Before the

INTER-AMERICAN COURT OF HUMAN RIGHTS

REQUEST FOR AN ADVISORY OPINION SUBMITTED BY THE REPUBLIC OF ECUADOR

Concerning "the institution of asylum in its different forms and to the legality of its recognition as a human right of every individual in accordance with the principle of equality and non-discrimination"

WRITTEN OBSERVATIONS OF LAW

Pursuant to Article 73(3) of the Rules of Procedure

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1. INTRODUCTION

1. Written observations in law are hereby respectfully submitted in reply to the Court's invitation for written observations from interested parties in relation to a request for an Advisory Opinion submitted by the Republic of Ecuador to the Court on 18 August 2016.

2. This *Amicus Curiae* brief is presented in accordance with Article 73(3) of the Rules of Procedure of the Inter-American Court of Human Rights. It relates to the issue of "the institution of asylum in its different forms and to the legality of its recognition as a human right of every individual in accordance with the principle of equality and non-discrimination", which is the subject of Ecuador's request for an Advisory Opinion.

3. The interested parties signing the present brief are:

Baltasar Garzon Real, Director, ILOCAD SL (Author)

Prof. Mads Andenas, Faculty of Law, University of Oslo, Norway

Prof. Emmanuelle Bribosia, Equality Law Clinic of the Université Libre de Bruxelles
(ULB), Bélgica

Prof. Lorenzo M. Bujosa Vadell, Professor of Procedural Law, Universidad de Salamanca, Spain

Prof. Javier Chinchón Álvarez, Professor of Public International Law, Universidad Complutense de Madrid, Spain

Prof. José Elías Esteve Moltó, Human Rights Institute, Universidad de Valencia, Spain

Johan Galtung, Founder, Transcend International

Dr. Carolus Grütters, Centre for Migration Law (CMR), Jean Monnet Centre of Excellence, Faculty of Law, Radboud University Nijmegen, Netherlands

Prof. Hernán Hormazábal Malarée, Professor of Criminal Law, Chile

Prof. Florabel Quispe Remon, Professor of Public International Law and International Relations, Universidad Carlos III de Madrid, Spain

Andrew Khoo, Human Rights lawyer, Malaysia

Dr. Liora Lazarus, Associate Professor in Law, Faculty of Law, University of Oxford, United Kingdom

Prof. Fernando M. Mariño Menéndez, Emeritus Professor of International Law at Universidad Carlos III, Madrid, Spain, Former President of the UN Committee Against Torture

Prof. Ana Messuti, lawyer specialised in Internation Criminal Law

Prof. Francisco Muñoz Conde, Professor of Criminal Law (retired), Universidad Pablo de Olavide, Sevilla, Spain

Prof. Manuel Ollé Sesé, Professor of Public International Law, Universidad Complutense de Madrid, Spain

Renata Avila Pinto, lawyer specialised in Human Rights, Guatemala

Prof. Guillermo Portilla Contreras, Professor of Criminal Law, Universidad de Jaén, Spain

Prof. Isabelle Rorive, Professor at the Faculty of Law, Institute of European Studies, Université Libre de Bruxelles

Prof. Jean-Marc Sorel, Professor at the Faculty of Law at la Sorbonne, Université Paris 1 Panthéon-Sorbonne, France

Prof. Laura Zúñiga Rodríguez, Professor at the Faculty of Law, Universidad de Salamanca, Spain

Organisations:

Asociación Pro Derechos Humanos de España (APDHE), Spain

Centre for Constitutional Rights (CCR), United States

Clínica Jurídica per la Justicia Social de la Universitat de València, Spain

Acción en Red Madrid, Spain

Derechos Humanos en acción, Spain

International Legal Office for Cooperation and Development (ILOCAD), Spain

Instituto de Derechos Humanos de Catalunya (UDHC), Spain

National Justice Project, Australia

Swedish Doctors for Human Rights (SWEDHR), Sweden

4. As authorities and organisations who work for the advancement of human rights, the interested parties above intervene to assist the Court in relation to the need to, in the context of the global refugee crisis, establish and affirm clear principles of protection for asylum seekers and refugees that are consistent with human rights and evolving international standards.

5. Section two provides the relevant facts and presents the operational definition of the term 'asylum' for the purpose of this brief. It highlights the approach taken in this analysis: a human rights-based approach that recognises that international human rights law and refugee/asylum law are mutually reinforcing and complementary legal regimes.

6. Section three sets out how the power to grant asylum – and the right to asylum – has become a rule of customary international law. It analyses the elements required to establish whether a customary international law rule exists in relation to the institution of asylum as a result of its constant and uniform general practice by States acting on the basis of '*opinio juris*'.

7. Sections four and five consider two instruments that have sought to codify what have historically been considered the two manifestations of the institution of asylum: asylum when sought outside the country of origin under the 1951 Convention Relating to the Status of Refugees ("the 1951 Refugee Convention"); and asylum sought within the jurisdiction of another State within the territory of the country of origin (or a third State) under the 1954 Inter-American Convention on Diplomatic Asylum ("the 1954 Caracas Convention"). This analysis respectfully submits that these two conventions are in fact complementary, because they concern an institution of international protection that is one and the same and which originates in customary international law.

8. Section six sets out the development of international refugee/asylum law and

international human rights law – and the mutual reinforcement of these areas of law – further highlights the complementary nature of both forms of asylum. The recognition of *non-refoulement* as a rule of customary international law and the recognition of States' obligations to protect individuals are engaged as soon as the person is within their jurisdiction (whether within their territory or under the States' effective control) has introduced further certainty in the duties of States *vis-à-vis* the individual and the obligations on the third States that flow from these mutually reinforcing regimes and binding rules of international law.

9. Section seven sets out that a general practice exists outside of the Latin American context to grant asylum, including under the 1951 Refugee Convention, outside the territory. State practice demonstrates how asylum is afforded as a result of a binding legal obligation and that this *opinio juris* extends beyond narrow humanitarian considerations of immediate danger to the life of the person. This is reinforced by numerous findings of international tribunals and the universally recognised primacy of the principle of *non-refoulement*.

10. The final section sets out that the complementary and mutually reinforcing nature of the legal regimes of international human rights law and refugee law necessarily leads to effective and enforceable rights of the individual *vis-à-vis* the State. The relationship between the right to enjoy asylum as recognised in the Universal Declaration of Human Rights (UDHR), and its corollary principle of *non-refoulement*, creates a duty on States to ensure that the asylum afforded is effective, regardless of the legal status afforded to the individual.

2. BACKGROUND

11. Throughout this *Amicus Curiae* brief, the term 'asylum' is used in accordance with the definition of the term under the Fifth Commission of the Institute of International Law (1953):

> 'the protection that a State grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it'.[1] In this brief, the term "asylum" refers to this definition.

12. Therefore, in the manner that it is operationalised in this *Amicus Curiae*, the term 'asylum' does not differentiate between international protection granted by a State within its territory or within its jurisdiction but outside its territory. The institution is one and the same. It originates in customary international law.

13. The institution of asylum has a long-standing tradition in international law, with recorded cases dating back to antiquity. The institution of asylum is recognised by custom as well as by statute. As early as 1554 a Venetian statute set out "he who has taken refuge in the house of a diplomat shall not be followed there, and his pursuers are to feign ignorance of his presence".[2]

14. The institution of asylum was historically recorded in multilateral and bilateral extradition treaties, which were signed by numerous States. A clause was typically included to prevent the extradition of a person who was politically persecuted or who risked physical injury or personal suffering if extradited. Therefore historically, and from the most profound customary international law, States have recognised the institution of asylum both through State practice and as signatories to extradition treaties containing asylum clauses.

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1 'Asylum in Public International Law', Resolutions Adopted at its Bath Session, Sept 1950, art 1.

2 UN General Assembly, *Question of Diplomatic Asylum. Report of the Secretary-General*, 2 September 1975, A/10139 (Part I), available at: http://www.refworld.org/docid/3ae68bee0.html [accessed 22 March 2017]

15. In the 20th century, and with the establishment of the United Nations system, a rights-based paradigm became enshrined in international law. With this human rights regime, the institution of asylum gained a new protagonism in international law. While separate, international refugee law and international human rights law are widely recognised to be mutually reinforcing and complementary legal regimes.[3]

16. Both these legal regimes have sought to codify the rights of individuals and the duties of States in relation to the institution of asylum, under the aegis of the United Nations.

17. This *Amicus Curiae* approaches asylum in its various forms from a human rights perspective, acknowledging the fact this institution has developed in line with international human rights instruments and regional conventions.[4]

3. ASYLUM AS A RULE OF CUSTOMARY INTERNATIONAL LAW

18. Article 38(1) of the Statute of the International Court of Justice sets out that international custom, as evidence of a general practice accepted as law, is a source of international law.

19. To determine the existence of a rule of customary international law and its content, it is necessary to ascertain that there is a general practice and that the general

[3] Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America of 16 November 2004; UN High Commissioner for Refugees (UNHCR) Executive Committee, General Conclusion on International Protection No. 79 (XLVII) – 1996 UN High Commissioner for Refugees (UNHCR) Executive Committee, General Conclusion on International Protection No. 81 (XLVII) ; UN High Commissioner for Refugees (UNHCR) Executive Committee, Safeguarding Asylum No. 82 (XLVIII) - 1997, 17 October 1997; UN High Commissioner for Refugees (UNHCR) Executive Committee, General Conclusion on International Protection No. 95 (LIV) (2003), para. (l)

[4] In line with this is the finding of this Court, in its Advisory Opinion OC-18/03 providing that "this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws... This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*." Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, paras 100-01 (September 17, 2003)

practice is accepted as law (*opinio juris*). These two constitutive elements of a customary rule of international law were adjudicated in the International Court of Justice case of *Colombia v Peru* (1950).[5]

"General Practice"

20. According to the International Law Association (ILA), a rule of customary law is "created and sustained by the constant and uniform practice of States in circumstances that give rise to the legitimate expectation of similar conduct in the future".[6] The rule need not be universally applied but must have obtained widespread acceptance by the international community, and is binding on all States (silence is taken to imply consent). The persistent objector doctrine suggests that a State can 'opt out' of an emerging customary international norm, provided the objection continues after the norm is formed and the State's objection is consistent, that is to say, it cannot rely on the rule at any stage) .

21. Granting of asylum on the basis of humanitarian considerations, whether the person is inside the territory or within the jurisdiction of the State outside of the territory, has widespread acceptance as a customary rule of international law. There is ample evidence of both general practice and *opinio juris* in relation to granting asylum on humanitarian grounds across the international community.[7]

5 International Court of Justice, *Colombia v Peru*. Rulings of 20 November 1950.

6 International Law Association, Statement of Principles Applicable to the Formation of Customary International Law (Mendelson M., Rapporteur), London Conference (2000), p.8 'Definitions'.

7 UN General Assembly, *Question of Diplomatic Asylum: Report of the Secretary-General*, 22 September 1975, A/101 39 (1975) (Part I and II) conducts an extensive review of the developments of so-called diplomatic asylum and States' positions in relation to it, for example: During the Spanish Civil War, fourteen embassies and legations gave asylum in embassies and legations in Spain; eight of these were Latin American, the rest European (Belgium, Norway, the Netherlands, Poland, Romania and Turkey). Austria supports diplomatic asylum in humanitarian contexts: 'asylum on the premises of a diplomatic or consular mission' is justifiable 'where a person is in immediate, serious danger, or where a State persecutes the person concerned in a manner incompatible with minimum standards of human rights'. Belgium 'emphasise[d] that it regards the granting of diplomatic asylum an option'. Canada stated that: 'Canadian policy related to so-called "diplomatic asylum" is to follow the generally accepted principle of international law and therefore only to grant protection in Canadian diplomatic premises for purely humanitarian reasons'. France: Having granted diplomatic asylum to various persons in its embassy in Santiago in 1973, France declared that *'La France a maintenu intégralement… le principe de l'asile des refugies politiques dans son ambassade de Santiago et sur le territoire français'*. Jamaica in 1975 observed that it 'supports the broad humanitarian grounds which provide the basis for a grant of diplomatic asylum'. Norway has observed that there may 'be cases in which humanitarian considerations and the necessity of protecting fundamental human rights are of decisive importance'; 'in the view of the Norwegian Government, it would be inhuman and repugnant in specific situations not to use a possibility of protecting the life of a person or of saving him from inhuman treatment or punishment'. Spain, in 1960, made known its view of diplomatic asylum: '"asylum" from the

Furthermore, the International Court of Justice has recognised humanitarian considerations as a source of international law in the *Corfu Channel Case*.[8]

22. Within the aegis of the United Nations, every State has formally recognised that asylum from persecution is a fundamental right intrinsic to all human beings. In 1948, Article 14(1) of the UDHR enshrined the long-established right to seek and to enjoy asylum from persecution in other countries in international law. While the UDHR is not strictly speaking a binding legal instrument, it has been declared to constitute "the inalienable and inviolable rights of all members of the human family and [to constitute] an obligation for the members of the international community".[9] The accession to this Declaration demonstrates both an acceptance of States' ability to grant asylum and individuals' rights to seek it and enjoy it. The implications for the duties of States of this recognition are far-reaching, as shall be shown in the final section of this *Amicus Curiae* submitted for the consideration of the Court.

23. There is therefore a general practice relating to granting asylum both on humanitarian grounds and in relation to political persecution. This *Amicus Curiae* will focus on the State practice of granting asylum outside of the territory, but within the jurisdiction (where the State exerts 'effective control') in further detail in section 7 and in particular how this practice intersects with the State's legal obligations under international human rights law, other norms of customary international law, and peremptory norms of international law.

"Accepted as law"

24. The second element that must be established to ascertain a rule of customary international law is whether the practice is distinguishable from "international acts, for example in the field of ceremonial and protocol, which are performed almost

international point of view, may be granted by a State 'outside of its territory', which gives rise to the so-called "diplomatic" asylum… which can now be granted not only on the premises housing diplomatic missions, but also in consulates'.

8 *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania*), ICJ 1947

9 Proclamation of Teheran, Final Act of the International Conference on Human Rights 3, at 4, para. 2, 23 U.N. GAOR, U.N. Doc. A/CONF. 32141 (1968)

invariably, but which are motivated only by considerations of courtesy, convenience or tradition".[10] Unlike these acts, rules of customary international law are performed out of a sense of legal duty.[11]

25. States recognise that granting asylum in its various forms derives from a legal duty and not just a discretionary power. States' accession to numerous international human rights instruments, regional instruments, and in some cases the incorporation into constitutional provisions, of rights to seek and enjoy asylum are evidence of this recognition. This widespread acceptance also extends to the recognition of the right to receive or be granted asylum in numerous instruments.[12]

26. An ILA report adopted at its fifty-third Conference provided:

> *"There shall be full and effective recognition of the right of asylum for political offences and from persecution" (Article 7)*

The ILA also adopted a Declaration dealing specifically with diplomatic asylum. Article 2 provided:

> *"Asylum will be granted to those whose prosecution is sought for political offences, or for offences of a mixed character in which the political aspect suffices to deny extradition. Asylum will likewise be granted to those who, though not charged with political offences, would be subjected to persecution on political grounds if they were returned to the country from which they had fled."*

27. It is well established that *non-refoulement* is a customary rule of international law. In relation to the risk of torture, it has acquired the standing of a peremptory norm,

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10 *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* , I.C.J. Reports 1969, report 3, International Court of Justice (ICJ), 20 February 1969, at 43-44.

11 *Idem*.

12 A number of international agreements explicitly provide for a right of an individual to receive asylum: the American Declaration on the Rights and Duties of Man, the Organization of American States Convention (OAS Convention), African Charter on Human and Peoples' Rights (AfrCHPR) and the American Convention on Human Rights (AmCHR). For example, Article 22(7) of AmCHR provides: "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 for political offenses or related common crimes." [emphasis added] Similarly, the Charter of Fundamental Rights of the European Union incorporates the right to asylum (Article 18) and protection from removal, expulsion and extradition (Article 19).

which is non-derogable and of a higher order than international treaties. A State can only refuse asylum on narrow grounds provided in law, in a manner that is consistent with its human rights obligations and the *jus cogens* rule of *non-refoulement*.

28. Significantly, the International Criminal Court (ICC) has recently referred to the right to political asylum (and its related protection against *refoulement*) as having attained the status of *jus cogens*.[13]

4. THE UNIVERSAL CODIFICATION: THE GENEVA CONVENTION OF 1951

29. The 1951 Geneva Convention Relating to the Status of Refugees codified the rights and responsibilities of persons who were granted asylum as a result of the conflict and genocide of the Second World War. With the 1967 Protocol the time and geographical restrictions of the 1951 Convention were abolished and the Convention acquired universal application. The Convention is underpinned by the the fundamental principles of non-discrimination and *non-refoulement*, and it is both a status-based and rights-based instrument.[14] [15]

30. The 1951 Convention only requires the person to be "outside of the country of his nationality" – and, importantly, does not require the person to be within the country of the recognising State. This point has been highlighted in recent commentary by A. Zimmermann & C. Mahler (2011):

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[13] *Prosecutor v. Katanga*, 'Decision on the application for the interim release of detained Witnesses DRC-D02-P-0236, DRC-D02-P-028 and DRC-D02-P0350', 11 October 2013, ICC-01/04-01/07-3405-tENG, http://www.icc-cpi.int/iccdocs/doc/doc1679507.pdf, at para. 57, citing "footnotes 35 and 36 of the Advisory Opinion of the UN High Commissioner for Refugees, cited at footnote 18 of the 9 June 2011 Decision; see also Organization of American States, Cartagena Declaration on Refugees, 22 November 1984, OAS/Ser.L./V/II.66, doc. 10, rev. 1, pp. 190-193; UN High Commissioner for Refugees, Executive Committee Conclusion No. 25 (XXXIII); "General Conclusion on International Protection", 20 October 1982, para. (b); UN High Commissioner for Refugees, Executive Committee Conclusion No. 79 (XLVII) "General Conclusion on International Protection" (1996), para. (i); Jean Allain, "The *Jus Cogens* nature of non-refoulement", 13(4) International Journal of Refugee Law (2002), pp. 533-558."

[14] Introductory Note, UNHCR, 2011. Available: http://www.unhcr.org/3b66c2aa10

[15] For the purpose of this brief, the relevant Articles of the 1951 Convention are Article 1(a)(2) (Definition of a refugee for the purposes of the Convention), Article 3 – Non-discrimination; Article 5 – Rights granted apart from this Convention; Article 33 –- *Non-refoulement*

Article 1A, para. 2 only requires that the person seeking refugee status must be "outside the country of his nationality". A person possessing a nationality and seeking protection must therefore not necessarily be present in a foreign country in order to fall within the scope ratione personae of Art. 1A, para. 2. Rather, refugee status may be acquired, e.g., on the High Seas, in the coastal waters of another State, or on land territory which does not form part of any given State.[16]

31. State practice in relation to the implementation of the 1951 Convention also demonstrates that there is no legal requirement that asylum seekers must be physically present in the State from which asylum is sought.[17]

32. Given that any territorial limitation concerning the procedure for applying for asylum would have significant implications for the operation and efficacy of the 1951 Convention, if the drafters of the Convention had required or intended such a limitation, it should have been included *expressis verbis*. The 1951 Convention is silent on the matter of granting 1951 status extraterritorially.[18]

33. While the principle of *non-refoulement* does not in itself oblige the State to grant 1951 Convention status, it does require States to give effect to its obligations under the Convention, meaning that the State must "adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger".[19] While Article 33(2) provides narrow exceptions to the application of this principle under the 1951 Convention, under international human rights law the principle of *non-refoulement* permits no derogation (for example where there is a risk of torture or other forms of irreparable harm).

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16 A. Zimmermann, ed., *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford: Oxford University Press, 2011, 281-465, 441-3.

17 Cf. C. Hein, M. de Donato, *Exploring Avenues for Protected Entry in Europe*, Italian Council for Refugees, 2012, pp.52-60

18 The brief examines State practice of asylum, including extraterritorial asylum, in light of Article 31(3) of the 1969 Vienna Convention on the Interpretation of Treaties, which provides that, in interpreting a treaty: "*... there shall be taken into account, together with the context, ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between parties.*"

19 UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, para. 8, http://www.unhcr.org/4d9486929.pdf

34. UNHCR is of the view that *non-refoulement* (both as set out in Article 33(1) and in international human rights law, including Article 3, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and Articles 6 and 7, International Covenant of Civil and Political Rights (ICCPR)) constitutes a norm of customary international law.[20] Moreover, signatory States to the 1951 Convention have recognised that the core principle of *non-refoulement* is embedded in customary international law.[21]

35. In its human rights law manifestation as *non-refoulement* to a risk of torture, the principle has acquired the rank of a peremptory norm of international law (*jus cogens*), "a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[22]

5. THE CODIFICATION IN LATIN AMERICA OF REINFORCED COOPERATION: THE CARACAS CONVENTION OF 1954

Background: The ICJ Case of *Colombia v Peru* (1950)

36. In the International Court of Justice (ICJ) the case *Colombia v Peru* of 20 November 1950 concerned a dispute arising from an asylum granted by Colombia to a political opponent in Peru, Victor Haya de la Torre, at Colombia's embassy in Lima, Peru.[23]

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20 UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol., at para. 15, http://www.unhcr.org/4d9486929.pdf

21 Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Ministerial Meeting of States Parties, Geneva, Switzerland, 12-13 December 2001, UN Doc. HCR/MMSP/2001/09, 16 January 2002. The Declaration was welcomed by the UN General Assembly in resolution A/RES/57/187, para. 4, adopted on 18 December 2001. See also, UNHCR, Note on Non-Refoulement (EC/SCP/2), 1977, para. 4. See also P. Weis, *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis*, Cambridge University Press, Cambridge (1995), at p. 341

22 Article 53 of the 1969 Vienna Convention on the Interpretation of Treaties.

23 Colombia argued that under the Bolivarian Agreement of 1911 and the Havana Convention of 1928 as well as "American international law in general", the State granting asylum had the right to unilaterally and definitively qualify the nature of the offence. Colombia also argued that, under the Havana Convention, Peru was not entitled to refuse the safe conduct requested by Colombia. Peru's submissions were that the offence was a common crime and

At the time of the ruling, the 1951 Convention was itself still in the process of being drafted, and the nature and scope of *non-refoulement* as a peremptory norm of international law in particular had not yet been fully recognised.

37. The Court did not make a determinative assessment on the practice of granting asylum in embassies in general. Rather, it considered a number of sub-issues that had arisen out of the particular confrontation between Colombia and Peru, as well as the applicable treaties and precedents in Latin America over the preceding century. As to the particulars of the case, Colombia submitted that under several treaties and "American international law in general", in cases of so-called 'diplomatic asylum', it had the right to unilaterally and definitively qualify the offence so that this qualification would be binding on Peru, the territorial State. The Court ruled that Colombia had failed to establish through its submissions that such a right existed under "American international law in general":

> *"it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule of unilateral and definitive qualification of the offence"* (p. 277).

38. The Court added that <u>"such a rule is not essential to the exercise of asylum"</u>.[24]

39. In relation to this point, the Court also ruled that "even if it could be supposed that such a custom [of unilateral and definitive qualification of the offence] existed [...] it could not be invoked against Peru" by reason of the doctrine of persistent objector (pp. 277-278). The remaining issues concerned the proper construction of the 1928 Havana Convention, a precursor to the 1954 Caracas Convention.[25]

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that it was not bound by treaty provisions and alleged rules invoked by Colombia, and that in any case the Havana Convention's requirement of 'urgency' was not fulfilled. Op. Cit. 5.

24 ICJ 1950, p. 275 (emphasis added).

25 Specifically, Article 2 of the Havana Convention (concerning safe conduct); Article 1(1), concerning the qualification of the offence; and Article 2 "First", which concerned urgency. In relation to the latter point, in *obiter dicta*, the ICJ anticipated that, beyond cases in which "asylum may be granted on humanitarian grounds in order to protect political offenders against the violent and disorderly action of irresponsible sections of the population", asylum could be granted on the basis of political persecution when *"in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly*

40. The ICJ ruling in *Colombia v Peru* is of limited applicability to the question that concerns this brief regarding the institution of asylum in its different forms as it has evolved in the almost seventy years since the ICJ ruling. The case pre-dates the drafting of the 1951 and 1954 Conventions, which crystallised the institution of asylum as a rule of customary international law. Therefore, the particulars of *Colombia v Peru*, its limited scope and historical context, mean that the case serves as a departure point for this brief's examination of the institution of asylum in light of evolving international standards.

41. The focus of this brief is to identify the sources of international law[26] that form the legal basis for asylum, the process of recognition of those rules since 1950 and the effect of this recognition on the institution of asylum. It submits that the legal basis for asylum has been strengthened, and its recognition broadened over the past seventy years, as a result of the complementary and reinforcing nature of the refugee law and international human rights law regimes.[27]

The 1954 Caracas Convention on Diplomatic Asylum

42. The 1954 Caracas Convention ("the 1954 Convention") was adopted to resolve the ambiguities highlighted by the ICJ in *Colombia v Peru* (1950). Specifically, the 1954 Convention imposed unequivocally an obligation on the territorial State to respect asylum in accordance with the provisions of the 1954 Convention (Article 1), and codified the right to grant diplomatic asylum (Article 2), as well as the duty of the territorial State to guarantee safe conduct (Articles 11, 12). It also unequivocally establishes that the granting State had the right to unilaterally and definitively qualify the nature of the offence (Article 4). The 1954 Convention has been ratified

extra-legal character which a government might take or attempt to take against its political opponents".

26 As set out in Article 38(1) of the Statute of the International Court of Justice.

27 The ICJ ruled that the legal basis for 'diplomatic' asylum must be established in each case in order for the asylum to be recognised, in particular in light of considerations concerning sovereignty and the application of the law in relation to the asylee (*Colombia v Peru*, 1959, p. 275): *"In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case."*

by 14 OAS States, including Peru.

43. Whereas the 1951 Convention requires the applicant to be "outside the country of his nationality", the 1954 Caracas Convention provides for granting asylum when, but not necessarily limited to, the person is inside their country of nationality (country of origin) but under the jurisdiction of the requested State. Typically, this will occur if the person applies for protection at the embassy or consulate of the requested State, but the convention extends to other legations, such as military and naval premises.

44. Furthermore, the codification of diplomatic asylum in Latin America was adopted with the purpose of extending the reach of the institution of asylum in the manner that it had been codified three years earlier, in the 1951 Geneva Convention relating to the Status of Refugees. This effort is anticipated in the wording of Article 5 of the Refugee Convention which provides: that "Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention". That is to say, the 1951 Convention allowed for States to take steps to grant further rights to refugees.

45. Thus, Latin American States embarked upon developing a regime of reinforced cooperation with the purpose of complementing the 1951 Convention with greater international protection by formally extending asylum to international protection in their diplomatic legations. This effort was codified in the 1954 Caracas Convention.

6. HOW THE TWO CONVENTIONS INTERACT

46. While the expressions of asylum found in the 1951 and 1954 Conventions are often described in binary terms,[28] this distinction is not at all clear – either in the text – or

[28] An example of this binary approach is provided by the 1975 Report by the UN Secretary General, who differentiates two "types" of asylum: "The term 'diplomatic asylum' in the broad sense is used to denote asylum granted by a State outside its territory, particularly in its diplomatic missions (diplomatic asylum in the strict sense), in its consulates, on board its ships in the territorial waters of another State (naval asylum), and also on board its aircraft and of its military or para-military installations in foreign territory. The other form of asylum granted to

in State practice. A closer analysis of the relevant provisions and State practice demonstrates that there is significant overlap between the grant of asylum and the ability of States to provide protection under both Conventions. Their application is not mutually exclusive and, in fact, the same set of facts can give rise to protection under both Conventions. The complementary and reinforcing nature of international human rights law and refugee law further supports this analysis.

47. UNHCR recognises that terms such as "asylee" may be of analogous legal status to the term "refugee" in a given constitutional or regional framework.[29] Furthermore, UNHCR has long established that the recognition of a person's status under the institution of asylum is a declaratory act.[30] UNHCR's *Note on Determination of Refugee Status under International Instruments* states that "any person is a refugee within the framework of a given instrument if he meets the criteria of the refugee definition in that instrument, whether he is formally recognised as a refugee or not."[31]

48. The declaratory nature of a recognition of asylum means that a person who qualifies for protection under the institution of asylum under one definition (such as under the 1951 Convention) may concurrently also qualify for protection under a different Convention, where the person's circumstances qualify them as such. Indeed, there are factual circumstances where both the 1951 and the 1954 Conventions are applicable.

49. A current example of this arises from the international community's concern about the refugee crisis in Syria, which has led to calls for asylum applications to be received at diplomatic legations in the country of origin or in the region in order to process asylum applications and to arrange safe conduct or travel documents if

individuals, namely, that which is granted by the State within its borders, is generally given the name 'territorial asylum'."

29 UN High Commissioner for Refugees (UNHCR), *Note on Determination of Refugee Status under International Instruments*, 24 August 1977, EC/SCP/5, para. 3. Available at: http://www.refworld.org/docid/3ae68cc04.html [accessed 17 March 2017]

30 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, Re-edited Geneva 1992, para. 28

31 24 August 1977, EC/SCP/5, available at: http://www.refworld.org/docid/3ae68cc04.html [accessed 20 March 2017]

necessary so that the person can reach the territory of the granting State safely, where he can enjoy the asylum he has been granted. The purpose is to prevent the person seeking protection from having to reach the territory of the country in order to receive international protection. Otherwise, he is forced to embark on a desperate journey, often by sea, which in many cases results in death.

50. Thus, the current Syrian crisis exemplifies the interaction between the two institutions – asylum granted in the territory of the protecting State and extraterritorial protection in the form of processing asylum applications in diplomatic legations. Successful applications can effectuate in the form of territorial asylum once the person is safely in the country that has granted asylum.

51. The solution proposed in order to grant effective protection to refugees in the context of the Syrian crisis is not novel. A 2002 study examined "Protected Entry Procedures" of European Union Member States. The study found that States have incorporated into their practice guidelines or legislation the possibility of processing asylum applications under the 1951 Convention within their diplomatic missions abroad (Netherlands, United Kingdom, Denmark). Three of the countries extended such procedures to processing 1951 Convention asylum applications to diplomatic missions in the country of origin (Austria, Spain, Switzerland).[32]

52. Some of these States sent personnel to selected representations to conduct refugee determination abroad, which the study took such procedures to be "indications of norm-based State behaviour".[33]

53. The effect of mutual reinforcement is further supported by Article 5 of the 1951 Convention:

> *"[n]othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention."*

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32 *Safe Avenues to Asylum? The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests A Preliminary Study*, by Dr. Gregor Noll, with Jessica Fagerlund, LL.M., a study conducted within the framework of the Refugee Research Programme at the Danish Centre for Human Rights.

33 *Ibid.*

54. Grael Madsen's commentary to the 1951 Refugee Convention explains:

> *The purport of Article 5 is that refugees may by virtue of the Convention get a more favourable position than they otherwise would have had, while on the other hand the Convention shall not be able to serve as an excuse for reducing or taking away rights and benefits which otherwise are granted to refugees by certain States*.[34]

55. Contemporary State practice acknowledges the mutually reinforcing nature of the Caracas Convention and the 1951 Refugee Convention, and their complementary relationship with international human rights instruments.[35] The institution of asylum in Latin America assimilates and gives effect to international human rights instruments. This is most starkly evidenced by Ecuador's invocation of numerous human rights instruments when it set out the grounds for granting of asylum to WikiLeaks founder Julian Assange at the diplomatic mission of the Republic of Ecuador in London, on 16 August 2012.

56. Ecuador cited the legal basis for granting this asylum as, *inter alia*, the UN Charter (1945), the UDHR (1948, Article 14); the American Declaration of the Rights and Duties of Man (Article 27, Right of Asylum); the 1951 Refugee Convention, the 1954 Caracas Convention, the 1954 Convention on Territorial Asylum, the 1969 American Convention on Human Rights, the 1981 African Charter on Human and Peoples' Rights, the 1984 Cartagena Convention and the 2000 Charter of Fundamental Rights of the European Union (Article 18).

57. Ecuador's right to grant asylum in accordance with principles enshrined in human

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[34] "The purport of Article 5 is that refugees may by virtue of the Convention get a more favourable position than they otherwise would have had, while on the other hand the Convention shall not be able to serve as an excuse for reducing or taking away rights and benefits which otherwise are granted to refugees by certain States". 'Article 5', United Nations High Commissioner for Refugees (UNHCR), *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, October 1997, available at: http://www.refworld.org/docid/4785ee9d2.html [accessed 22 March 2017]

[35] Article 31(3) of the 1969 Vienna Convention on the Interpretation of Treaties provides that, in interpreting a treaty: "... there shall be taken into account, together with the context, ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between parties."

rights instruments and international law was backed by a number of States.[36]

58. Just as the power to grant asylum under the 1951 Convention can arise in circumstances historically considered the preserve of the 1954 Convention, diplomatic asylum under the 1954 Convention is granted on the same grounds as the 1951 Convention. Both can be granted extraterritorially and both apply to persons seeking protection from persecution and for political offences.

59. Having established the complementary and overlapping nature of asylum granted within the territory of the protecting State (under the 1951 Convention) and in diplomatic legations (under the Caracas Convention in certain cases, or through international custom for States that are not parties to the Convention), the analysis now turns to the effect of international human rights law on the duty of States to protect persons within their jurisdiction, in relation to the customary rule of *non-refoulement* in particular. These obligations can be engaged extraterritorially, enlivening protection obligations, including in diplomatic missions.

7. EXTRATERRITORIAL ASYLUM OUTSIDE OF THE LATIN AMERICAN CONTEXT

60. State practice of granting asylum outside of the territory in diplomatic missions is widespread outside of the context of Latin America and beyond the geographical scope of the 1954 Convention. It is a universal rule of customary international law, not a regional Latin American institution, given that there is a "constant and

[36] The Council of Ministers of Foreign Affairs of UNASUR issued the following declaration at the Extraordinary Summit in the city of Guayaquil on 19 August 2012: "Considering: […] That Ecuador being in the process of analysing the asylum request [of Mr. Assange] in accordance with principles of protection enshrined in Human Rights instruments and under International Law; On 15 August the Government of the Republic of Ecuador publicly announced that it had received an Aide Memoire from the United Kingdom containing a threat to 'take actions to arrest Mr. Assange inside the premises of the Embassy.' […] That in accordance with the principles enshrined in the United Nations Charter, States must abstain from threats or the use of force or from acting in any manner that is incompatible with the goals of the United Nations in its international relations and to resolve its differences in a peaceful manner; Declares: […] 2. The Council reiterates the sovereign right of States to grant asylum. […] 6. The Council reiterates the validity of the institutions of asylum and refuge to protect the Human Rights of persons who consider that their life or physical integrity is at risk.", 19 August 2012. Available: http://www.cancilleria.gov.co/content/declaraci%C3%B3n-de-guayaquil [accessed 26 March 2017]

uniform" practice and given that its application is carried out in the belief that there is a legal obligation to do so (*opinio juris*), often, but not only, out of humanitarian considerations.

61. The United States of America (US), for example, has granted asylum in embassies to political refugees on numerous occasions, such as during the civil war in Chile in 1891, following the suppression of the uprising in Hungary in 1956 and following the fall of the regime of President Allende of Chile in 1973.[37] The US Embassy in Budapest gave diplomatic asylum to Cardinal Mindszenty in the period of 1956 until 1971, when a resolution was brokered by the Pope. Most recently, the US granted asylum to Chinese dissident Chen Guancheng in the US Embassy in Beijing.[38]

62. In 2002 a group of 28 North Korean dissidents obtained protection in the diplomatic missions of Germany, the United States and Japan in China and later safe passage to South Korea. It was reported that in all cases "foreign diplomats have granted the refugees protection and refused to allow China to repatriate them" and Chinese authorities permitted them to leave China.[39] Their family members later walked into the office of the United Nations High Commissioner for Refugees in Beijing demanding asylum and were subsequently resettled in Seoul. Similarly, in 2016 a North Korean national participating in the Hong Kong mathematics olympiad sought asylum at the South Korean consulate in Hong Kong, where he remained for two months before obtaining safe passage to Seoul.[40]

63. The United Kingdom (UK), while publicly refusing to recognise diplomatic asylum, clearly states it does so in internal reports and has policies in place for the grant of asylum in diplomatic missions. For example, in 2009 the UK's Minister of State for Foreign and Commonwealth Affairs' written responses to the Foreign Affairs

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37 I Roberts, *Satow's Diplomatic Practice* (6th edn, Oxford University Press, 2009) at [8.24]

38 Cf. for example http://www.theguardian.com/world/chen-guangcheng

39 'North Koreans Seek Asylum at Consulates in China', *New York Times*, 9 May 2002; *The Times*, 15 March 2002; (2002) Revue générale de droit international public 650.

40 'How North Korean maths-whizz defector escaped through Hong Kong', *South China Morning Post*, 26 February 2016

Committee's tenth report state that:

> *"FCO [Foreign and Commonwealth Office] Posts [that is, embassies and consulates] do have procedures for walk-in asylum requests. All claims are considered in line with UK Border Agency (UKBA) asylum policy, and decisions on granting asylum are ultimately made by the UKBA in London. Claims on political asylum are considered in line with the 1951 Refugee Convention and current UKBA asylum policy, and claims for temporary diplomatic asylum are considered in line with international law, the 1963 Vienna Convention on Consular Relations and UKBA asylum policy."*[41]

64. Further examples of diplomatic asylum outside of the Latin American context include Andry Rajoelina, who obtained asylum in the Embassy of France in Antanarivo, Madagascar, where he remained for ten days, after which he was appointed caretaker President of the Republic (2009). Presidential candidate in Zimbabwe, Morgan Tsvangirai, obtained asylum in the Embassy of the Netherlands in Harare before negotiating a power-sharing agreement with the Zimbabwe Government (2008). Alassane Ouattara, a presidential candidate of Cote d'Ivoire, obtained asylum in the Embassy of France in Abidjan, where he remained for two months prior to France securing his safe conduct to Gabon and France (2002). The Kurdish leader, Abdullah Öcalan, in 1999 was granted asylum in the Embassy of Greece in Nairobi for two weeks. João Bernardo Vieira, President of Guinea-Bissau, obtained asylum in the Embassy of Portugal, where he remained for one month before Portugal secured his safe conduct to Lisbon (1999). Burundi's President, Sylvestre Ntibantunganya, obtained asylum in the US Embassy in Bujumbura, where he remained for eleven months prior to the US securing his safe passage (1996-97). Lebanese commander Michel Aoun obtained asylum in the Embassy of France in Beirut for ten months (1990-91), after which he obtained safe conduct to France. Hou Dejian, who protested in Tiananmen Square in 1989, spent 72 days

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41 Tenth Report of the Foreign Affairs Committee Session 2007-08 Global Security: Japan and Korea - Response of the Minister of State for Foreign and Commonwealth Affairs Presented to Parliament By the Secretary of State for Foreign and Commonwealth Affairs By Command of Her Majesty (January 2009), at para. 20, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/238665/7534.pdf

under the asylum protection of the Embassy of Australia in Beijing. Australia secured his safe passage to Taiwan. Olivia Forsyth, a former spy for the Apartheid regime, obtained asylum at the Embassy of the United Kingdom in Luanda, Angola, for six months in 1988 before the UK's successful negotiations allowed her to obtain safe conduct to London. In 1979, the Swedish Embassy in Teheran provided protection to the US agricultural attache for a week in the wake of Iran's takeover of the US embassy.[42] The Swedish embassy in Santiago de Chile famously gave diplomatic asylum and secured safe conduct for political opponents and Cuban diplomats who were persecuted following the military coup of Augusto Pinochet in 1973.

65. As recently as 2015, Switzerland granted asylum to a human rights activist who sought protection from political persecution at the Swiss Embassy in Baku. Switzerland prolonged his protection until such time that the Azerbaijani authorities allowed him safe passage to Switzerland. Switzerland secured safe passage from Azerbaijan after ten months.[43]

66. The governments of Apartheid South Africa, Afghanistan under Taliban rule, and Ethiopia in relation to the former Derg leadership acted in manners that frustrated the right to enjoy asylum, either through breaching the immunity of the granting State/institution; or because the territorial State refused to provide safe conduct or remove the threat to the asylee in any other manner. These cases have in common the fact that they involved regimes that systematically violated their international human rights obligations. In the case of Taliban Afghanistan, the former President of Afghanistan, Mohammad Najibullah, had been given refuge at the UN compound in Kabul for four years while the UN attempted to negotiate his safe passage out of Afghanistan together with his brother and two others. The compound was breached by the Taliban in 1997 and Najibullah and his brother were brutally executed (the Taliban had promised to return the former President

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42 'A Classic Case of Deception', Antonio J. Mendez, Center for the Study of Intelligence, CSI Publications, *Studies in Intelligence*, winter 99-00

43 'Switzerland Flies Out Opposition Activist Hiding In Its Baku Embassy' Radio Free Europe, 13 June 2015. Available: http://www.rferl.org/a/azerbaijan-huseynov-switzerland-baku-embassy-asylum/27070371.html

and his brother to the UN premises within 30 minutes). The United Nations Special Envoy to Afghanistan issued a statement condemning these summary executions which violated international law.[44] In Ethiopia, Italy's Embassy granted asylum to four former Derg officials in 1991, two of whom are still alive and remain in the Embassy as all negotiations for safe conduct with Ethiopian authorities have failed. In the case of Apartheid South Africa, the regime initially failed to recognise that Dutch national Klaas de Jonge was under the protection of the Embassy of the Netherlands in Pretoria after he was forcibly removed from the premises by South African police. De Jonge was returned to the Embassy three weeks later following diplomatic protests. The Netherlands subsequently refused South Africa's request to surrender de Jonge on the basis that it does not surrender its own nationals for prosecution in other countries. De Jonge's asylum lasted two years (1985-87) and ended with a prisoner swap between South Africa and Angola. In 1984, the British Consulate in Durban granted temporary asylum to six South Africans who faced prosecution under the Apartheid regime.[45] The UK said that it would not force the asylees out of the Embassy, while making it clear that they could not remain in the premises indefinitely. The Durban Six attempted to obtain asylum from the Embassies of France, Netherlands, Germany and the US. When these States refused, the Durban Six were arrested by South African police upon exiting the Consulate.

67. Obligations also arise for the United Nations when it exercises effective control, for example in UN compounds. The United Nations has provided shelter in compounds to persons at risk.[46] In the case of the former Afghan President, Najibullah, the United Nations Secretary General "had personally intervened with the Kabul authorities on a number of occasions to persuade them that Mr. Najibullah... should be allowed to leave Afghanistan safely". The Secretary General's report of 26 November 1997 explained that "the Taliban's seizure of Kabul and murder of Mr. Najibullah brought these discussions to an end and raised

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44 UN Commission on Human Rights, *Final report on the situation of human rights in Afghanistan / submitted by Choong-Hyun Paik, Special Rapporteur, in accordance with Commission on Human Rights resolution 1996/75*, 20 February 1997, E/CN.4/1997/59

45 'Diplomatic Asylum as a Human Right: The Case of the Durban Six', S. Riveles, *Human Rights Quarterly*, Vol. 11, No. 1 (February 1989), pp. 139-159.

46 Examples include UN compounds in Rwanda in 1994 and East Timor in 1999.

new issues relating to violation of the immunity of United Nations premises and the execution of persons who had sought refuge in those premises."[47]

68. In light of the above, it is submitted that State practice of "diplomatic" asylum exists as a general practice, outside of the 1954 Caracas Convention context. The above-mentioned cases where diplomatic asylum has not been given effect correspond to regimes in which international human rights obligations were not complied with (Apartheid South Africa, Afghanistan under the Taliban, and Ethiopia). It is important to then consider the influence of international human rights law in State practice in relation to asylum, in particular with regards to the duties of States *vis-à-vis* persons within their jurisdiction or effective control.

69. The broad nature of the protection against *refoulement* translates in practice to, firstly, a legal right for States to grant asylum, in the form of effective protection, to individuals who are not within the territory, jurisdiction or effective control of that State, and secondly, a duty on all States not to undermine the protection afforded to the individual in question.

70. In circumstances that raise issues of a possible violation of the right to life, or the risk of torture or cruel, inhuman and degrading treatment, the first aspect (the legal right to grant asylum status to individuals who are on the territory of that State) is transformed into a <u>duty</u> if the individual otherwise falls under the jurisdiction or control of the State. To put it concretely, if a person at risk claims asylum in an Embassy or location falling under the control and/or jurisdiction of the State, the State has both the legal right and the duty to ensure their protection, and third States have a corresponding duty not to undermine this protection.

71. UNHCR sets out its position on the extraterritorial applicability of the customary principle of *non-refoulement* as follows:

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[47] Report of the Secretary-General of 26 November 1996, 'The Situation in Afghanistan and its Implications for International Peace and Security', United Nations General Assembly Doc. A/51/698 / United Nations Security Council Doc. S/1996/988, paras. 18-19. https://www.un.org/en/ga/search/view_doc.asp?symbol=A/51/698

a State is bound by its obligation under Article 33(1) of the 1951 Convention not to return refugees to a risk of persecution wherever it exercises effective jurisdiction. As with non-refoulement obligations under international human rights law, the decisive criterion is not whether such persons are on the State's territory, but rather, whether they come within the effective control and authority of that State.[48]

72. This "effective control" approach also engages the State's obligations under the ICCPR. The Human Rights Committee stated that:

> *States are required by Article 2(1) [of the ICCPR] to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.*[49]

73. The Human Rights Committee also found in the case of *Mohammad Munaf v. Romania*[50] that if country A expels a person from its embassy when there is a foreseeable risk, at the time of that expulsion, that the person's rights under the ICCPR may be violated by country B, the responsibilities of country A will be engaged. The case further highlights how obligations of country A to the individual can prevail over those between country A and country B. Where a treaty between State A and State B is in conflict with the *jus cogens* prohibition against *refoulement*, it will be void.[51]

74. The Hague District Court found that Dutch UN peacekeepers violated their international legal obligations by refusing to allow Bosnian Muslims to stay in the UN compound, notwithstanding the foreseeable risk to which they would be

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48 UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, available at: http://www.refworld.org/docid/45f17a1a4.html [accessed 21 March 2017].

49 UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13

50 UN Human Rights Committee (HRC), Views concerning Communication No 1539/2006. Mohammad Munaf v. Romania. CCPR/C/96/D/1539/2006, 21 August 2009

51 Vienna Convention on the Law of Treaties 1969, Article 53.

exposed if they left.[52]

75. The European Court of Human Rights has also found that its Member States have a duty not to expel persons claiming protection from areas that fall under the control or jurisdiction of the Member State, even if they were located in the territory of a third State. Thus, in the case of *Al-Sadoon & Mufdhi v. the United Kingdom*, the Grand Chamber chastised the UK for failing to comply with a Rule 39 interim measure taken by the Court and transferring applicants out of the UK's jurisdiction (a detention facility under the control of the UK) into that of Iraqi authorities where they faced a risk of the death penalty.

76. In a three-State scenario (for example where the asylee has been granted protection in the Embassy of State A, within the territory of State B, in relation to a *refoulement* risk in State C), the intermediary country (State B) cannot request the extradition or surrender of the person from State A unless it is willing and able to guarantee that the person will not face *refoulement* to State C before and not after the person is first extradited to State B.

77. Furthermore, in terms of the obligations of third States *vis-à-vis* the asylee, Article 3 of the Convention against Torture extends to a duty "to **refrain from enabling** *refoulement* to torture or other ill-treatment" (emphasis added).[53] This obligation applies even if the person in question would not otherwise qualify as a refugee under the 1951 Convention or domestic law.[54] Accordingly, even if a State Party (State B) does not agree or accept an asylum determination made by a third State (State A), Article 3 of CAT still requires the State Party to refrain from undermining or frustrating the protection which State A has afforded to the person against *refoulement*.

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52 The Hague District Court, Judgment of 16 July 2014, *Foundation of Mothers of Srebrenica v The Netherlands and The United Nations*. Case C/09/295247 / HA ZA 07-2973. Available: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2014:8748

53 A/70/303, para. 27.

54 A/70/303, para. 41.

The right to enjoy asylum and effective protection

78. UNHCR has determined that "the very purpose of the 1951 Convention and the 1967 Protocol implies that refugee status determined by one Contracting State will be recognised also by other Contracting States".[55] Similarly, the ECtHR imposes an obligation on State Parties to give appropriate weight and consideration to the fact that a person has been recognised as a refugee by another State.[56]

79. The *non-refoulement* principle also applies where the asylum concerns not two, but three, States. If a person seeks asylum in an embassy of State A in the territory of State B, due to a risk of *refoulement* as concerns State C, even if State B disagrees with the asylum assessment, it would still have an independent obligation under Article 3 of the Convention against Torture not to take any steps that could undermine the person's right to enjoy protection against *refoulement*. This obligation would also need to be respected in a manner that is consistent with other human rights obligations, such as the protection against arbitrary detention (Article 9 of the ICCPR). The Special Rapporteur on Torture has elaborated in this regard that "the positive obligation of the State to protect persons within their jurisdiction from torture and ill-treatment requires the implementation of safeguards. These include, but are not limited to, the right to legal assistance, access to independent medical assistance (E/CN.4/2003/68), […] and the right of individuals deprived of their liberty in any situation to challenge the arbitrariness or lawfulness of their detention and receive remedies without delay."[57]

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55 UNHCR's Executive Committee went on to say "refugee status as determined in one Contracting State should only be called into question by another Contracting State when it appears the person manifestly does not fulfil the requirements of the Convention". UNHCR Executive Committee, Conclusion no. 12 (XXIX), 1978 Report of the 29th Session: UN doc. A/AC.96/559, para. 68.2.

56 *M.G. v. Bulgaria* (application no. 59297/12) 25 March 2014: Notwithstanding the absence of an explicit EU legal instrument mandating mutual recognition, the fact that Germany and Poland had recognised the applicant as a refugee was: "*d'une indication importante démontrant que, à l'époque où ce statut avait été accordé à l'intéressé, respectivement en 2004 et en 2005, il y avait suffisamment d'éléments démontrant que celui-ci risquait d'être persécuté dans son pays d'origine.*"

57 A/70/303, par. 37.

80. Thus, read together in such a three-State scenario, Article 3 of CAT and Article 9 of the ICCPR equate the *negative* duty to refrain from expelling the person with a positive duty to ensure their rights are respected. The *positive* duty encompasses the second limb of Article 14 of the UDHR, the right to enjoy asylum. State A must ensure that the protection granted is given effect, for example by providing safe passage to the territory of the State that granted asylum or by otherwise removing them from detention or resolving the underlying threat. The examples of successful diplomatic asylum resolution illustrate these twin duties. These negative and positive duties do not only obligate State A, but also State B in relation to State C.

81. *Non-refoulement* is a customary rule of international law that is binding on all States. It has acquired standing as a *jus cogens* norm when read in conjunction with the absolute prohibition against torture. As such, States have an *erga omnes* obligation (owed to the international community as a whole) to ensure that they act in compliance with the norm.[58] *Non-refoulement* gives rise to a negative duty not to "expel or return ('*refouler*') a person in any manner whatsoever". A human rights-based approach that recognises the complementary and mutually reinforcing nature of the international human rights regime and refugee law, however, also discerns a corresponding positive duty that is derived from Article 14.1 of the UDHR, which clearly sets out the individual's right to enjoy asylum.

82. Through their accession to international human rights instruments, States have limited the margin of discretion with which they can lawfully act in relation to the institution of asylum. In situations of asylum granted in diplomatic legations, the duties arising from international human rights instruments give rise to a duty by State A (the granting State) to give effect to the protection, for example, through seeking guarantees in relation to safe conduct from State B (the territorial State). In practice, the ability of State A to give effect to its protection will be limited by the decisions of State B.

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[58] ICJ *Belgium v Spain (Barcelona Traction Case)* (Second Phase) ICJ Rep 1970 3: "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. [...] Such obligations derive, for example, [...] from the principles and rules concerning the basic rights of the human person" (at 33-34).

83. However, State B also has duties *vis-à-vis* the individual in question. State B's duties arise from Article 14.1 of the UDHR and from the fact that the person has been granted asylum (regardless of their legal status). The issue is not whether State B has a positive duty to recognise a particular legal status of the protected person, but rather that State B, by virtue of its accession to the UDHR, has a duty to refrain from taking any action that may impede the effective enjoyment of the asylum granted. In other words, while the UDHR does not enshrine a right to receive asylum *per se*, once granted, it enshrines the fundamental right to enjoy that asylum.

84. A person who is granted asylum protection but who is forced to remain confined indefinitely, whether inside diplomatic premises[59] or in detention facilities, is subject to circumstances which result in the breach of their fundamental human rights. The ability of the State granting protection to implement its domestic and international obligations in relation to the individual is likewise subject to the acts or omissions of the territorial State. Meanwhile, the territorial State's obligations in relation to Article 14(1) of the UDHR will be engaged, as well as, potentially, Article 9 of the ICCPR (arbitrary detention), Articles 7 (cruel, inhuman or degrading treatment or punishment), and 10(1) ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person").

85. In relation to the prohibition of *refoulement* as a peremptory norm of international law, the territorial State's obligations are *erga omnes.* All States can be held to have a legal interest in State B acting in a manner that is consistent with the absolute prohibition against *refoulement.*

86. How *non-refoulement* is to be ensured in situations of extraterritorial asylum, in particular when read in conjunction with the territorial State's obligations under, *inter alia,* the second limb of Article 14.1 of the UDHR (the right to enjoy asylum), is

[59] See, for example, the case of Julian Assange where the refusal of the UK and Sweden to recognise the asylum granted by Ecuador has been found to create a situation in which Mr Assange is arbitrarily detained in breach of UK and Sweden's obligations: United Nations Working Group on Arbitrary Detention, Opinion 54/2015 of 4 December 2015 (the Opinion reaffirmed by the Working Group during its 77th regular session in November 2016).

beyond the scope of this analysis and will depend on the circumstances of each case. It is not the intention of this brief to predict or suggest specific mechanisms through which the territorial State should ensure compliance with its international obligations. However, this analysis submits that the legal basis of the institution of asylum has been strengthened over the past seven decades through the process of the codification of asylum rights into human rights instruments and the complementarity and mutual reinforcement of these legal regimes, as well as the principles of equality and non-discrimination.

87. Specifically, seventy years of State practice and jurisprudence evidence three interlocking principles that arise from this mutual reinforcement: the first principle is *non-refoulement*, the negative duty not to expel a person facing persecution or the risk of torture. The second principle is the obligation of States to comply with their international human rights obligations in respect of persons who find themselves within their territory, jurisdiction or effective control. This second obligation carries positive duties, such as a duty to ensure the right to enjoy asylum (Article 14.1 of the UDHR), that is to say, to ensure that the protection afforded is given effect. As has been submitted in this brief, these twin duties do not only engage the granting State, but also the territorial State. The territorial State cannot act in a way so as to frustrate the enjoyment of the rights of the person to whom asylum has been granted (regardless of their legal status), which may mean that the State must take positive steps to resolve the situation that gives rise to the violation of the person's rights, although what steps will depend on the circumstances of each case. Because of the nature of the principle of *non-refoulement,* which is a *jus cogens* norm of international law when read together with the absolute prohibition against torture, its fulfilment is not subject to considerations of political expediency. Rather, ensuring that *non-refoulement* is respected is *erga omnes*, incumbent on all States and owed by each State to the international community as a whole.

88. Thus, the three principles that have strengthened the legal basis for asylum over the past seventy years are the negative duty of *non-refoulement;* the positive duty to

ensure that the person's fundamental rights are effective, such as the right to enjoy asylum once granted (and regardless of legal status); and finally, the *erga omnes* obligation of ensuring that *non-refoulement* is respected.

8. CONCLUSIONS

89. International human rights law and international refugee/asylum law are mutually reinforcing and complementary legal regimes. Over the course of the past seventy years, State practice and jurisprudence has evolved and recognised the progressive development of the human rights paradigm in international law.

90. Customary international law – as evidenced by State practice and the growing body of human rights jurisprudence – provides for asylum to be granted to protect persons from persecution and from *refoulement*. The 1951 and 1954 Conventions are mutually complementary, rather than mutually exclusive, mechanisms of asylum protection. As such, they may even operate together and/or apply in the same set of factual circumstances. This reinforcing aspect of asylum protection mechanisms is further supported by the growing body of human rights law protecting individuals from *non-refoulement*, which reiterates the obligation upon States within their jurisdiction and effective control to protect individuals from persecution and harm.

91. The right to seek asylum and the right to enjoy asylum are interconnected and fundamental human rights. States are obliged to recognise the effects of the grant of asylum by another State by virtue of their recognition of the right to enjoy asylum under Article 14 of the UDHR and have an obligation not to undermine that protection, so that the action of third States must be consistent with the human rights of the individual even when they are not within their own jurisdiction.

92. The institution of asylum and the legality of its recognition has been fundamentally strengthened by the recognition of the principle of *non-refoulement*, a negative duty to refrain from taking any steps that can expose a person to the risk of persecution or ill-treatment if expelled from the territory, jurisdiction or effective control of a State. The State also has a positive duty towards the asylee, to ensure the right to enjoy asylum, as set out by the 1948 Universal Declaration of Human Rights.[60] Finally, and due to the *jus cogens* nature of *non-refoulement* when read together with the absolute prohibition against torture and cruel, inhuman and degrading treatment, the State's obligation is also *erga omnes.* The community of States, and not only the State(s) that owe these negative and positive duties to the asylee, have an interest in its being given effect.

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Authors:

Baltasar Garzón Real, Director, ILOCAD SL

Sara Gonzalez, University of Law (UK)

sara.gonzalez[at]lmh.oxon.org

Aitor Martínez, ILOCAD SL

aitor.martinez[at]ilocad.info

Jennifer Robinson, Doughty Street Chambers

j.robinson[at]doughtystreet.co.uk

Melinda Taylor, Counsel, Human Rights, International Criminal Law

melindataylor[at]gmail.com

[60] Asylum in this brief is defined as "the protection that a State grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it", footnote 1, *supra*.