

## THE ASYLUM CASE: AN ANALYSIS OF THE INTERNATIONAL COURT OF JUSTICE'S LEADING JUDGMENT ON POLITICAL ASYLUM AND REGIONAL CUSTOM

*O CASO ASILO: UMA ANÁLISE DO JULGAMENTO PARADIGMÁTICO DA CORTE INTERNACIONAL DE JUSTIÇA SOBRE ASILO POLÍTICO E COSTUME REGIONAL*

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### ABSTRACT

This paper offers an overview of the political background in Peru when a dispute on the political asylum of Victor Raúl Haya de la Torre between Colombia and Peru arose. The claim and counter-claim submitted to the International Court of Justice (ICJ) and the Court's decision are discussed. It critically reviews the judgment's main issues to the international legal debate: the right of qualification of a political offense, the discussion over regional customary international law, the duty or not to give a safe-conduct, and what should be considered urgency for the purposes of diplomatic asylum. It claims that the unilateral qualification of the offense is essential to the nature of diplomatic asylum. It highlights that this was the first decision of an international court that confirms the existence of a regional custom and discusses what is necessary for a local practice to be considered regional custom. It refutes ICJ's ruling and argues that nowadays, in the Latin-American context, the territorial State is bound to issue a safe-conduct, regardless if it requested the refugee to leave the country. It disagrees with ICJ's restrictive interpretation of the term "urgent cases" and understands that urgency shall be construed to allow diplomatic asylum in times of political instability and prevent it in times of democratic normality. Finally, it reflects on the actual impacts of the judgment on the development of international law.

**Keywords:** Diplomatic asylum. Political offense. Regional custom. Refugee. Safe-conduct.

## RESUMO

Este artigo oferece um panorama do cenário político no Peru quando surgiu a disputa sobre asilo político de Victor Raúl Haya de la Torre entre Colômbia e Peru. Discute a demanda e a reconvenção submetidas à Corte Internacional de Justiça (CIJ) e a decisão da Corte. Analisa criticamente as principais questões do julgado para o debate jurídico internacional: o direito de qualificação do crime como político, a discussão sobre o costume regional, o dever ou não de conceder salvo-conduto e o que deve ser considerado urgência para fins do asilo diplomático. Alega que a qualificação unilateral do delito é essencial ao caráter de asilo diplomático. Destaca que essa foi a primeira decisão de um tribunal internacional que confirma a existência de costume regional e discute o que é necessário para que uma prática local seja considerada um costume regional. Refuta a decisão da CIJ e argumenta que hoje, no contexto latino-americano, o Estado territorial é obrigado a emitir salvo-conduto, independentemente de ter requerido a saída do refugiado do país. Discorda da interpretação restritiva da CIJ do termo “casos urgentes” e entende que a urgência deve ser interpretada para permitir o asilo diplomático em tempos de instabilidade política ou preveni-lo em tempos de normalidade democrática. Por fim, reflete sobre os impactos atuais do julgamento para o desenvolvimento do direito internacional.

**Palavras-chave:** Asilo diplomático. Crime político. Costume regional. Refugiado. Salvo-conduto.

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## **INTRODUCTION**

Asylum (1950) was a case judged by the International Court of Justice (ICJ) concerning the dispute over the diplomatic asylum of Victor Raúl Haya de la Torre, a political leader charged with involvement in a military rebellion. The Colombian embassy in Lima granted asylum to Haya de La Torre, where he stayed as a refugee for five years. The controversy arose after the Colombian government requested a safe-conduct to the refugee, which was denied by Peru.

First, this paper provides an overview of Peru's political background when the dispute arose. Then, it presents the State's claim and ICJ's decision. Next, relevant questions concerning the international jurisprudence are critically analyzed: the right of qualification of an offense as a political one; the discussion over regional customary international law; and what should be considered urgency for the purposes of diplomatic asylum. The case was decided in 1950; nonetheless, it is a leading case, and its relevance to the development of international law remains a current issue.

This paper is a qualitative research and addresses the question of what were the main rulings from the judgment of the Asylum case by ICJ, and what their importance was to the development of international law. Bibliographical research was conducted in history and international law doctrine to this aim. Documentary research was also carried out in the legislation of the international and inter-American system, and ICJ and Inter-American rulings. The results of the bibliographical research were analyzed using the hypothetical-deductive method. The results of the documentary research on legislation and jurisprudence were analyzed using the inductive method.

### **1. HAYA DE LA TORRE AND THE POLITICAL BACKGROUND**

Born in 1895 Haya de la Torre was a Peruvian politician, philosopher, and author who founded in 1924 the American Popular Revolutionary Alliance

(APRA), the oldest currently existing political party in Peru.<sup>1</sup> This center-left political movement with an anti-imperialist approach aimed at building social equality in Peru and then in Latin America.<sup>2</sup>

APRA was politically prosecuted and remained unlawful for an extended period.<sup>3</sup> In 1945 APRA returned to legality while participating in the coalition “Frente Democrática Nacional” (FDN). The coalition agreed to support José Luiz Bustamante y Rivero to run as a candidate in the presidential election. Bustamante y Rivero was elected. APRA approved various measures in favor of the Peruvian people and pressured the government to undertake reforms.<sup>4</sup> The right-wing reacted against the APRA’s political approach and a time of extreme political instability started. This political context resulted in General Odría’s coup. In October 1948, General Odría headed a military junta, which deposed President José Luis Bustamante y Rivero. The coup was said to aim to protect Peru from the APRA party, which had led unsuccessful uprisings against the conservative Bustamante regime. Odría was proclaimed provisional president, elected president in 1950, and ruled until 1956. He promptly dissolved the legislature and imposed a military rule. Dictatorial tactics to silence the opposition characterized his Administration.<sup>5</sup>

Succinctly, during the 40’s and 50’s Peru bounced between periods of democracy and military rule. The dispute submitted to the ICJ arose in this context of political instability.

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<sup>1</sup> HELLEINER, E.; ANTULIO, R. **Toward Global IPE: The Overlooked Significance of the Haya-Mariategui Debate**, 2017, p. 3. The paper states that Haya de la Torre “[...] declared that APRA had five goals: “1) Action of the countries of Latin America against Yankee Imperialism, 2) The political unity of Latin America, 3) The nationalization of land and industry, 4) The Internationalization of the Panama Canal, 5) The solidarity of all the oppressed people and classes of the world”.

<sup>2</sup> GANAN, A. de B. F.; PINTO, L. F. S. **Pátria Grande, Indo-américa: a integração da América Latina na obra de Haya de la Torre**, 2012, p. 72-84. “Esse é o programa que Haya dá à APRA: *a construção de um capitalismo de Estado que aponte para um futuro socialista na América unificada.*” (p. 83)

<sup>3</sup> GARCIA-BRYCE, P. I. **A Revolution Remembered, a Revolution Forgotten: The 1932 Aprista Insurrection in Trujillo**, 2010, p. 277-322. On this regard, the author stresses that: “The persecution of Apristas that had begun during the Sánchez Cerro government continued with varying degrees of intensity over the course of the next decades. During the period from 1934 to 1945 Haya de la Torre remained in hiding, while high-ranking party leaders were either jailed or living in exile.” (p. 305)

<sup>4</sup> *Ibidem*, p. 277-322. The author points that: “Although the party remained barred from presenting a presidential candidate, it won government positions both at the congressional and cabinet level during the period from 1945 to 1948.” (p. 306)

<sup>5</sup> PAYNE, James. **Peru: The Politics of Structured Violence**, 1965, p. 362-374.

## 2. ASYLUM CASE

During Bustamante y Rivero's government, on October 3, 1948, a Military rebellion broke out in Peru.<sup>6</sup> On the following day, a decree charged APRA, the political party headed by Haya de la Torre, for conducting the rebellion, and the government declared a state of siege.

On October 5, 1948, a note against Haya de la Torre and other party members was issued. The Denunciation was approved both by Minister for the Navy and by Public Prosecution. On October 11, 1948, a magistrate issued an order to open judicial proceedings, and on October 25, 1948, the magistrate ordered the arrest of Haya de la Torre and other APRA members.

Twenty-four days after the military rebellion, on October 27, 1948 the military coup headed by General Odría, mentioned in the former section, broke out. After the military coup, on November 16, 1948, Haya de la Torre was served public summons and did not report. On January 3, 1949, Haya de la Torre sought asylum at the Colombian Embassy in Lima. The Colombian Ambassador granted him asylum on the following day and requested a safe-conduct to the Peruvian government. On January 14, 1949, the Colombian Ambassador sent a note to the Peruvian authorities informing them that Haya de la Torre was considered a political refugee.

The dispute arose after Colombia requested a safe-conduct to Victor Raúl Haya de la Torre. Peru denied the safe-conduct and requested the surrender of the refugee. Unable to find a negotiated solution to the dispute, Colombia and Peru signed August 31, 1949, the Act of Lima, an agreement to refer the dispute to ICJ.

On October 15, 1949, the Colombian government filed an application requesting the ICJ to adjudge and declare that Colombia, as the State granting asylum, was competent to unilaterally qualify the offense committed by Haya de la Torre for the purposes of the asylum. It further asked ICJ to rule

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<sup>6</sup> GARCIA-BRYCE, P. I. **A Revolution Remembered, a Revolution Forgotten:** The 1932 Aprista Insurrection in Trujillo, 2010, p. 277-322. About the military rebellion Peru Iñigo García-Bryce states that: "On October 3, an APRA sympathizer, army major Víctor Villanueva and a group of navy officers led an uprising in Callao, Lima's port, against the Bustamante government. Sixty military men and 175 civilians were killed as the government suppressed this revolt. Although the exact role of the Aprista leadership within this uprising remains unclear, the party once again lost its legal status. A few weeks later, on October 27, General Manuel Odría staged a military coup that put an end to the Bustamante government. For the next eight years, APRA once again was forced underground." (p. 309-310)

that Peru was bound to give a safe-conduct to the Haya de la Torre.<sup>7</sup> Peru filed a counterclaim in March 1950 requesting ICJ to rule that Haya de la Torre's Asylum violated Havana's Convention on Asylum.<sup>8</sup>

ICJ rejected both submissions of Colombia, ruling that "Colombia, as the State granting asylum, was not competent to qualify the offense by a unilateral and definitive decision, binding on Peru."<sup>9</sup> Regarding the safe-conduct, ICJ stated that there is only such an obligation if the territorial State requests the refugee to leave the country.<sup>10</sup> If the State granting asylum makes the request, there is not such an obligation.<sup>11</sup>

ICJ rejected Peru's counterclaim regarding a violation of Article 1, paragraph 1, of the 1928 Havana Convention on Asylum by stating that Peru had the burden of proving that Haya de la Torre committed a Common Crime. ICJ ruled there was a breach regarding Article 2, paragraph 2 ("First"), of that Convention, which requires that the refugee is in imminent or persistent danger.

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<sup>7</sup> INTERNATIONAL COURT OF JUSTICE. Asylum case (Colombia v. Peru). ICJ Reports, 1950, p. 266. "To pass judgment on and answer, whether the Government of the Republic of Peru enters an appearance or not, and after such time-limits as the Court may fix in the absence of an agreement between the Parties, the following questions: First Question. -Within the limits of the obligations resulting in particular from the Bolivarian Agreement on Extradition of July 18, 1911, and the Convention on Asylum of February, 1928, both in force between Colombia and Peru, and in general from American international law, was Colombia competent, as the country granting asylum, to qualify the offence for the purposes of said asylum? Second Question. -In the specific case under consideration, was Peru, as the territorial State, bound to give the guarantees necessary for the departure of the refugee from the country, with due regard to the inviolability of his person?" (p. 7)

<sup>8</sup> Ibidem, p. 266. "To adjudge and declare [...] that the grant of asylum [...] to Víctor Raúl Haya de la Torre was made in violation of Article I, paragraph I. And article 2, paragraph 2, item I (first item) of the Convention on Asylum signed at Havana in 1928." (p. 8)

<sup>9</sup> Ibidem, p. 266.

<sup>10</sup> ICJ made a grammatical interpretation of the expression "in turn" of article 2 of the Havana Convention. Regional Refugee Instruments & Related, Havana Convention on Asylum, 20 February 1928. "Article 2. Third: The Government of the State may require that the refugee be sent out of the national territory within the shortest time possible; and the diplomatic agent of the country who has granted asylum may in turn require the guarantees necessary for the departure of the refugee with due regard to the inviolability of his person, from the country." (emphasis added)

<sup>11</sup> INTERNATIONAL COURT OF JUSTICE, op. cit., p. 266. "In the present case, the Peruvian government has not requested that Haya de la Torre should leave Peru. It has contested the legality of the asylum granted to him and has refused to deliver a safe-conduct. In such circumstances the Colombian government is not entitled to claim that Peruvian government should give the guarantees necessary for the departure of Haya de la Torre from the country, with due regard to the inviolability of his person." (p. 17)

### 3. WHICH STATE SHOULD QUALIFY THE OFFENSE FOR THE PURPOSES OF ASYLUM?

Colombia argued it was entitled to qualify the offense unilaterally as a political one for the asylum and that such a right was implied in the Havana Convention. The State claimed that according to article 18 of the Bolivarian agreement of 1911 “[...] States recognize the institution of asylum in conformity with the principles of international law.” and that those principles encompass a right of unilateral qualification.

ICJ unanimously decided that “Colombia, as the State granting asylum, was not competent to qualify the offence by a unilateral and definitive decision, binding on Peru.”<sup>12</sup> It stated that a unilateral and definitive qualification would imply a derogation of the equal rights of qualification and exasperates the derogation of territorial sovereignty, which is not essential to the institution of asylum. Nonetheless, ICJ recognized that the diplomatic asylum would be more effective with a rule of unilateral qualification by the country that granted asylum.<sup>13</sup> ICJ further emphasized that States signed the Havana Convention with the manifest intention of preventing abuses, and thus it cannot be construed as to encompass the right of unilateral qualification.

This paper disagrees with the ICJ’s reasoning. ICJ’s decision that Colombia was not competent to unilaterally qualify the offense was a denial of the essential character of diplomatic asylum. The right of unilateral qualification of the offense by the State that grants asylum is a fundamental measure to protect the refugee. The diplomatic asylum is sought because the person is politically prosecuted and, thus, is unable to find safety in the territorial

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<sup>12</sup> INTERNATIONAL COURT OF JUSTICE. Asylum case (Colombia v. Peru). ICJ Reports, 1950, p. 266 (p. 16).

<sup>13</sup> Ibidem, p. 266. “It involves a derogation from the **equal rights of qualification** which, in the absence of any contrary rule, must be to each of the states concerned; it thus aggravates the derogation from territorial sovereignty constituted by the exercise of asylum. Such a competence is not inherent in the institution of diplomatic asylum. This institution would perhaps be more effective if a rule of unilateral and definitive qualification were applied. But such a rule is not essential to the exercise of asylum.” (p. 13)

State. If the territorial State has a stake in qualifying the offense of its political opponent, the very existence of the institution is threatened.

In this sense, the dissenting opinion by Judge Castilla stresses that unilateral qualification is part of the nature of diplomatic asylum and that the territorial State is not in a condition to impartially qualify the offense of a political opponent who sought refuge.

The right to qualify the nature of an offence must necessarily lie with the State granting asylum, otherwise the very institution of asylum could no longer exist. For asylum is granted precisely to protect those persons who are prosecuted by the local government, usually at difficult moments in the life of the country, moments of great upheaval when political passions lead to the diminution or disappearance, even in very highly cultured statesmen, of that serenity of mind which is indispensable for an impartial judgment of political opponents. To recognize the right of the local State to qualify the nature of the offence would be equivalent to allowing this qualification to depend upon the opinion of the government, whose interests would urge it to act against the refugee. Asylum in these circumstances would be absurd.<sup>14</sup>

In his dissenting opinion, Judge Azevedo also stated that asylum qualification must be unilateral and stable. He also emphasized that such competence was essential for the normal functioning of the institution. “What is involved here is not a provisional qualification or a mere question of effectiveness,

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<sup>14</sup> INTERNATIONAL COURT OF JUSTICE. Asylum case (Colombia v. Peru). ICJ Reports, 1950, p. 266. Dissenting opinion by M. Caicedo Castilla. In the same sense CASTILLA states: “The right to qualify the nature of an offence must necessarily lie with the State granting asylum, otherwise the very institution of asylum could no longer exist. For asylum is granted precisely to protect those persons who are prosecuted by the local government, usually at difficult moments in the life of the country, moments of great upheaval when political passions lead to the diminution or disappearance, even in very highly cultured statesmen, of that serenity of mind which is indispensable for an impartial judgment of political opponents. To recognize the right of the local State to qualify the nature of the offence would be equivalent to allowing this qualification to depend upon the opinion of the government, whose interests would urge it to act against the refugee. Asylum in these circumstances would be absurd. Unilateral qualification is in fact inherent in the very nature of the asylum itself; it is essential for the continued existence of this institution as it is understood in Latin America.”



but rather a necessary consequence of the normal functioning of asylum as understood in Latin- American practices.”<sup>15</sup>

The importance of unilateral qualification to diplomatic asylum is recognized in international treaties such as the Montevideo Convention on diplomatic asylum, not ratified by Peru, and the Caracas Convention on Diplomatic Asylum concluded after the case’s judgment.

The Convention on Diplomatic Asylum signed in Caracas on 28 March 1954, states in article IX the right of unilateral qualification. This convention was ratified by Peru on July 2, 1962.<sup>16</sup> Out of the South American States, only Suriname and Guyana did not sign it.<sup>17</sup>

All-in-all, the Caracas Convention codifies and clarifies earlier agreements and state practice, and enjoys wider acceptance than the Montevideo Convention. It recognizes that every State has the right, not the obligation to grant diplomatic asylum and this is not subject to reciprocity. The convention reconfirms that the State granting asylum determines the nature of the offense or the motives for the persecution and the degree of urgency of the particular case.<sup>18</sup>

In conclusion, many Latin American countries, through signature and ratification of treaties, support the unilateral qualification of the offense, which reveals that the development of the regional international law was in

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<sup>15</sup> INTERNATIONAL COURT OF JUSTICE. Asylum case (Colombia v. Peru). ICJ Reports, 1950, p. 266. Dissenting Opinion by Judge Azevedo. For a deeper comprehension of the opinion, a longer excerpt was transcribed: “18. The qualification of asylum must not only be unilateral but also stable, as has already been seen above. What is involved here is not a provisional qualification or a mere question of effectiveness, but rather a necessary consequence of the normal functioning of asylum as understood in Latin- American practice. The conclusion reached on the nature of qualification cannot, however, attribute the value of res judicata to a unilateral decision of the country of asylum, even if this qualification should assume a definitive character. This qualification is not unattackable and is subject not to the ordinary revision of facts in each case, but, in exceptional cases, to a sort of appeal such as the appeal cassation, in the event of manifest violation of international law. Obvious abuse and misuse of powers may occur in the grant of asylum, in which case international law will intervene – as would municipal law – to suppress any arbitrary action by specific means for the peaceful settlement of disputes. In fact, reference to such means may be found in certain treaties (Treaty of Montevideo, 1939, Art. 16).”

<sup>16</sup> ORGANIZATION OF AMERICAN STATES (OAS). Convention on Diplomatic Asylum, 29 December 1954. “Article IX. The official furnishing asylum shall take into account the information furnished to him by the territorial government in forming his judgment as to the nature of the offense or the existence of related common crimes; but this decision to continue the asylum or to demand a safe-conduct for the asylee shall be respected.”

<sup>17</sup> Ibidem.

<sup>18</sup> VARK, R. **Diplomatic asylum**: Theory, Practice and the Case of Julian Assange, 2012, p. 248.

the opposite direction of what ICJ decided in the Asylum case.<sup>19</sup> Nowadays, this paper claims that in a Latin-American context, the answer to the question “Which State should qualify the offense for the purposes of the asylum?” is undoubtedly the State granting asylum.

The Caracas convention was a reaction to the ICJ’s decision on the Asylum case since States were unsatisfied with the court’s decision.<sup>20</sup> It is based on this collateral effect of ICJ’s judgment, that recent grants of diplomatic asylum in Latin America are grounded on unilateral qualification. Concrete examples are 2019 grants of Diplomatic Asylum to Guaidó supporters at the Brazilian Embassy in Caracas.<sup>21</sup>

The unilateral qualification of the offense dialogs with recent discussions on externalization<sup>22</sup> and asylum, which question the negative impacts on territorial asylum seekers of decisions taken outside the host State. The Refugee Law Initiative highlights that such decisions have “increasingly impacted in detrimental ways on access to territorial asylum for refugees and asylum seekers.”<sup>23</sup> An unexplored side of this discussion is that externalization is an inherent aspect that positively impacts asylum seekers in the case of diplomatic asylum, which is often a gateway to territorial asylum. A requirement for such diplomatic asylum decisions to protect refugees is the right of unilateral qualification, as the State that might be

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<sup>19</sup> VARK, R. **Diplomatic asylum: Theory, Practice and the Case of Julian Assange**, 2012, p. 248. In this Regard Rene Vark states that “After the gradual development, the law on diplomatic asylum reached a point where the State granting asylum was given the power to take the principal decision affecting the fate of the asylum seeker. Where the International Court of Justice was cautious and inclined in favour of the territorial State, Latin and Central American States decided to take daring steps and led the law to an opposite direction”.

<sup>20</sup> Ibidem, p. 248. “[...] the Caracas Convention on Diplomatic Asylum (1954) is a reaction to the proceedings before the International Court of Justice. In the end, no State was satisfied with the judgments or ambiguities in the law governing diplomatic asylum and it was decided to adopt two new, more comprehensive treaties on both territorial and diplomatic asylum.”

<sup>21</sup> FOLHA DE S. PAULO. **Brasil autoriza asilo a 25 militares venezuelanos em embaixada**, 30 April 2019. See also: HUGHES-GERBER, L. **Diplomatic Asylum on the Basis of Humanitarian Considerations**, 2021, p. 82.

<sup>22</sup> REFUGEE LAW INITIATIVE. **Declaration on Externalisation and Asylum**, 29 June 2022. “We understand ‘externalisation’ as the process of shifting functions that are normally undertaken by a State within its own territory so that they take place, in part or in whole, outside its territory. Such externalised functions might be implemented by a State unilaterally, jointly with other States and/or entities – including International Organisations (IOs) and private actors – or through partially or wholly delegating the functions to other States and/or entities.”

<sup>23</sup> Ibidem. See also: CANTOR, D. (et al.). **Externalisation, Access to Territorial Asylum, and International Law**, March 2022, p. 120-156.

putting the asylum seeker at risk cannot have a stake in the qualification of the offense.

#### 4. REGIONAL CUSTOM

The Asylum is a leading case since it was the first decision of an international tribunal that confirmed the existence of a regional custom. A regional custom, also named by the doctrine and jurisprudence special or local custom, is an international law that arises from state practice and *opinio juris* of a group of States or even two States.<sup>24</sup>

Colombia defended the existence of a customary Latin-American norm of unilateral qualification of the offense as a political one or not. It latched onto its statement on many extradition treaties in this regard. Moreover, it claimed that the Montevideo Convention on Political Asylum<sup>25</sup> codified principles already recognized by Latin-American customary law.

ICJ rejected the claim by stating that the Colombian government did not prove the alleged custom.<sup>26</sup> It also pointed that the Montevideo Convention modified the Havana convention, and Peru did not ratify it.

The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum [...], and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to alleged rule of unilateral and definitive qualification of the offence.

Despite rejecting the existence of a customary Latin-American norm on unilateral qualification of the offense, as Professor Cohen-Jonathan notes,

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<sup>24</sup> D'AMATO, A. **Special Custom in International Law**, 1969, p. 211-223. D'Amato states: "The distinction between special and general custom is conceptually simple. General customary law applies to all states, while special custom concerns relations between a smaller set of states." (p. 212)

<sup>25</sup> ORGANIZATION OF AMERICAN STATES (OAS). Convention on Political Asylum (A-37), 26 December 1933, Article 2. "The judgment of political delinquency concerns the State which offers asylum."

<sup>26</sup> INTERNATIONAL COURT OF JUSTICE. Asylum case (Colombia v. Peru). ICJ Reports, 1950, p. 266 (p. 15)

ICJ admitted the theoretical possibility of the existence of a regional or local custom proper of Latin-American States.<sup>27</sup>

The Asylum case presents a relevant framework of what is necessary for a local practice to be considered regional custom.

The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom as evidence of a general practice accepted as law.<sup>28</sup>

As it can be observed from the quotation above, the ICJ, while discussing a regional custom, invokes article 38 of the Statute of the Court, which defines general international custom as “[...] evidence of a general practice accepted as law.”<sup>29</sup> Professor Anthony D’Amato stresses that ICJ has construed a broad interpretation of Article 38 and included special custom. He states that “Such an interpretation was necessary in order to fulfill the reasonable expectations of states who often order and regularize special relationships among themselves [...]”.<sup>30</sup>

It is essential to note that ICJ sets a higher standard for proving a regional custom than the one necessary for general custom in the Asylum case. It argued that the party that alleges a regional custom has the burden of proving that it is a duty binding on all parties involved, whereas, in general customary law, it suffices to prove that most states consented. In this sense,

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<sup>27</sup> COHEN-JONATHAN, G. **La coutume locale**, 1961, p. 119-140. The author stresses that: “[...] elle a admis la possibilité théorique de l’existence « d’une coutume régionale ou locale propre aux Etats de l’Amérique latine »” (p. 128)

<sup>28</sup> INTERNATIONAL COURT OF JUSTICE. Asylum case (Colombia v. Peru). ICJ Reports, 1950, p. 266 (p. 14-15)

<sup>29</sup> UNITED NATIONS. **Statute of the International Court of Justice**, 18 April 1946.

<sup>30</sup> D’AMATO, A. **Special Custom in International Law**, 1969, p. 217.

Professor Anthony D'Amato stresses the difference between local and general customs. He claims that according to ICJ's jurisprudence, it is only necessary to prove the consent of all states involved when the claim is of a special custom. "The particular problems of proving consent on the part of the defendant state in any claim-conflict situation that are associated with a claim of special custom need not be extended to the broader question of norms of general custom [...]."<sup>31</sup> Malcolm N. Shawn also emphasizes the need of an acceptance of all nations involved on a local custom: "While in the case of a general customary rule the process of consensus is at work so that a majority or a substantial minority of interested states can be sufficient to create a new custom, a local custom needs the positive acceptance of both (or all) parties to the rule."<sup>32</sup>

After the Asylum Case, ICJ also recognized the institution of local custom in the Case Concerning Rights of Nationals of the United States of America in Morocco (1952) and Case Concerning Right of Passage Over Indian Territory (1960). In the Case Concerning Rights of Nationals of the United States of America in Morocco (1952), ICJ quoted the Asylum case and, using the same reasoning, concluded that The United States did not present sufficient proof that the alleged customary right to exercise consular jurisdiction created a duty that was binding on Morocco.<sup>33</sup> In Case Concerning Right of Passage Over Indian Territory (1960) the court expressly recognizes the possibility of a local custom between only two

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<sup>31</sup> D'AMATO, A. **Special Custom in International Law**, 1969, p. 221.

<sup>32</sup> SHAWN, M. N. **International Law**, 2008, p. 208.

<sup>33</sup> INTERNATIONAL COURT OF JUSTICE. Case Concerning the Rights of Nationals of the United States of America in Morocco. ICJ Reports, 1952, p. 28. "The second consideration relates to the question of proof. This Court, in the Asylum Case (I. C. J. Reports 1950, pp. 276-277), when dealing with the question of the establishment of a local custom peculiar to Latin-American States, said: 'The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law'.' In the present case there has not been sufficient evidence to enable the Court to reach a conclusion that a right to exercise consular jurisdiction founded upon custom or usage has been established in such a manner that it has become binding on Morocco."

states.<sup>34</sup> It concludes that the constant, uniform, and long-lasting practice presented in the case fulfilled the requirements to deem that they constitute a local custom accepted as the law by the parties. Thus, ICJ recognized in favor of Portugal a customary right of free passage of private persons, civil officials, and goods over intervening Indian territory.<sup>35</sup>

A recent Interamerican Court of Human Rights advisory opinion reiterated ICJ's Asylum case threshold.<sup>36</sup>

160. On the other hand, the Court reiterates that some States participating in this procedure expressly expressed their position that there would not be a uniform position in the Latin American sub-region to conclude that diplomatic asylum is part of the regional custom, but would only be a system based on treaties. Furthermore, most of the participating States stated that there is no legal obligation to grant diplomatic asylum, as this constitutes an act of foreign policy.<sup>37</sup>

The Interamerican Court of Human Rights advisory opinion OC-25/18 first reinforces the possibility of the existence of the regional custom, as was coined by the Asylum decision. Furthermore, it maintains ICJ's conclusion of the inexistence of Latin American regional custom on diplomatic asylum, which is currently grounded on legally binding

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<sup>34</sup> INTERNATIONAL COURT OF JUSTICE. Case Concerning Right of Passage Over Indian Territory (Portugal v. India). ICJ Reports, 1960, p. 37. "With regard to Portugal's claim of a right of passage as formulated by it on the basis of local custom, it is objected on behalf of India that no local custom could be established between only two States. It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States."

<sup>35</sup> *Ibidem*, p. 39. "The Court, therefore, concludes that, with regard to private persons, civil officials and goods in general there existed during the British and post-British periods a constant and uniform practice allowing free passage between Daman and the enclaves. This practice having continued over a period extending beyond a century and a quarter unaffected by the change of regime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation. The Court therefore holds that Portugal had in 1954 a right of passage over intervening Indian territory between coastal Daman and the enclaves and between the enclaves, in respect of private persons, civil officials and goods in general, to the extent necessary, as claimed by Portugal, for the exercise of its sovereignty over the enclaves, and subject to the regulation and control of India."

<sup>36</sup> INTER-AMERICAN COURT OF HUMAN RIGHTS. Advisory opinion OC-25/18 requested by Equator, 30 May 2018, p. 157-160.

<sup>37</sup> *Ibidem*, p. 160.

instruments. Various regional treaties deal with diplomatic asylum; the most important treaty in this regard is the 1954 Caracas Convention.<sup>38</sup>

In sum, the Asylum judgment substantiated the possibility of a regional custom and presented the requirements which are still used today. Furthermore, the conclusion of inexistence of a regional custom regarding diplomatic asylum was reiterated by the Interamerican Court of Human Rights in 2018. Therefore, as international law currently stands, we cannot claim a regional custom of diplomatic asylum.

## 5. IS THE TERRITORIAL STATE BOUND TO GIVE A SAFE-CONDUCT?

Colombia claimed that Peru is bound to issue a safe-conduct to Víctor Raúl Haya de la Torre. Using a grammatical interpretation of the expression “in turn” of article 2 of the Havana Convention,<sup>39</sup> ICJ ruled that there is only such an obligation if the territorial State requests the refugee to leave the country. If the State granting asylum makes the request, there is not such an obligation.

In the present case, the Peruvian government has not requested that Haya de la Torre should leave Peru. It has contested the legality of the asylum granted to him and has refused to deliver a safe-conduct. In such circumstances the Colombian government is not entitled to claim that Peruvian government should give the guarantees necessary for the departure of Haya de la Torre

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<sup>38</sup> Treaty on International Penal Law (adopted 23 January 1889), OAS Official Records, OEA/Ser.X/7; Treaty Series 34, Convention on Asylum (adopted 20 February 1928, entered into force 21 May 1929), OAS Official Records, OEA/Ser.X/I, Treaty Series 34; Convention on Political Asylum (adopted 26 December 1933, entered into force 28 March 1935), OAS Official Records, OEA/Ser.X/I, Treaty Series 34; Treaty on Political Asylum and Refuge (adopted 4 August 1939), OAS Official Records, OEA/Ser.X/1, Treaty Series 34; Treaty on International Penal Law (adopted 19 March 1940), OAS Official Records, OEA/Ser.X/1, Treaty Series 34; Convention on Diplomatic Asylum (adopted 28 March 1954, entered into force 29 December 1954), 1438 UNTS 101; Convention on Territorial Asylum (adopted 28 March 1954, entered into force 29 December 1954), 1438 UNTS 129. See also: FISCHER DE ANDRADE, J. H. **Regional Refugee Regimes**: Latin America, 2021.

<sup>39</sup> ORGANIZATION OF AMERICAN STATES (OAS). Havana Convention on Asylum, 20 February 1928. OAS, Treaty Series, No. 34 Article 2, Third: “The Government of the State may require that the refugee be sent out of the national territory within the shortest time possible; and the diplomatic agent of the country who has granted asylum may in turn require the guarantees necessary for the departure of the refugee with due regard to the inviolability of his person, from the country.”

from the country, with due regard to the inviolability of his person.<sup>40</sup>

Judge Caicedo Castilla disagrees with the Court and argues, in his dissenting opinion, that the Havana Convention recognizes both, first the right of the territorial State to request the departure of the refugee, which must be respected by the State that granted asylum, and second the right of the State of asylum to request a safe-conduct. On the second right, he invokes a unanimous practice of American States.

This right is a necessary consequence of asylum. The unanimous practice of American States is in accordance with this interpretation. In all cases of asylum, the diplomatic agent has requested and obtained the departure of the refugee without waiting for the territorial government to take the initiative. This practice has been amply proved in the documents annexed to the Pleadings of this case.<sup>41</sup>

In a different perspective, Judge Alvarez dissents and points out a gap in the Havana Convention of 1928 regarding the request of a safe-conduct by the State that granted asylum. He argues that “To bridge this gap, the Court would actually have had to create the law [...]”

This paper claims that ICJ’s grammatical interpretation was a subtle way to bypass the gap in the Havana convention noted by Judge Alvarez. Nonetheless, the court’s task to create the law is controversial on international law doctrine<sup>42</sup> and also not appreciated by States. Bridging

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<sup>40</sup> INTERNATIONAL COURT OF JUSTICE. Asylum case (Colombia v. Peru). ICJ Reports, 1950, p. 17.

<sup>41</sup> Ibidem. Dissenting Opinion by Caicedo Castilla: “[...] I believe that the Havana Convention recognizes two separate rights: (a) firstly, the right of the territorial State to require the removal of the refugee from the territory as rapidly as possible, that is to say that, as asylum is a transitory situation which cannot be prolonged indefinitely, the State granting asylum should respect this request. This is an obligation on the State granting asylum. The sojourn of the refugee on national territory cannot be prolonged against the will of the territorial State; (b) the second right is that, which is conferred by the abovementioned text upon the State granting asylum, to require that the refugee should leave the country with the necessary guarantees. This right is a necessary consequence of asylum. The unanimous practice of American States is in accordance with this interpretation. In all cases of asylum, the diplomatic agent has requested and obtained the departure of the refugee without waiting for the territorial government to take the initiative. This practice has been amply proved in the documents annexed to the Pleadings of this case.” (p. 110-111)

<sup>42</sup> TAMS, C. **The Development of International Law by the International Court of Justice**, 2017. He points that “However, the views of Montesquieu, Hughes and others provide the backdrop only. They allow us to appreciate the extreme positions: that of judges as mere mouthpieces versus judges in control of lawmaking. But neither of these extreme positions reflects the reality within international law”.



gaps in international law must be done with due care since it might threaten ICJ's legitimacy.

The Caracas Convention on Diplomatic Asylum<sup>43</sup> states in article XII that “Once asylum has been granted, the State granting asylum may request that the asylee be allowed to depart for foreign territory, and the territorial State is under obligation to grant Immediately, except in case of force majeure [...] the corresponding safe-conduct.” This convention was not applicable to the Asylum case, since it was ratified by Peru on July 2, 1962.<sup>44</sup>

Nowadays, if there is a treaty of diplomatic asylum between the States, this paper claims that the territorial State is bound to issue a safe-conduct<sup>45</sup> as this is a necessary corollary of diplomatic asylum to protect individuals from political prosecution. Issuance of safe-conduct also contributes that diplomatic asylum is compatible with human rights. Long-lasting residence in diplomatic facilities might threaten asylee's human rights.

[...] the right to liberty, the prohibition on inhuman or degrading treatment, freedom of movement, freedom of thought, conscience and religion, freedom of expression, freedom of assembly, freedom of association, the right to asylum from persecution, the right to participate in government and the right of access to the public service and democratic elections, the right to equality before the law or the prohibition on arbitrary detention may be put at risk of breach or actually breached by virtue of the diplomatic asylum granted.<sup>46</sup>

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<sup>43</sup> ORGANIZATION OF AMERICAN STATES (OAS). Convention on Diplomatic Asylum, 29 December 1954.

<sup>44</sup> Ibidem. “Article IX. The official furnishing asylum shall take into account the information furnished to him by the territorial government in forming his judgment as to the nature of the offense or the existence of related common crimes; but this decision to continue the asylum or to demand a safe-conduct for the asylee shall be respected.”

<sup>45</sup> Interview with Francisco Resek. Check out: LÉLLIS, L. **Ritmo de progresso do Mercosul é devagar como previsto**, 15 nov. 2014. In this sense, Rezek affirmed the illegality of Bolivia's refusal to concede a safe-conduct to Roger Pinto Molina. “O direito é claro sobre isso: concedido o asilo diplomático, era obrigação do governo boliviano dar imediatamente o salvo-conduto para que o asilado diplomático se transformasse em exilado territorial no Brasil. Não era uma opção, era um dever.”

<sup>46</sup> HUGHES-GERBER, L. **Diplomatic Asylum on the Basis of Humanitarian Considerations**, 2021, p. 188.

Nonetheless, in practice, there is a trend of host States facilitating a safe-conduct, but often territorial States refuse a safe-conduct.<sup>47</sup> Concrete examples are 2009 Honduran President Manuel Zelaya asylum at the Brazilian embassy in Tegucigalpa. He was brought to Brazil without a safe-conduct, and Honduras filed a case against Brazil at the ICJ, which was later discontinued.<sup>48</sup> Another example is Bolivian Senator Roger Pinto, who received diplomatic asylum in the Brazilian Embassy in La Paz in 2012. He was also brought to Brazil without a safe-conduct which generated a diplomatic crisis.<sup>49</sup>

## 6. URGENCY AS A REQUIREMENT FOR POLITICAL ASYLUM

Peru affirmed in its counter-claim that the grant of asylum violates article 2, paragraph 2 of the Havana Convention, since the case is not urgent. According to the Havana Convention, “Asylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to ensure in some other way his safety.”<sup>50</sup>

ICJ stated, in short, that the government of Colombia had the burden of proving urgency and emphasized that, when it granted asylum, three months had elapsed since the military rebellion. It further affirms “[...] it is inconceivable that the Havana Convention could have intended the term “urgent cases” to include the danger of regular prosecution [...]”<sup>51</sup> and that Colombia did not prove the alleged danger of subordination of the Peruvian judicial authorities to the Executive power. Thus, it concludes

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<sup>47</sup> HUGHES-GERBER, L. **Diplomatic Asylum on the Basis of Humanitarian Considerations**, 2021, p. 84.

<sup>48</sup> INTERNATIONAL COURT OF JUSTICE. *Certain Questions concerning Diplomatic Relations (Honduras v Brazil)*, 28 October 2009. HUGHES-GERBER, L. **Diplomatic Asylum on the Basis of Humanitarian Considerations**, 2021, p. 78. “[...] following the election of new President Porfirio Lobo on 27 January 2010, a deal was negotiated under which Zelaya was permitted to leave the embassy to take up exile in the Dominican Republic.309 Proceedings before the ICJ were thus discontinued and the case removed from the list.”

<sup>49</sup> SANDY, M. **Diplomatic war erupts after Bolivian senator flees to Brazil**, 28 August 2013.

<sup>50</sup> ORGANIZATION OF AMERICAN STATES (OAS). *Havana Convention on Asylum*, 20 February 1928.

<sup>51</sup> INTERNATIONAL COURT OF JUSTICE. *Asylum case (Colombia v. Peru)*. ICJ Reports 1950, p. 266 (p. 22)

“[...] there did not exist a danger constituting the case of urgency within the meaning of Article 2, paragraph 2, of the Havana convention.”<sup>52</sup>

The contention over urgency was the most controversial part of the judgment since the lack of thereof was decided by ten votes to six.

Judge Badawi Pasha dissents from ICJ’s decision and states the term “urgent cases” shall be construed as to exclude asylum in cases of political normality and to allow it in times of political disturbance. “[...] this reference to “urgent cases” to exclude from asylum those cases in which it is granted following legal proceedings, instituted in normal circumstances and in the absence of revolutionary disturbances or of possible exceptional measures.”<sup>53</sup> He also recalls that there is an undeniable practice of successful revolutionaries to seek political opponents in times of political disturbance. In this context, “exceptional measures are usually adopted, but the general structure of the government remains intact.”<sup>54</sup> He further argues that the other persons charged with the rebellion of October 3 who, from the standpoint of urgency, were in the same situation as Haya de la Torre, received safe-conducts.<sup>55</sup>

As judge Badawi Pasha, Judge Read also argues that term “urgent cases” must be interpreted to allow the grant of asylum to political offenders in times of political disturbance.<sup>56</sup> He further states that considering the history of revolution worldwide and at Latin America, the time-lapse of three months

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<sup>52</sup> INTERNATIONAL COURT OF JUSTICE. Asylum case (Colombia v. Peru). ICJ Reports 1950, p. 266 (p. 24)

<sup>53</sup> Ibidem, p. 266. Dissenting Opinion by Judge Badawi Pasha. On p. 51 he argues that “These rules tend not to admit asylum in times of peace and order, but to grant it in times of revolution, euphemistically described in the Convention as ‘urgent cases’”.

<sup>54</sup> Ibidem, p. 266 (p. 42-43).

<sup>55</sup> Ibidem, p. 266. Dissenting Opinion by Judge Badawi Pasha, on p. 43: “In the absence of further proof, it is sufficient to recall what happened in connection with these same events of October 3. Independently of the degree of responsibility (a question which is entirely irrelevant to the validity of the asylum), all the refugees in the eight diplomatic missions, with the exception of Haya de la Torre, received safe-conducts, whereas from the point of view of the nature of offence with which they were charged, and from the point of view of urgency, they were all in the same situation.”

<sup>56</sup> Ibidem, p. 266. Dissenting Opinion by Judge Read on p. 60: “On the positive side the application of this test would strongly support and confirm an interpretation of the expression “urgent cases” as covering cases in which asylum was granted during a period of disturbed conditions following a revolution, and as excluding asylum during periods of political tranquility.”

is reasonable and does not exclude urgency.<sup>57</sup> He stresses that the ICJ's interpretation of urgent cases not only revises the Havana Convention but also threatens the very institution of diplomatic asylum.

It is unthinkable that, in using an ambiguous expression “urgent cases”, they were intending to bring to an end an “American” institution, based on ninety years of tradition, and to prevent the grant of asylum to political offenders “in times of political disturbance.” To apply such a construction would be to revise, and not to interpret the Havana Convention; a course which I am precluded from adopting by the rule laid down by this Court when it stated: “It is the duty of the Court to interpret the Treaties, not to revise them.” “Interpretation of Peace Treatise (second phase), Advisory Opinion: ICJ. Reports 1950, p. 229.<sup>58</sup>

While discussing the concept of urgency and Judges Read's and Badawi Pasha's opinion, the Report of the Secretary-General on the Question of Diplomatic Asylum of 1975 states:

There could be no doubt that the institution of asylum, which the Havana Conference had been seeking to regulate in 1928, was one in which asylum was freely granted to political offenders during periods of disturbed conditions following revolutions.<sup>59</sup>

In his dissenting opinion, Judge Alvarez argues that, in the written reply, Colombia has demonstrated the danger faced by Haya de La Torre and that he was in a highly critical situation. As judge Badawi Pasha, Alvarez recalls that other participants of the revolutionary movement received asylum. “The fact that several foreign embassies and legations had granted asylum

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<sup>57</sup> INTERNATIONAL COURT OF JUSTICE. Asylum case (Colombia v. Peru). ICJ Reports 1950, p. 266. Dissenting Opinion by Judge Read, on p. 67: “Further, the suggestion that 48 days or even three months was an unreasonably long time seems somewhat unrealistic to any person who possesses any knowledge of the history of revolutions, whether in Latin-America or in other parts of the world.”

<sup>58</sup> *Ibidem*, p. 266 (p. 60).

<sup>59</sup> UNITED NATIONS GENERAL ASSEMBLY. **Question of Diplomatic Asylum**. Report of the Secretary-General, 22 September 1975.

in Peru to various persons who had participated in the same revolutionary movement as Haya de la Torre, further confirms this urgency.”<sup>60</sup>

This paper disagrees with ICJ’s restrictive interpretation of the term “urgent cases.” It understands, aligned with judges Read and Badawi Pasha’s opinion, that urgency shall be construed to allow diplomatic asylum in times of political instability and prevent it in times of democratic normality. Furthermore, ICJ’s decision demonstrates a lack of consideration of the conditions “on the ground.” It disregards the political context of a dictatorship in Peru, that Haya de La Torre was a founder and leader of the APRA party and politically prosecuted for a long time. The democratic abnormality was such that state of siege was declared. As judge Badawi Pasha emphasized, exceptional measures are usually adopted in times of political disturbance, but the powers’ apparent legality and general structure remain complete. Considering that all other members of APRA that were in a similar situation received a safe-conduct, it is ungrounded to conclude that there was no urgency only concerning Haya de la Torre. Lastly, it is unreasonable to argue that a period of three months excludes urgency since political leaders must consider the party, its ideology, and which attitude might better serve the interests that it conveys; this might require a time-lapse.

## FINAL CONSIDERATIONS

The main contributions to the international legal debate presented by the Asylum case and analyzed throughout this paper were: the right of unilateral qualification of an offense as a political one; the discussion over regional customary international law; the duty or not to issue a safe-conduct; what should be considered urgency for the purposes of diplomatic asylum.

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<sup>60</sup> INTERNATIONAL COURT OF JUSTICE. Asylum case (Colombia v. Peru). ICJ Reports, 1950, p. 266. Dissenting opinion by Judge Alvarez, on p. 40. For a deeper understanding of Judge Alvarez’s viewpoint, a longer excerpt of the opinion was transcribed: “At the time at which Haya de la Torre requested asylum, he was in a most critical situation, and he was by no means in safety. In the written Reply, the Government of Colombia has explained the nature and magnitude of the danger which threatened Haya de la Torre. It is in the light of that situation that the diplomatic agent of Colombia decided to grant asylum. I consider that he was able to appreciate exactly, and better than anyone else, the urgency for such action. The fact that several foreign embassies and legations had granted asylum in Peru to various persons who had participated in the same revolutionary movement as Haya de la Torre, further confirms this urgency. Moreover, Peru has only recently invoked the absence of urgency.”

On the right of unilateral qualification of the offense, the ICJ decided that Colombia, as the State granting asylum, was not competent to qualify the offense unilaterally. This paper argues against ICJ's decision since it envisions that the right of unilateral qualification is essential to the institution of asylum. It is a fundamental measure to protect a refugee, who is politically prosecuted and unable to find protection in the territorial State. In times of political instabilities, the territorial State is not in a condition to impartially qualify its political opponents. Arguments of the doctrine and the dissenting opinions of Judges Azevedo and Castilla were presented to support this standpoint. The Caracas Convention on Diplomatic Asylum, was a reaction to the judgment and makes it possible that nowadays, for its parties, including Peru, diplomatic asylum, is grounded on unilateral qualification. We also fostered an initial reflection on the relation between the right of unilateral qualification of the offense and recent discussions on externalization<sup>61</sup> and asylum. While the existing externalization debate questions the negative impacts on territorial asylum seekers of decisions taken outside the receiving State, we highlighted that an unexplored part of this discussion is that externalization inherent in the case of diplomatic asylum, and in this situation, positively impacts asylum seekers.

Regarding customary regional international law, the Asylum judgment is a leading case. Despite rejecting the presence of a customary Latin-American norm on unilateral qualification of the offense, it is the first precedent of an international court that recognizes the theoretical possibility of the existence of a regional custom. The court made an expansive interpretation of Article 38 of the Statute of the Court, which defines general international custom to encompass special custom. Moreover, the Asylum case also set standards for the recognition of a local custom. The court holds that the party that alleges a regional custom has the burden of proving that it is a duty binding on all parties involved, whereas, in general international customary law, it suffices to prove that most states consented. A recent Interamerican Court of Human Rights advisory opinion reiterated ICJ's

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<sup>61</sup> REFUGEE LAW INITIATIVE. Declaration on Externalisation and Asylum, 29 June 2022. "We understand 'externalisation' as the process of shifting functions that are normally undertaken by a State within its own territory so that they take place, in part or in whole, outside its territory. Such externalised functions might be implemented by a State unilaterally, jointly with other States and/or entities – including International Organisations (IOs) and private actors – or through partially or wholly delegating the functions to other States and/or entities."

requirements for regional custom stated in the Asylum case and also kept the conclusion of the inexistence of a regional norm on diplomatic asylum, which is grounded on treaties.<sup>62</sup>

In the Asylum case, ICJ decided that Peru was not bound to issue a safe-conduct, arguing that according to article 2 of the Havana Convention,<sup>63</sup> there is only such an obligation if the territorial State requests the refugee to leave the country. If the State granting asylum makes the request, there is no duty to issue a safe-conduct. Nowadays, if there is a treaty on diplomatic asylum among the involved States, this paper claims that, in a Latin-American context, the territorial State is obliged to issue a safe-conduct. However, territorial States often refuse a safe-conduct.

The ICJ decided for the lack of the requisite of urgency, established by article 2, paragraph 2 of the Havana Convention, by ten votes to six. This was the most controversial point of ICJ's judgment. This paper presented a critique of ICJ's decision. It argued, aligned with judges Read and Badawi Pasha's dissenting opinions, that the term "urgency" shall be construed to allow diplomatic asylum in times of political instability and prevent it in times of democratic normality. The restrictive interpretation of urgency provided by the Court creates a new condition that threatens the very existence of diplomatic asylum. On the factual discussion, the paper argued that ICJ's reasoning demonstrated a lack of consideration of the situation "on the ground."

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<sup>62</sup> INTERAMERICAN COURT OF HUMAN RIGHTS. Advisory opinion OC-25/18 requested by Ecuador, 30 May 2018, p. 157-160.

<sup>63</sup> ORGANIZATION OF AMERICAN STATES (OAS). Havana Convention on Asylum, 20 February 1928. OAS, Treaty Series, No. 34 Article 2 Third: "The Government of the State may require that the refugee be sent out of the national territory within the shortest time possible; and the diplomatic agent of the country who has granted asylum may in turn require the guaranties necessary for the departure of the refugee with due regard to the inviolability of his person, from the country."

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