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The Rights Of Asylum, Refuge, and Complementary Protection In Mexico Since 2011

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SUMMARY:

I. Introduction.

One of the main challenges in exercising the right of asylum, refuge or any other form of international protection, it's the conceptual confusion that often exists between the institutions, both in the theoretical as well as the pragmatic and legal frameworks, due to the fact that they are closely related, but require a different treatment in virtue of its nature.

On the occasion of the Mexican constitutional reform of June 2011, in which a series of articles on the subject of human rights were added or modified, Article 11 established the right to enter and leave the Republic, as well as the ambulatory freedom rights that every person retains within the national territory. Its second

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paragraph stipulates the human right to seek asylum and to receive international protection:

"*In case of persecution, for political reasons, every person has the right to seek asylum; for humanitarian reasons, refuge will be granted*"[3]

The Mexican legal system recognizes primarily a classic asylum reproach, when the right to seek such status is solely established, and not the right to receive it, as pronounced in Article 14 of the Universal Declaration of Human Rights and the Declaration on Territorial Asylum of 1967[4]. Such does not constitute a substantial advancement beyond the constitutional status provided to the institution of asylum; that is, an advancement is not existent towards the consolidation of the asylum as a real public subjective right. However, as later mentioned, the sense in which the conventional framework has developed is respected.

In contrast, it is instituted the human right to receive refuge for humanitarian reasons. In a strict sense, it moves away from the meaning given in recent years to international refugee law, whose development is largely based on the definition of *refugee* by the Geneva Convention of 1951 on Refugee Rights (and the additional Protocol was signed in New York in 1967). [5]

It is worth mentioning that due to humanitarian concerns, in agreement to the definition given to international humanitarian law at the beginning of its own development, there must be a preliminary understanding on circumstances that arise from armed conflicts.[6] Services provided by international organizations (e.g.

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[3] *Vid*. DOF 10/Jun/2011.

[4] General Assembly of the United Nations. Resolution 2312 (XXII), December 14, 1967

[5] Geneva Convention on the Rights of Refugees, adopted in Geneva, Switzerland, on July 28, 1951 by the Plenipotentiary Conference on the Statute of Refugees and Stateless Persons (United Nations), convened by the General Assembly in its Resolution 429 (V), December 14, 1950. Article 1

6 The essential instruments of international humanitarian law are the Four Geneva Agreements of August 12, 1949 and its two Additional Protocols of June 8, 1977. See the "Guide on the International Law of Refugees", UNHCR and the Inter-Parliamentary Union, 2003, chap. 3.

International Committee of the Red Cross) during time of war, are often referred as aid or humanitarian assistance. [7]

In Europe, as in other world regions, there are international subsidiary protection statutes directed towards groups of people coming from established situations (e.g. state of emergency), making a clear distinction from groups of people who are considered refugees under the definition set by the Geneva Convention of 1951.[8]

Thus, given possible semantic inaccuracies that could arise from the previously mentioned Article 11 (and the interpretation of the statutes established in the Mexican Law on asylum, refuge, and complementary protection), it is necessary to thoroughly clarify the following concepts in order to contribute to its conceptual delimitation in the Mexican practice (whereas the protection statutes for each case are configured): The **right of asylum**, the **right of refuge**, and the **right to complementary protection**.

II. Notions and current *Rights of Asylum*

The **right of asylum** is the protection granted by a sovereign State within its territory, to every non-native individual suffering persecution in their country of origin or former place of residence, for political, ideological or related reasons concerning certain principles and democratic values; whose regulation takes place in different national legal systems...[9]

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[7] ABRISKETA, Joana, "Humanitarian action: legal foundations", Dictionary of Humanitarian Action and Development Cooperation, University of the Basque Country, 2005-2006, available at: http://www.dicc.hegoa.ehu.es/listar/mostrar/3 Last visit on 12/Nov/2018

[8] The Board 2004/83/CE of the Council of the European Union, of April 29, 2004, which establishes minimum standards regarding the requirements for the recognition and status of third-country nationals or stateless persons as refugees or people who need another type of international protection and the content of the granted protection.

[9] The definition is ours and is published in the form of "VOCES" (same way, it is used in this work. much of the information), in the collective work: "Dictionary of Constitutional and Conventional Procedural Law", Institute of Legal Research of the UNAM and the Council of the Federal Judicature.

There seems to be no confusion regarding the **right of asylum** in the constitutional reform under consideration, since Article 11 (second paragraph) establishes the human right to seek asylum for suffering political persecution. Such reason is why political asylum (also known as territorial or diplomatic asylum) is traditionally granted in Latin American.

Historically, asylum emerges as an institution with a distinctly religious aspect, whose aim was to help and protect people persecuted by civil forces. Consequently, in the doctrine referring to the origins of asylum reference is made to biblical passages and theological interpretations, rather than anthropological.[10]

In the Classical Greece period, asylum reached a high degree of development, known as "*asylon*," meaning inviolable.[11] It is known that this institution was transmitted through time via popular mercy precept, apostolic and patristic tradition, shaped though social custom, and eventually acquiring a legal nature under laws, beginning on the 5th and 4th centuries BCE (Before the Common Era).[12]

The institution of asylum has had a dissimilar development in different regions of the world, hence the current two known types of asylum of most importance and practice in the Western World: Territorial and diplomatic.

The most relevant reference on “territorial asylum” is found in Resolution 2312 (XXII) of the United Nations General Assembly (December 14, 1967) adopted

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[10] In this sense, RICO ALDAVE, Hipólito, "The Rright of Asylum in Christianity, historical-juridical sources", Public University of Navarra, Navarra, 2005, pp. 39ss.

[11] BODELÓN, Gloria, "The Asylum Policy in the Third Pillar of the European Union", in: "The third pillar of the European Union. Cooperation in Justice and Home Affairs ", General Secretary, Technical Department of the Ministry of the Interior, Madrid, Spain, 1997, pp. 97ss.

[12] *Íbidem*.

as a "Declaration on Territorial Asylum." It includes the Universal Declaration of Human Rights of 1948, which establishes the human right to seek asylum and to be granted in any country (Art.14). These become the fundamental principles of the United Nations, upheld as their axiological base (i.e. peace, security and international cooperation, and the promotion of friendly relations among nations, in order to guarantee human rights).

The Declaration also states that territorial asylum should not be considered as an unfriendly act between societies, it should be granted to individuals on the basis of the exercise of sovereignty (Article 1) and this right may not invoked by individuals who have committed a crime against peace, of war or against humanity (Art. 1.2). Thus, the right to seek asylum is conditional and will not be granted. However, each country has the freedom to provide or deny the requested protection.

The relative effectiveness of the mentioned Declaration should be noted, in consideration of its legal nature, which lacks a coercive bond and represents a document of goodwill that can be considered *Soft Law.*[13] For this reason, the United Nations assembled a conference in Geneva, Switzerland, from January 10 to February 4 in 1977, in accordance with Resolution 3456 of the General Assembly, for the purpose of adopting a Convention on territorial asylum law, which does recognize a minimum framework of rights in a binding way. However, it was not possible to reach any formal agreement and the expectations remain distant for a new conference or adoption of an international legal framework for territorial asylum.

[13] According to some *Soft Law* rules on, it could be taken into consideration the Declarations in the said category. To deepen this issue, see DAMIÁN OLMEGNA, Pablo, "Impact of Soft Law standards on the development of International Law of Human Rights", Electronic journal of the Ambrosio L. Gioja Research Institute, Year VI, no. 8, 2012. p. 30.

As mentioned previously, diplomatic asylum was conceived as a typical institution in Latin America,[14] consistent in the protection provided in the State missions or diplomatic legations. Alike territorial asylum, it is granted to people who are victim of political or ideological persecution, with the singularity that such protection is granted in the installations of the embassies or consulates of a State, within the territory of another.

The purpose of this institution is to achieve enough diplomatic guarantees from the persecuting State through a sort of travel safeguard document which allows the persecuted individual to leave its territory without endangering her/his life or physical integrity, which can be interpreted as a preceding step to the right of territorial asylum. Diplomatic asylum is understood in Latin American regulations as political asylum,[15] unlike the European concept in which territorial asylum is understood as a synonym of the latter.

In Europe, the protection offered in the diplomatic legations to people suffering persecution is distinguished as a type of "temporary refuge for humanitarian reasons."[16] It is awarded on the basis of the "inviolability of diplomatic premises" principle (established in the Vienna Convention on Diplomatic Relations of 1961, in its Article 22.1) and under the principles of traditional international law protecting life, preventing torture, and inhuman or degrading treatment (but in no legal connection to diplomatic asylum, an institution not recognized in that continent).[17]

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[14] . In this sense, see GÓMEZ-ROBLEDO VERDUZCO, Alonso, Temas Selectos de Derecho Internacional , National Autonomous University of Mexico, fourth edition, México 2003, pp. 619ss.

[15] *Vid*. Convention of La Havana on Asylum, February 20, 1928; modified by the Convention of Montevideo on Political Asylum, December 26, 1933.

[16] See the case of the United Kingdom, "London does not recognize the diplomatic asylum of Ecuador and denies the safe-conduct to Assange", Journal: El Mundo, elmundo.es, available at: http://www.elmundo.es/elmundo/2012/08/16/international/1345123131.html last visit on 12/Dec/2018

[17] In this sense, TRUJILLO HERRERA, Raúl, *La Unión Europea y el Derecho de Asilo*, Edit. DIKYNSON, S.L, Madrid, 2003, p. 101

Therefore, the modality of diplomatic asylum is understood as a common Latin American regional practice and its international framework found in the Caracas Convention on Diplomatic Asylum of March 28, 1954, held within the *10th Conferencia Interamericana*.

The Caracas Convention was born under the old concept of *extraterritoriality*, in which States may grant diplomatic asylum outside their actual territorial limits jurisdiction. In it includes the grounds of the [diplomatic] *mission* and the residence of the Chief diplomat, warships, military bases/camps, and aircrafts (Article 1). However, currently it appears that *extraterritoriality* loses legal basis,[18] as the *inviolability of the diplomatic mission* becomes a more important principle. This means that, under the concept of *extraterritoriality*, the diplomatic enclosures are considered "islands of absolute sovereignty of the State mission" within the territory of a host State; while the principle of *inviolability of the diplomatic mission* sustains that buildings or compounds where embassies or consulates are located depend partly on the receiving State. Thus, through the adoption of domestic laws on diplomatic and consular premises (see the case of the United Kingdom, 1987 Law) it is possible to revoke the diplomatic status of an embassy or consulate in certain crisis situations, such as breaks in diplomatic relations by virtue of ideological, political or armed conflicts.

III. Notions and Current *Rights of Refuge*

The right to obtain refuge and protection, set and regulated in the international order by legal instruments and customary law, is recognized to every individual persecuted for reasons of race, religion, nationality, affiliation of a particular social group or political opinion. The refugee status is generally regulated by the domestic law of a State, in response to diverse sinalagmatic commitments contracted in the Geneva Convention of 1951 on the Status of

[18] To deepen in the topic, see SEARA VÁZQUEZ, Modesto, *Derecho Internacional Público*, Porrúa, 15th ed. México, 1994, p. 237.

Refugees, established with the intention of solving the problem of displaced individuals in the European region, highly affected by World War II events.[19]

However, in a broad sense, refugees are often recognized in various world regions or by international bodies also for diverse reasons, such as indiscriminate violence, systematic violation of human rights, climate issues, hunger, among other circumstances that by *de facto* can lead to a deprived situation, in the country of origin or former place of residence.[20] Naturally, the circumstances must generate in the individual justified fear, and by such is unable or unwilling to return to the place where she/he suffered persecution in the above-mentioned forms.

In a practical sense, the right of refuge consists mainly in not to return to the country of origin or another State where her/his life or physical integrity are endangered, in addition to the proportion of minimum conditions of reception. These last are usually more or less generous depending on the criteria and possibilities of the host State, since the Geneva Convention is silent regarding the minimum economic benefits.

It is appropriate to clarify the narrow relationship that exists between asylum and refuge, as in the dialectic framework in international law on these concepts it is common to find it difficult to comprehend.

The right of asylum consists in the protection that the sovereign State optionally grants in their territory and national settings. To a prominent scholastic sector, led by Professor Diego López Garrido, the concept of asylum as a real subjective right is a vital debatable topic.[21] While the *refugee* figure is a regulated institution, defined in an international legal framework under the Geneva Convention of 1951 on the statute of refugees and its additional Protocol of 1967

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[19] Convention on the Statute of Refugees, adopted on July 28, 1951 by the Plenipotentiary Conference on the Statute of Refugees and Stateless Persons (United Nations), convened by the General Assembly in its resolution 429 (V) of December 14, 1950. Coming into force: April 22, 1954.

[20] See, for example: "The Convention of OAU which regulates the specific aspects of refugee problems in Africa of 1969, art. 1. The "Cartagena Declaration on Refugees of 1984", Conclusions.

[21] LOPÉZ GARRIDO, Diego, *El Derecho de Asilo*, Ed. Trotta, Madrid, 1991.

from which diverse obligations derive for the participating States, granting a similar statute to asylum, but generally is more limited in time and in content of rights.

As mentioned before, in different legal instruments of the Latin American region, asylum and refuge are understood somewhat as synonyms. These are referenced as such in the 1889 Montevideo Treaty (Article 16) and 1939 (Art. 11-14) on Political Asylum and Refuge, in the Havana Convention of 1928 (Art. 1), and the Caracas Convention of 1954, in which asylum and refuge are considered the same (Art. 9).

The 1951 Geneva Convention does not regulate the right to territorial asylum; it only mentions the preamble to asylum, as pertains to the *principle of international solidarity* with respect to the overload of requests for asylum or refugee status in a member State. Thus, in the United Nations system, it is clear that asylum has had its specific regulation as a different institution to that of refuge in the Declaration on Territorial Asylum of December 14, 1967.

Meanwhile, in Europe an *ad hoc* regional legal framework on refuge or asylum is non-existent. However, the rules of the European Union has exercised considerable influence on domestic law of its States towards the views of asylum as a synonym for refuge, forcing the amendment or creation of new domestic asylum laws. For example, the Spanish case, Law 5/1984, established two securities [*Títulos*]: One related to the right of asylum and the other to refugee status, in which the specific conditions of each statute were separately regulated. This changed, under strong community influence, with the 9/1994 Law of May 19, which abolished the second *Título* related to refugee status and unified the concepts according to its preamble to avoid confusion and abuse. This new standard defines asylum (Art. 2.1) as "the protection granted to foreigners to whom the refugee status has been recognized and is in its non-return or expulsion under the terms of Article 33 of the Convention relating to the Status of Refugees, which took place in Geneva on July 28 1951."

In the Spanish case, the recognition of refugee status is conditioned in the granting of asylum, consolidating a synonym in the regulation. Without limiting the

aforementioned, some member States have granted protection to individuals outside of the Geneva Convention definition, and are therefore not refugees in a strict sense; they are nevertheless considered "*de facto refugees*," that is to say, received in the exercise of sovereignty, such as it ensues under territorial asylum rights.

It is important to mention that refugee rights have had a heterogeneous development in other regions, such as Africa, as well as Latin America, where legal texts have been adopted with broader definitions that stand out to this regard for considering new grounds that lead to persecution. Such broader scope, in the opinion of a prominent scholastic sector (previously mentioned), should be undertaken by the 1951 Convention and its 1967 Protocol.[22] However, the United Nations High Commissioner for Refugees acknowledges that these new definitions are of peculiar nature, as they tackle refugee issues in light of circumstances of each specific geographical area.

In this regard, the Organization of African Unity Convention of 1969, in its definition of a refugee, reproduces Article 1/paragraph 1, of the Geneva Convention of 1951, which only consents the refugee status on the grounds of persecution of race, religion, nationality, political opinion and affiliation to a particular social group. However, in its second paragraph, it also admits refugee status to every individual that due to: an external aggression, occupation or foreign domination, or events disturbing public order, in parts or the whole country of origin, or the country of her/his nationality or the one forced to escape. Such constitutes a much broader definition that does not require the element of discriminatory persecution.

In Latin America, the Cartagena Declaration on Refugees of November 1984 also contains a vanguard definition in respect to the Geneva Convention of 1951. A refugee is considered to be anyone who has fled their country because

[22] For all of them, in this sense, see: TRUJILLO HERRERA, Raúl, *Op. Cit*., supra, cita 17, pp. 67ss; GORTÁZAR ROTAECHE, Cristina, *Derecho de Asilo y <<no rechazo>>del Refugiado*, ed. DYKINSON, Madrid, 1997, pp. 102-106.

their lives, safety or freedom have been threatened by generalized violence, a foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

Finally, it must be noted that the Mexican Law on Refugees and Complementary Protection, of January 27, 2011,[23] is also configured as a vanguard legal text with a broad refugee definition and closer to the refugee reality in question (Art.13). In addition to the reasons required by the refugee definition of the Geneva Convention on the Status of Refugees (Article 1), the Mexican Law recognizes persecution under gender explicitly, by indiscriminate violence, foreign aggression, internal armed conflict, or other reasons leading to a disturbance of public order, reflecting to some extent, the current situation faced by some countries in Latin America.

However, the Mexican [Refugee] Law makes no reference to the recognition of the condition of refugee for humanitarian reasons, but it does seems to pertain into the status of complementary protection, to which is presented in the next section.

IV. Notions and current *Complementary Protection Law*

The status of complementary protection, established by the Mexican Law on Refugees and Complementary Protection (Article 2, frac. IV), consists in the right of every individual to obtain international protection, in a complementary or subsidiary right of asylum or refugee status. It refers to certain legal mechanisms of domestic structure, encouraged and based on the development of human rights of national and international sources, to protect people who are not recognized as refugees under the interpretation of the States on the definition of refugee, by the Geneva Convention 1951, and are not beneficiaries of the status of asylum according to the national criteria. However, these individuals are pragmatically endangered due to indiscriminate violence, systematic violation of human rights;

[23] *Vid*. *DOF 27/Jan/2011.*

disasters caused by humans or natural causes, among other reasons, that puts their life at risk or suffer inhumane and/or degrading treatment.

The law consists essentially in the non-extradition or expulsion to the country, territory or previous place of residence, where a risk persists causing founded fear of persecution (understood as the fear of suffering serious personal, physical or psychological harm) in a manner consistent with the principles of customary international law *non-refoulement* and protection of life.

The beneficiaries of complementary, or subsidiary, protection usually have access to human rights considered fundamental by States, in their domestic legal systems, as well as a residence permit, which is usually of a shorter period than the residence permit granted under refugee status or asylum status. Countries, such as Mexico, provide very accessible ways of acquiring citizenship; therefore, it should be clearly distinguished from other forms of international protection that may grant a condition of final settlement.

The status of subsidiary or complementary protection supplements the gaps, to some extent, of the different systems of asylum and refuge. However, it should not be construed to the detriment of those statutes, since it does not substitute, but is recommended by the United Nations High Commissioner for Refugees. The possibility should remain open to anyone in a position of subsidiary or complementary protection, and can be subsequently recognized as a refugee or *asylee*.[24]

It is worth mentioning that the statute lacks a dedicated internationalist framework that establishes minimum application criteria (except in the European region where community regulations have been instrumental in its development in the various domestic systems). In a way, some States have regulated additional

[24] *Vid*. Conclusions on "international protection by means of complementary forms of protection", from the Executive Committee of the High Commissioner's Program. EC / 55 / SC / CRP.16- June 2, 2005.

protection in a peculiar manner, adopting the procedure for recognition of refugee status or asylum in an analogous form. [25].

V. Conclusions.

The condition of international mixed migrations, in which one can include both economic migrants and asylum seekers, refugee or complementary protection is extremely problematic. The receiving countries have demonstrated, in recent years, little sensitivity towards the requestors of international protection, and as such, a clear procedure to provide asylum and protection in a complementary, clear, efficient and effective way is essential.

Since the adoption of the Geneva Convention text on the Status of Refugees of 1951, the development of this field in the international arena has been slow and fearful, which undoubtedly has led to radical, and sometimes irrational, unfair nationalistic regulations.

Currently, the dissimilar and more realistic development on the regulation of the refugee law on regional systems of human rights protection, and in some national legal systems, suggests a certain obsolescence of classic internationalist nature of the United Nations framework in two ways: First, to leave out of its definition different groups of individuals who require international protection; and second, by allowing member States to carry out examinations of recognition of refugee status on rigorous extremes demanding strictly personal experiences of persecution and imposing an excessive burden of proof on the applicant; in Mexico this fortunately has not happened in the legal framework, however, national statistics on exam recognitions and granting of the status categories is questionable.

[25] Such is the case of the Mexican Law on Refugees and Supplementary Protection, DOF 27/Jan/2011 and the Spanish Law 12/2009, regulating the right of asylum and subsidiary protection, BOE 263 31/Oct/2009.

For all, it is necessary to focus the attention on Mexican practices on asylum, refuge, and additional protection in the new legal framework that Article 11 of the Constitution represents, and the new law on the subject, in which case we must not lose sight of the Spanish practices since the adoption of the Law 5/1984, 9/1994, and 12/2009 successively, asylum and refugees have gone from two different categories to become one. However, it should be noted that in recent years, Spain has come from being considered generous, to a country with very strict regulations, with declining grants of refugee status.

It is necessary to specify the European context, where a statute of subsidiary protection is formed - similar to the statute of complementary protection in Mexico, which in a positive side, protects individuals who are not recognized as refugees or *asylees*. Nevertheless, it seems to condemn asylum and refuge normatively, and lack development in a more realistic and protective sense.

In conclusion, it is worth mentioning that in large measure, the mass movement of people occurred in the first decade of the XXI century, first they found shelter in the form of subsidiary or complementary protection when outside the scope in application of the Geneva Convention of 1951 relating to the status of refugees. However, this should have be seen as a temporary solution, that without plan on international regulation will cause a policy development at the domestic level, unbalanced and damaging, both socially and economically, for the contested recipient States (usually those in developing countries) both for recipients of complementary or subsidiary protection.

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