantee seeking and receiving asylum (OC-25/18, para 141).

The IACTHR widely allowed the states to domestically implement the right to seek and receive territorial asylum as their will (OC-25/18, para 121). However, the Court prevented member states to extradite the person accused of a political offense, pursuant to Article 4(4) of the Inter-American Convention on Extradition (art.4(4) of the Inter-American Convention on Extradition). The Court also affirmed that the prohibition of extradition cannot be used as a mean to encourage or ensure impunity in serious human rights violations cases (OC-18/03, para 211).

In contrast, the Court has accorded state parties an extensive discretionary power to provide protection in case of diplomatic asylum, considering that incorporated to the state’s sovereign power and state prerogative (OC-25/18, paras 155-163). Conservatively to *Pro homine* principle, the Court noted that diplomatic asylum is a humanitarian action for the purpose of protecting fundamental human rights to save lives, so that issue should be taking into consideration during the case assessment (OC-25/18, paras 103-108).

3.3. Comparing the IACTHR’s jurisprudence on the right to seek and receive asylum with its European counterpart:

There are several distinctions between the right of asylum in the Americas and the European region. Firstly, a clear difference is that the Inter-American system includes a human right to asylum, while the European Convention of human rights does not (Ilias and Ahmed v. Hungary, para 125). Secondly, according to the IACTHR, the right to be granted asylum obligates States to grant asylum to the individual who meets refugee status criteria and to his/her family members (OC-25/18, para 123). This differs from refugee law in the European Union, which does provide family members of the refugee with protection but does not oblige States to grant them refugee status formally (arts 23, 24(1) of directive 2011/95/EU). Thirdly, refugee status in the Americas has extraterritorial effect (OC-25/18, para 123), the Inter-American Court mentioned “if the applicant of refugee status according to one state party enters another State Party in the OAS and applies for asylum there, the authorities of that State has to “guarantee a duty of special care in the verification of [refugee] status”(Pacheco v. Bolivia, para 159). On the contrary, recognized refugees in one of the Member States of the EU would usually be deemed inadmissible by their subsequent application for asylum in another Member State (art 33 of directive 2013/32/EU).

The novelty of the right to seek asylum, as compared to the European system, is that the Inter-American Court clearly indicates that “States [party to the OAS] may not take action to prevent persons in need of international protection from seeking protection in other territories” (OC-25/18, para 122). As for the European counterpart, it should be

recalled that through the EU Trust Fund for Africa, the EU provides financial assistance to Libya to improve its border control capabilities in order to deter people from reaching the EU borders. This practice recently challenged before the Court of Auditors.

4. “WELL-FOUNDED FEAR” CONTRA THE REFOULEMENT:

While confirming that there is no obligation over the state to grant asylum, the relevant IACTHR’s case law and advisory opinions have established certain constraints to curb the discretionary power of a state to accept or remove asylees. As known, the non-refoulement principle is well-established internationally as a cornerstone of asylum seekers protection, but the Court made a clear obligation over the state parties and not just a principle but a peremptory norm of human right. The Court did so believing that State sovereignty must be counterweighted by *jus cogens* (OC-25/18, paras 98 & 181).

The codification of non-refoulement is traditionally and internationally proved hard; Mainly the provisions are regulated in Article 22(8) of the ACHR, and art. 13(4) of the Inter-American Convention to Prevent and Punish Torture, and art. 33(1) of the 1951 refugee status Convention. However, the Court went further those legal instruments evidentially in the following enterprising approaches (OC-25/18, para 190).

Firstly, in Pacheco Tineo Family’s case, the Court expands the ambit of non-refoulement for all aliens regardless his/her situation, stating “.....*the right of any alien, and not only refugees or asylees, to non-refoulement is recognized, when his life, integrity and/or freedom are in danger of being violated, whatsoever his legal status or migratory situation...*”(Pacheco v. Bolivia, para 135). Secondly, considering non-refoulement not only a customary rule of international law (OC-21/14, para 211), but also a *jus cogens* which means it is a non-breached, non-derogable, absolute, and peremptory norm, so States should abstain from any act that in any case directly or indirectly makes situations of *de jure* or *de facto* refoulement (OC-21/14, para 225). Thirdly, non-refoulement is not exclusive to asylum only, but also it is a guarantee for all human rights (.OC-21/14, paras 211- 227). Finally, the Court has consolidated non-refoulement with other *erga omnes rights* as the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, to ensure that the states will not expel, deport, return, extradite or remove a person to a State where he will confront a well-founded fear or danger (Wong v. Peru, para 127).

As reiterated by IACTHR, in (OC-25/18, paras 172-173), that non-refoulement principle, other than the right of asylum, has an extraterritorial application as a fence against recent- direct or indirect- states’ practices (OC-25/18, para 193) which prevent asylees to access the asylum procedures. However, the diplomatic asylum is not included by the ACHR and ADH, but the non-refoulement principle must be respected in the case of extraterritorial asylum provided that the states exercise their control and with its consent over those persons as legations (OC-25/18, para 188).

In the sphere of the connection between asylum and non-refoulement, the IACTHR deduced that non-refoulement is a reconceptualization of the right to seek and receive asylum (OC-25/18, para 179). While the same result is implicitly assumed by the

ECtHR concerning the application expulsion or refoulement (*Soering v UK*, paras 88-91), the IACtHR judges expanded their dialectics beyond Article 22(7, 8) of the ACHR. For instance, in the Pacheco Tineo's case, the Court considered that the connection of asylum-non-refoulement must be regarded as a specific modality of asylum (OC-25/18, para 179), providing protection for asylum seekers against the removal decisions where well-founded jeopardy subjected to torture or ill-treatment under regardless of their legal or migratory position (*Pacheco v. Bolivia*, para 152).

However, conceptually recognized that there is a distinction between asylum and non-refoulement, Goodwin and McAdam (2018, p 202) confirmed that the former relates to the admission of the foreigner to its territory, while the latter concerns a prohibition of expulsion or forcible return. Some argued that asylum and non-refoulement are considered separate notions, but asylum can be extracted from the non-refoulement principle (Edwards 2005, p.302). This paper is proponent to Hathaway's opinion that non-refoulement duty is tantamount to the right of asylum but in negative terms, based on the prohibition of non-entrée policy (Hathaway and Gammeltoft-Hansen 2015, p 241). In other words, concerning asylum seekers, non-refoulement obligation integrates with the right to seek and grant refugee status (Hathaway 2005, p. 301).

4.1. The extraterritorial effect of non-refoulement obligation in the ECtHR's jurisprudence:

The concept of 'jurisdiction' for the IACtHR does not vary from that of the ECtHR: jurisdiction is defined outside the territory of the State when the person is subject to the authority or effective control, *de iure* or *de facto*, of the State (OC-25/18, para 188). The IACtHR tends to presume that a person who enters a foreign State's embassy to seek protection automatically falls under that State's jurisdiction. However, it appears that, unlike the ECtHR, the Inter-American Court does not require diplomatic agents to take particularly strong measures to find that they practice authority or effective control over individuals (OC-25/18, paras 94 & 192).

The ECtHR concluded in *M.N. and Others v. Belgium case* (2020) that extraterritorial jurisdiction is only justified in exceptional circumstances. The claimants argued that the principle of non-refoulement laid down in Article 3 of the European convention on human rights placed a positive obligation to be granted a humanitarian visas to allow them to apply for asylum in Belgium later. This would, in their opinion, represent the only way to prevent any threat of inhuman or degrading treatment (*M.N. case*, paras 8-27).

The ECtHR stated that exceptional circumstances, which may justify the extraterritorial application of the non-refoulement obligation, are recognized only in cases where 'effective control of an area outside its national territory (*M.N case*, para 104) or effective control over an individual when the State is exercising "power and physical control over persons", usually in the form of force or physical control (*M.N. case*, para 105). The Court recalled, with regard to the particular conduct of diplomatic officers, that extraterritorial jurisdiction can be created only if they use authority over their nationals or property (*M.N. case*, para 106).

4.2. The absolute nature of non-refoulement obligation in light of the future Convention on Crimes Against Humanity:

The IACtHR has noted in its advisory opinion OC-25/18 that the principle of non-refoulement is essential not only to the right to asylum but also to the guarantee of other non-derogable human rights because it is a measure designed to preserve the right of life, freedom, and dignity of the individuals (M.N. case, para 180). The Court's tenet has reflected obviously on the proposed Convention on Crimes Against Humanity, particularly article 5 of the draft (ILC 2017b) which provides an absolute non-refoulement obligation for crimes against humanity.

Article 5 of the draft states:

'1. No State shall expel, return (refouler), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.'

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.'

In its commentary, the International Law Commission concluded (ILC 2017a) that it did not include an exception provision similar to Article 33(2) of the Convention Relating to the Status of Refugees, since the adoption of the Refugee Convention in 1951, that clause had not been replicated in other international conventions. Nevertheless, it is correct that the exception clause has not been adopted into international treaties, but that Article 21(2) of the 2011 EU Qualifications Directive has more recently been reiterated. I argue that the commission insisted not to include such an exception clause to counter recent states practices which show an increased application and expansive interpretation of the anti-terror clause enshrined in Art 33(2) of refugees convention, especially in aftermath of the September 11 attacks (Jöbstl 2019).

4.3. Non-refoulement and positive obligations:

The Court has explicitly rejected, since its first controversial case in *Velásquez-Rodríguez v. Honduras* (1988), the classical negative position that human rights only give rise to negative obligations to refrain from behaving in a manner that violates human rights. The Court has instead interpreted ACHR as also giving rise to positive obligations requiring state intervention to actively protect against violations of human rights (Lavrysen 2014, pp.96-97). With regard to the interpretation of the non-refoulement principle, the tenet of positive obligations, that requires States to deter human rights violations, even though the harm is caused by an action that is not due to them. Two key positive obligations relating to non-refoulement have been recognized by the Court; the duty to prevent irreparable harm and the obligation to cooperate (Beduschi 2015, p 71).

The Court required to prevent harm by private actors; the Court emphasized, *according to its Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants (para 70)*, that fundamental rights must be protected by both public authorities and individuals with regard to other individuals. Equally, the Court has recalled the significance of a general obligation to cooperate in order to ensure that international obligations are upheld. In the case of providing protection from refoulement, the duty to cooperate includes, *inter alia*, the use of diplomatic channels to ensure a safe passage for the individuals concerned.

5. THE IMPORTANCE OF THE IACTHR'S DECISION IN VÉLEZ LOOR V. PANAMA CASE IN CORONAVIRUS ERA:

On May 26, 2020, The Court has issued an important decision in the context of the COVID-19 epidemic in the case of *Vélez Loor v. Panama* (IACTHR 2020b), which may have the potential to impact beyond the specific case analyzed by the Court in relation to detention centers in Panama, considering how the problems examined by the Court also exist elsewhere. This potential regional impact, or even international, can take place by virtue of the interpretation given by the Court in relation to analogous rights (Santarelli 2020).

The Court's resolution decided about urgent measures regarding the case of *Vélez Loor v. Panama*, and thereby ordered Panama to undertake a variety of new measures to protect immigration detainees during the disease outbreak. The Court has indicated that it must defend and protect the right to health, among other human rights, like the right to life and to personal integrity, of individuals detained in migrant detention centers. Therefore, the decision notes that Panama must provide access to essential health care services to all individual detained in the 'La Peñita' and 'Laja Blanca' centers, and that the early diagnosis and treatment of COVID-19 must be included among these services (Fachin and Nowak, 2020).

This is a crucial decision that, if implemented as expected by the State, can have an influence on the protection of the rights of migrants and refugees. Unfortunately, the rights of those vulnerable groups are often neglected, and it is mandatory that supervisory entities remind the States of their obligations. International bodies have already indicated that monitoring and supervising State initiatives and measures in the COVID-19 context are important. The United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, and the Special Rapporteur on the human rights of migrants, for example, has stated that it is necessary that States facilitate and promote monitoring of human rights and the collection of data by international organizations and other actors (UNHCR 2020).

5.1. Using the magic of jus cogens on non-discrimination principle to boost the protection of migrants and refugees:

On the other hand, another important aspect of the above-mentioned resolution is the reminder that discrimination is prohibited -as a matter of peremptory law (*jus cogens*), none the less, as the Court itself indicated in its previous jurisprudence, such as advisory opinions

OC-18/03 and OC-24/17 (2017). In addition, the Court emphasized the significance of the non-discrimination obligation in the previous statement, entitled “*COVID-19 and human rights: The problems and challenges must be addressed from human rights perspective and with respect for international obligations*”(IACtHR 2020a). In which, the Court stated, among others, that considering the nature of the pandemic, the economic, social, cultural and environmental rights have to be guaranteed, without any sort of discrimination, to every person under the state’s jurisdiction, in particular, to those groups that are excessively affected as they are in a vulnerable situation. The court also alerted the competent bodies or agencies to face and fight xenophobia, racism and other forms of discrimination, so that they have to undertake special measures to ensure that, during the pandemic, no one supports flare-ups of this nature with false news or incitements to violence.

5.2. A broader protection from broader provisional measures:

In this regard, the extension of the scope of the provisional measures in the case of *Vélez Looz v. Panama* was a controversial aspect of the IACtHR procedure. In its resolution of 26 May 2020, the President of the Court ordered very broad provisional measures after an already-decided case in the context of the pandemic, such as guaranteeing women’s sexual and reproductive rights and access to food and drinking water. It was not the first time that the Court has behaved in this way (Rivas 2020).

In the case of *Durand and Ugarte v. Peru* (López and Salerno 2018), after this case finished, the IACtHR has ordered some requests a lot of provisional measures. On one occasion, the Court conceded the measures and recognized that the requests were related to the subject-matter of the dispute. The urgent provisional measures in the *Vélez Looz v. Panama case*, besides being necessary for the context of a pandemic, raise the importance of dialogue between the regional judicial system and national constitutional orders. The IACtHR should act vigorously in anticipating the implications of some Latin American governments’ decisions in exceptional circumstances, but carefully in the light of its current procedures in order to safeguard its institutional position (Fachin and Nowak 2020).

6. SUBCONSCIOUS BIAS LED TO AN INCONSISTENT TENET: CONTROVERSIAL POINTS IN THE IACTHR’S JURISPRUDENCE:

The IACtHR has certainly imposed a dynamic jurisprudence aiming to expand the protection of refugees and asylum seekers. Nevertheless, there are controversial concepts used by the Court like *jus cogens and obligations egra omnes* in the framework of refugees’ protection (6.1). Furthermore, the Court has an unclear vision concerning asylum and refuge (6.2).

6.1. Jus cogens and obligations egra omnes in the Framework of Refugees’ Protection:

The IACTHR has heavily reiterated those two concepts “*jus cogens*” and “*egra omnes*” regarding the protection of refugees and asylum seekers. It found the justification for the principle of non-refoulement (OC-25/18, para 95) concerning the protection of

refugees especially and for the principle of non-discrimination (Ramírez v. Guatemala, para 270) general – that they belong to the realm of *jus cogens*, which entails obligations *erga omnes* against third states (bind all states).

-The legal argumentations of the non-refoulement principle as a jus cogens norm with obligations erga omnes:

The question here, does non-refoulement need to be jus cogens to bind all states? Would the concept of jus cogens make states abstain from exercising refoulement on the grounds of the asylum, better than duties derives from the binding refugee conventions?

To answer these questions, IACTHR's claims must be analyzed as a proponent for jus cogens with obligations *erga omnes*, and the other opponent's claim. Before this, however, we have to recognize jus cogens and obligations *erga omnes*;

A. The concepts of jus cogens and obligations erga omnes:

Jus cogens (*ius cogens*) literally means “compelling law”, and according to Article 53 of the Vienna Convention on the Law of Treaties (VCLT) jus cogens refer to a peremptory norm, elusive, non-derogable, accepted and recognized by the entire international community of states (Hernandez 2013, 37). Consequently, the states cannot violate peremptory norms, so any international or regional treaty conflicts with them are void. Till now, there is no exhaustive list of jus cogens that has been issued officially, but it is generally accepted that genocide, slavery, maritime piracy, crimes against humanity.... etc (Criddle and Fox-Decent 2009, 334).

Although the *jus cogens* can be frequently observed in the case law of international tribunals, there is an apparent lack of supportive evidence of these peremptory norms (Criddle and Fox-Decent 2009, 332). Regarding the IACTHR, it seems that it has depended on natural law, It related equality and non-discrimination with human dignity that those in power may not ignore. The vague reliance on natural law, comparatively to the scant reliance on the *de facto* state practices, arguably affects negatively on the credibility of *jus cogens*, additionally, that would open the door for the arbitrary inclusion of other selected norms on the peremptory norms, pretending that it is will serve the international community interests (Focarelli 2008, 440).

Moving to obligations *erga omnes*, its recognition was by ICJ determining that *erga omnes* means all states have a legal interest in the protection of basic human rights, including protection from slavery and discrimination....etc, that generates direct obligations towards the international community as a whole (Barcelona Traction case, para 34). The IACTHR was not strict to the *erga omnes* character of the basic human rights, but also has exaggerated in considering the duty of cooperation among States, in promoting human rights, has an *erga omnes* nature (OC-25/18, para 199).

The Barcelona Traction Decision included the overlap between *jus cogens* and *erga omnes* obligations, providing that *jus cogens* norms would have *erga omnes*

obligations (para 34). The IACTHR, as will be discussed later, cited that the principle of non-refoulement is considered a peremptory norm (OC-21/14, para 225), may impose extraterritorial obligations which are given the *erga omnes* nature (OC-25/18, para 107). Regrettably, the IACTHR did not attribute to clarify the ongoing debate around the vague relationship between the *jus cogens* and *erga omnes* norms (Erika De Wet 2013, 541–561).

B. The Controversial Debate on the Nature of the Obligation of Non-Refoulement:

The IACTHR has deemed that the prohibition of refoulement is a peremptory norm of customary international law (*jus cogens*) with *erga omnes* nature, permeating the entire national and international legal system (OC-25/18, para 170). Judge cançado (2018, 39) defended the overuse of *Jus cogens* that those norms resist crimes committed by the states, instituting *erga omnes* obligations for human rights protection, in its vertical (Engle 2009, 168) and horizontal ((Knox 2008, p 165-173) dimensions. The Court has relied on *opinio juris* existing in the Cartagena, Mexico Declaration and Plan of Action 2004 and Brazil Declaration and Plan of Action 2014, which have explicitly incorporated the non-refoulement as *jus cogens*.

In fact, regarding non-refoulement is *jus cogens* is a matter of controversy, the recent scholarship separates into two distinct sides. *Elihu Lauterpacht and Daniel Bethlehem* (2003) argue that the non-rejection principle is not only an obligation of customary law, but it prohibits all states (Hathaway 2010, 507). They ground their belief that non-refoulement justified *jus cogens* elements “states practices and *opinio juris*” (Nicar. v. U.S, para 184).

This paper agrees with Hathaway’s (2010) refutations for the *jus cogens* proponents; firstly, he argued the there is no well-recognized acceptance from all states about particular categories or types of risk concerning non-refoulement. Secondly, the *opinio juris* – owing to the non-common substantive accord - is slightly veiled, and about the General Assembly resolutions are not sufficient to constitute a full *opinio juris*. Thirdly, the *de facto* exercises of the states undermine considering non-refoulement as a peremptory norm.

Some scholars strongly debate that *jus cogens* are non-derogable absolute rules, and there are fundamental exceptions for the non-refoulement principle pursuant to the 1951 refugees Convention (Farmer 2008, 22). Bruin (2003, 26) argue that accepting non-refoulement as a peremptory norm that means states and international organizations cannot derogate from it, and it is actually will lead to irrational consequences. Goodwin-Gill (Goodwin-Gill et al, 2014) replied for the matter of non-refoulement exceptions that those could strengthen its peremptory nature.

To be clear, considering non-refoulement as *jus cogens* on encounter with *de facto* states’ practices- could result in the content and scope of the obligation being hollowed out. Relatively, states practices show inconsistent rhythm in support of this putative norm; for example the U.S Asylum Policy, the world’s largest recipient for asylum seekers, is against the principle of non-refoulement in the 1951 Convention in aspects. Starting

with the exercising of interception at sea, obviously seen in the case of Haitians and Cubans (Costello and Foster 2016) ending with the 2018 presidential proclamation and the Department of Justice and Department of Homeland Security regulation (Presidential Proclamation 2018 Reg. 55,934 and Reg.57,661), both have barred asylum requests by migrants who entered the United States territory between ports of entry.

This can be deduced from comments on the draft of the future Conventions on Crimes Against Humanity, when Some states, such as the United States (U.S comments 2019) and the United Kingdom (Report of ILC 2017, para 3), have expressed their concern that Draft Article 5 represents a progressive development of international law and imposes a new mandatory feature on non-refoulement principle.

Replying to those alleged that the states' violations of non-refoulement will not affect *jus cogens* existence, we easily reply that one of the elements required to describe a duty of obligation as a peremptory rule to be accepted from the international community as a whole, so it does not even exist from the beginning. Besides, we cannot uphold that non-refoulement is an absolute duty, as it conflicts with the state immunity and its sovereignty (Knuchel 2011, 153-174) to protect itself against massive mixed fellows or terrorism for instance. Basically, to describe the principle of non-refoulement as *jus cogens* is not the effective sufficient mean to ensure protection for refugees against expulsion, deportation, forcible rejection to the origin of persecution. How can we imagine that we derive the state will any authority to define who is safe to the existence of its land.

There are long powerful arguments in this issue with different persuasive evidential claims, but we cannot see the domestic Courts admit that *jus cogens* have any impact inside the country. *The Sale v. Haitian Centers Council* and *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* are the best testimonial examples for circumventing attempts.

The extreme penchant of the IACTHR for *pro hominnie* principle has given way to the misapplication of *jus cogens*. Unlike the Court of ECtHR which explained the obligations *erga omnes* effects clearly (Belgium v. Spain, para 33), the IACTHR relies solely on *jus cogens* -unsupported by unquestionable evidence- which weakens the recognition of these norms (Trindade 2018, 40). The Court ignores the *erga omnes* effects, it could describe non-refoulement as *erga omnes* obligation only- respect, ensure, and guarantee protection standards and the effective exercise of the rights- especially after its affirmation that the provisions of the ACHR have *erga omnes* nature (OC-25/18, para 169).

Notably, if the *jus cogens* nature could be conferred on non-refoulement obligations, Article22 (3) of ACHR and Article33(2) of 1951 convention have to be modified to fit the absolute non-derogable nature of peremptory norms.

After analyzing the above-mentioned debate, it's proven that considering the principle of non-refoulement is an absolute peremptory norm (*jus cogens*) may constitute a rapid progressive development of the current non-refoulement obligation under refugee

and human rights law. Secondly, while that absolute nature would enhance protection of individuals from deportation and expulsion, it does so in a somewhat arbitrary manner.

6.2. The Conceptual Incongruity in IACTHR's Jurisprudence:

In advisory opinion OC-25/18, the Court has laid down some expressions linked to asylum that may cause confusion for a lot. However, the Court has fallen into the discrepancy trap; hesitant about the definition of asylum. Sometimes, it mentioned that asylum encompasses all the institutions associated with the protection granted to persons who fled of their country of nationality or habitual residence (territorial asylum, diplomatic asylum, political asylum, and refugee status), and other times realize that it could be from any other state (alien from asylum state) (OC-25/18, paras 65,66 and 101).

However, there is another point of inaccuracy, after the Court criticized that Latin American asylum tradition caused terminological confusion, sometimes political asylum refers to diplomatic asylum (OC-25/18, paras 127-130), it has slipped on this fault. The Court admitted that political asylum can be territorial and diplomatic, then the Court mixed between political and diplomatic asylum; it used political asylum to refer for diplomatic. We can see that the Court noted that "the United States of America does not recognize or subscribe to the doctrine of political asylum as part of international law"(OC-25/18, para 161), and the United States does not recognize diplomatic asylum (Rogin 2012).

In addition, the Court suffers from inexactness one more time, when it has defined that the territorial and diplomatic asylum related to political reasons only, then it avoided this error by adopting the Cartagena refugee definition to extend the definition of asylum institutions in general(territorial and diplomatic asylum) and for all reasons (reasons of UN refugee convention) (OC-25/18, paras 67 and 68).

7. CONCLUSION

This paper has illustrated that the IACTHR has promoted a sustained approach of protection of asylum seekers' and refugees' rights in Latin America. the IACTHR has considered seeking-asylum persons in situations of vulnerability, therefore it has granted them an extraordinary context of protection through adopting pro homine principle against member states, applying its regional basic documents and International refugee law.

Its jurisprudence has evolved in line with its prominent Advisory Opinion OC-25/18 issued in 2018, in which the Court iterated its desire to consider non-refoulement not only a principle of international customary law, but it is a *jus cogens* norm with an extraterritorial application. Through the proactive interpretation of international refugee protection, it has deposited minimum guarantees to protect the right to health and other fundamental rights like non-discrimination, equality, and human treatment.

Nonetheless, IACTHR's doctrine law has moderately guided judicial authorities and academics inside and outside Latin America; they have referred sometimes to the controversial concepts which the Court has affirmed such as *jus cogens* and obligations

egra omnes to ensure a compulsory legal frame of protection to asylum seekers. However, the Court's vision may seem inconsistent in some points like Confusion between asylum and refuge, political and diplomatic asylum as well.

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Received: October 7th 2020

Accepted: January 31st 2021

