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Inter-American Court of Human Rights - Request for an Advisory Opinion OC-25
Public Hearing
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Newcastle University welcomes the opportunity to present the findings of research conducted at our institution before the Inter-American Court of Human Rights, the Member States of the Organisation of American States, and the Inter-American Commission on Human Rights, pursuant to Article 73(4) of the Court's Rules of Procedure and Article 24(1) of the Statute of the Court. Newcastle University is a research-intensive institution in the UK Russell Group and a world-class civic university with a vision to put academic knowledge, creativity and expertise to the service of individuals, organisations and society as a whole.

These submissions focus on the following elements of the questions before the Court, and draw from research conducted at Newcastle University, notably, in relation to 'Asylum as a General principle of International Law' and 'Asylum in the practice of Latin American and African States' (published by the United Nations High Commissioner for Refugees (UNHCR)):

1. Asylum as a right of States
2. Asylum as a human right
3. The relationship between asylum and *non-refoulement*
4. The nature of asylum as a general principle of international law
5. Reconciling international obligations of States: Asylum and other rules of international law
6. Conclusions

1. Asylum as a Right of States

Asylum, understood 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'[1] is a well-known institution in international law and its historical roots in State practice are well established.[2] It is in this sense that the term asylum will be used in this paper. Asylum is different from refugee status, as the former constitutes the institution for protection while the latter refers to one of the categories of individuals –among others- who benefit from such protection.

Historically, the practice of asylum pre-dates the existence of the international regime for the protection of refugees (which was born in the inter-war period in the twentieth century) and the international regime for the protection of human rights (born in the UN era).[3] Asylum constitutes the

[1] Institute of International Law (5th Commission), "Asylum in Public International Law", Resolutions Adopted at its Bath Session, Sept 1950, art 1.
[2] For an overview of the evolution of this institution see A Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell International 1980) and E. Reale, 'Le droit d'asile' (1938) 63(1) *Recueil des Cours de l'Académie de Droit International de La Haye* 473.
[3] It is worth noting, however, that at the time when the foundations of international law were laid down from a natural law perspective, the individual protection aspects of asylum were subject of much consideration by early writers; F de Vitoria, *Relectiones Theologicae XII*, Section 53, first published in 1557 (from the notes compiled by his students); H Grotius *De iure belli ac pacis*, *libri duo* [1625] (translated by AC Campbell)

protection that a State grants to an individual in its territory (territorial asylum) or in some other place under the control of certain of its organs (such as diplomatic premises and warships). As such, asylum is an expression of State sovereignty. Indeed, it is uncontroversial that asylum is a right of States to grant it *if they so wish* in the exercise of their sovereignty, without it being considered a hostile act towards other States, who have a correlative duty to respect it.[4] Article 1(1) of the UN Declaration on Territorial Asylum words it in this way: 'Asylum granted by the State, in the exercise of its sovereignty […] shall be respected by all other States.' The nature of asylum as a sovereign right of States is further safeguarded by article 1(3) of the Declaration, whereby '[it] shall rest with the State granting asylum to evaluate the grounds for the grant of asylum.'[5]

As a matter of international law, States are allowed to do what is not specifically prohibited, which is an expression of the principle of sovereign equality of States on which international law is founded.[6] Therefore, restrictions to sovereignty cannot be presumed;[7] if they exist they must be found in express agreements to which States have entered their consent. Accordingly, asylum as an expression of State sovereignty is under no limitation in international law, with the exception of obligations acquired by treaty or customary law.[8]

2. Asylum as a Human Right

Although refugees enjoy a distinct and unique standard of protection under international law, which is based on the Refugee Convention and its 1967 Protocol,[9] as well as the legal standards of regional scope developed in Africa, Latin America, and more recently Europe, asylum has not found expression in any international treaty of *universal* scope and therefore, there is no internationally agreed definition of what that protection encompasses. However, despite the failure of the 1977 UN Conference on Territorial Asylum[10] and accordingly, the lack of an international treaty of universal scope on the definition and content of asylum as a result, the practice of asylum throughout centuries shows that its distinct feature is its vocation of permanence. The right to reside therefore constitutes the essential and distinct content of asylum, with its foundations soundly rooted in the early writers of international law. In 1625 Grotius wrote that 'a permanent residence [ought not] to be refused to foreigners, who, driven from their own country, seek a place of refuge.'[11] In 1758 Vattel calls for the same principle: 'no Nation may, without good reason, refuse even a perpetual residence to a man who has been driven from his country.'[12] More recently, Grahl-Madsen stated that '[t]o say that an individual has a right to be granted asylum is to say that the requested State is […] duty bound to admit him to its territory, to allow him to remain there, or to abstain from extraditing him.'[13] The same position was held in 1988 by Special Rapporteur Mubanga-Chipoya, of the already disappeared UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.[14]

(Batoche Books 2001) ch 2, first published in 1625. Various translations of these works have been published in different languages.

[4] See for instance the Havana Convention on Asylum (adopted 20 Feb 1928) 132 LNTS 323; the Montevideo Convention on Political Asylum (adopted 26 Dec 1933, entered into force 28 Mar 1935) OASTS 34; the Convention on Diplomatic Asylum (adoped 28 Mar 1954, entered into force 29 Dec 1954) OASTS 18; and the Convention on Territorial Asylum (adoped 28 Mar 1954, entered into force 29 Dec 1954) OASTS 19.

[5] UNGA Res 2312(XXII) 14 Dec 1967.

[6] Article 2(1) Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

[7] *Lotus*, PCIJ, Series A, Nº 10, 1927 pp. 18-19.

[8] For a discussion on the limits imposed by international law on the right of States to grant asylum, see F Mariño Menéndez, 'El asilo y sus modalidades en Derecho internacional', in F Mariño Menéndez (ed), *Derecho de extranjería, asilo y refugio* (Ministerio de Asuntos Sociales 1995) 509-511.

[9] Adopted 31 Jan 1967, entered into force 4 Oct 1967, 606 UNTS 267.

[10] See *Yearbook of the International Law Commission*, 1977, vol. II (Part Two), para. 109.

[11] H Grotius, *De iure belli* n 20 ch 2, No. XVI, 84.

[12] E De Vattel, *The Law of Nations* [1758] (Carnegie Institute 1916), Book I, ch 21, para 231.

[13] A Grahl-Madsen, *The Status of Refugees in International Law, Vol. II* (Sijthoff 1972) 79.

[14] CLC Mubanga-Chipoya, 'The Right of Everyone to Leave any Country, Including His Own, and to Return to His Country', Doc. E/C.4/Sub.2/1988/35, pp 103-106.

Yet, the UN Refugee Convention does not enshrine a right of asylum or a right of residence. In fact, the enjoyment of most of its provisions is conditional on the immigration status of the refugee; some can only be enjoyed by refugees "lawfully present" while others only by refugees "lawfully resident". Its drafters were well aware that refugees could find themselves without a country of asylum and therefore the Conference that adopted the Convention recommended 'that Governments continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum and the possibility of resettlement' (Recommendation D). Refugee status is indeed temporary by nature; it exists so long as the circumstances that turn an individual into a refugee exist, and experience shows that in many cases this can be a lifetime. Therefore, the notion of permanence is not alien to the Refugee Convention, whose article 34 imposes obligations on States Parties regarding naturalization:

> The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

The significance of this provision is often overlooked. Its relevance lies in the recognition that States' obligations towards refugees include *every effort* to facilitate the full integration of refugees into the political community of the State of asylum. The inclusion of this article among the provisions of the Refugee Convention (immediately after the prohibition of *refoulement*) speaks about the relationship between these two areas of protection and the aim of restoring the legal bond between the individual and the State, which had been previously severed by persecution and flight, and thus correct the "anomaly" that refugee status actually represents.[15] The practice of States shows largely that domestic legislation has incorporated article 34 of the Refugee Convention.

More explicitly, asylum as a human right is recognised in regional instruments of international law, including Article 22 of the American Convention on Human Rights,[16] Article 12(3) of the African Charter on Human and Peoples' Rights[17] and Article 18 of the Charter of Fundamental Rights of the European Union.[18]

3. The Relationship between Asylum and *Non-Refoulement*

Asylum and *non-refoulement* are two different norms of international law. *Non-refoulement* refers to the prohibition to remove someone to a territory where he may face a risk of prohibited treatment. Protection under *non-refoulement* can take different modalities, including but not only asylum, such as temporary refuge. Asylum, as explained above, refers to the institution for protection with a vocation of permanence.

However, the relationship between these two areas of protection cannot be underestimated. Aware of the fact that refugees protected by *non-refoulement* may find themselves without a country of asylum, Grahl-Madsen affirmed the qualified obligation of States to grant asylum derived from the political clause in extradition treaties and -more interestingly- from the duty of non-*refoulement*. He

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[15] For a discussion on the background of art 34 of the Refugee Convention, see R Marx, 'Article 34 (Naturalization/Naturalisation)', in A Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (Oxford University Press 2011). For a political analysis of asylum as surrogate membership of a political community in the asylum State, see ME Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge University Press 2009). Although Price equates asylum with Convention Refugees only, his analysis on this point remains valid. For a review of Price's argument, see M-T Gil-Bazo, 'Rethinking Asylum: History, Purpose, and Limits. By Matthew E. Price' (2010) 23(3) *Journal of Refugee Studies* 402.

[16] Adopted 22 November 1969, entered into force 18 July 1978; 114 UNTS 123.

[17] Adopted 27 June 1981, entered into force 21 Oct. 1986; OAU Doc. CAB/LEG/67/3 rev. 5, printed in (1982) 21 *International Legal Materials* 58.

[18] [2016] OJ C 202/389. On the interpretation of Article 18 of the EU Charter as a human right of individuals, see M-T Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27(3) *Refugee Survey Quarterly* 33.

noted that 'our generation has witnessed an impressive development towards an internationally guaranteed right for the individual to be granted asylum' and stated that '[a]rticle 33 [of the UN Refugee Convention] creates an obligation to grant asylum to persons entitled to invoke it, provided that no third State is either obliged or willing to receive them.'[19]

Grahl-Madsen's position on the existence of a right to asylum derived from *non-refoulement* must be seen in the overall context of his work. Grahl-Madsen also examined in detail the plight of unlawfully present refugees, that is, refugees without a country of asylum, and concluded that when the State is unable to remove a refugee, he gains

> freedom of movement and residence [and it] follows that he must be considered 'lawfully' (and 'lawfully staying') in the territory. And after a number of years (normally about three years) his interest in growing roots must override any other considerations, which means that he may not be caused to leave the territory, merely because another country should prove willing to accept him.[20]

Grahl-Madsen argued this position on the grounds that '[i]t has never been envisaged that there should be any group of underprivileged refugees, subject to the whims of the authorities'[21] and that 'as a State would not dream of expelling its own nationals […] there is hardly any reason for a State to press too hard for the expulsion of refugees'[22] and therefore, 'after a period of some three years, the interests of the refugee in remaining where he is, must normally be held to override any other considerations.'[23]

In sum, a careful reading to the works of Grahl-Madsen shows that he believed that asylum as a subjective right of the individual was already a reality in domestic legislation, notably of constitutional rank. Grahl-Madsen went further in arguing that the principle of *non-refoulement* in the UN Refugee Convention imposed an obligation of States to grant asylum if no other country was ready to receive them after a reasonable time, which he fixed in three years.

More recently, an obligation to grant asylum based on *non-refoulement* has been recognised by the Inter-American Court of Human Rights itself in the case of *Pacheco Tineo*.[24] While article 22(7) of the American Convention on Human Rights[25] recognises 'the right to seek and be granted asylum', article 22(8) enshrines the principle of *non-refoulement*. The Court therefore chose to interpret that the right to *non-refoulement* includes a right to asylum in the specific circumstances of the case. The Court confirmed the interpretation that article 22(7) on the right to asylum enshrines a right of individuals, which imposes specific obligations on States.[26]

The significance of this line of argument cannot be underestimated, given that States parties to the UN Refugee Convention have recognised that the principle of *non-refoulement* is a rule of customary international law,[27] the consequence being that it is binding on all States.

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[19] A Grahl-Madsen, *Territorial Asylum*, n 2, 42-43.
[20] A Grahl-Madsen, *The Status of Refugees Vol. II*, n 13, 442.
[21] Ibid.
[22] Ibid 443.
[23] Ibid 437.
[24] Caso *Familia Pacheco Tineo vs. Estado Plurinacional de Bolivia*, Sentencia de 25 de noviembre de 2013.
[25] Adopted 22 Nov 1969, entered into force 18 Jul 1978, 114 UNTS 123.
[26] Caso *Familia Pacheco Tineo*, n 24.
[27] Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees, Adopted on 13 December 2001 at the Ministerial Meeting of States Parties to the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees (HCR/MMSP/2001/09), Preamble, para 4.

4. The nature of asylum as a general principle of international law

In order to discuss the nature of asylum as a general principle, we need to consider what a general principle is and where we find it. In this regard, it is necessary to examine what we understand by Law.

The English term "Law" is translated into two different terms in Spanish and French: "*Derecho/Droit*" and "*ley/loi*". The latter refers to the actual rules or provisions dictated by the competent authority to impose or prohibit a particular conduct. But the former reveals a much deeper concept. The Spanish dictionary defines "*Derecho*" as the 'body of principles and norms, expression of an idea of justice and order, which rule human relations in every society'.[28] Likewise the French dictionary defines "*Droit*" as the 'body of rules considered as [those which] must order human relations, founded on the ideas of the defence of the individual and of justice, and which constitute the subject-matter of the law [*loi*] and regulations' as well as 'the moral foundation of those rules'.[29] In other words, the actual legal rules (*ley/loi*) exist to carry an idea of Justice at the service of the human person (*Derecho/Droit*) and therefore their lawfulness requires that they comply with such ideals. The former President of the International Court of Justice, Dame Rosalyn Higgins, expresses this duality in the following terms: 'International law is not rules. It is a normative system … The role of law is to provide an operational system for securing values.'[30]

International law takes account of this perspective, as together with treaties and custom, it also recognises general principles as binding sources of international law irrespective of State consent (article 38(1)(c) of the Statute of the International Court of Justice). As Judge Tanaka from the ICJ states '[a]rticle 38, paragraph 1 (c) … does not require the consent of States as a condition of the recognition of the general principles. States which do not recognize [a] principle or even deny its validity are nevertheless subject to its rule.'[31] The International Court of Justice affirmed in the *Genocide Convention* case that 'the principles underlying the Convention are principles which are recognised by civilized nations as binding on States, even without any conventional obligation.'[32] Furthermore, principles are not only self-standing sources of international law, but rather, as argued by Verdross in 1935, they serve as a standard of validity for treaties and custom.[33]

In the words of Cançado Trinidade, Judge at the International Court of Justice and former President of the Inter-American Court of Human Rights:

> Despite the apparent indifference with which they were treated by legal positivism (always seeking to demonstrate a "recognition" of such principles in positive legal order), and despite the lesser attention dispensed to them by the reductionist legal doctrine of our days, yet one will never be able to prescind from them. From the *prima principia* the norms and rules emanate, which in them find their meaning. The principles are thus present in the origins of Law itself, and disclose the legitimate ends to seek: the common good (of all human beings, and not of an abstract collectivity), the realization of justice (at both national and international levels), the necessary primacy of law over force, the preservation of peace. Contrary to those who attempt — in my view in vain — to minimize them, I understand that, if there are no principles, nor is there truly a legal system.[34]

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[28] Real Academia Española, *Diccionario de la lengua española*, <www.rae.es>, visited on 26 Jun 2014 (author's own translation).

[29] Académie française*, Dictionnaire Académie française*, <http://www.academie-francaise.fr/dictionnaire/index.html>, visited on 26 Jun 2014 (author's own translation).

[30] R Higgins, *Problems and Process International Law and How We Use It* (Clarendon Press 1995) 1.

[31] *South West Africa (Liberia v. South Africa)*, Second Phase, Judge Tanaka Dissenting Opinion [1966] ICJ Reports 6, 298.

[32] *Reservations to the Convention on Genocide, Advisory Opinion* [1951] ICJ Reports 15, 23.

[33] A Von Verdross, 'Les principes généraux du droit dans la jurisprudence internationale' (1935-II) 52 *Recueil des cours de l'Académie de droit international de La Haye* 191, 204-206.

[34] AA Cançado Trinidade, 'International Law for Humankind: Towards a New *Jus Gentium* (I). General Course on Public International Law' (2005) 316 *Recueil des cours de l'Académie de droit international de La Haye* 9, 85-86.

As Valencia Restrepo argues, a principle requires the pre-existence of a fundamental social value whose acceptance by the international community confers upon it the conviction of its compulsory nature, which in turn can be enforced. in his view, a value has fundamental nature when its existence is necessary for the existence of the international community itself and its social nature implies that it pursues the collective (rather than individual) interests of the international community.[35]

Principles are to be found –but not only- in national legal orders and from there, they are "transferred" to international law itself. After an examination of the *travaux préparatoires* of article 38, Judge Gaja of the International Court of Justice concludes that 'the drafters had different views about what the reference to general principles of law was intended to cover [… and] the text adopted […] covered a division of opinions, especially on the question whether a general principle was to be regarded as part of international law only because it was already present in municipal systems.'[36]

The case-law of the Permanent Court of International Justice and of the International Court of Justice shows that both Courts have made express reference to general principles existing in national legal orders as sources of general principles of international law.[37] In Gaja's view

> When a principle exists both in municipal laws and in international law, the origin of the principle is likely to be in municipal systems … However, the application of the principle in international law does not necessarily depend on the fact that the principle is common to a number of municipal systems.'[38]

This opinion is also shared by Judge Tanaka when he states that 'the recognition of a principle by civilized nations […] does not mean recognition by *al1* civilized nations, nor does it mean recognition by an official act such as a legislative act'.[39] As Mariño (former Chair of the UN Committee Against Torture) notes, for a given principle to exist in international law, its recognition among States does not need to be universal. The main legal traditions worldwide are represented in the International Court of Justice, which allows for principles to be drawn from the most relevant legal orders in any given case, and even from general principles found in the domestic legal orders of a group of States. What matters is that the principles thus found may have the potential for universal applicability.[40]

In sum, international law is not only made of treaties and therefore the absence of an express recognition of the right to be granted asylum in an international instrument of universal scope cannot lead the affirmation of its absence altogether from international law. General principles of international law are legally binding on States irrespective of their express recognition and when a general principle exists in national legal orders, it can constitute a source of a principle in international law. Yet, the understanding of general principles and of the position that they take in the different legal order varies across legal cultures. Notably, general principles –understood as binding law- have very little grounding in the common law tradition, while they enjoy a much more prominent role in civil law jurisdictions.

Once the nature of general principles as sources of international law has been established and the way in which general principles of international law may draw from constitutional values, one needs to examine the nature of asylum as a general principle by examining its normative nature. Today, constitutions worldwide recognise the right to asylum in their bill of rights and in doing so they represent a continuation in the ancient normative character of the institution to inform conceptions

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[35] H Valencia Restrepo 'La definición de los principios en el Derecho internacional contemporáneo' (2007) 37(106) *Revista de la Facultad de Derecho y Ciencias Políticas* 76

[36] G Gaja, 'General Principles of Law', in R Wolfrum (ed) *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) 370, 371.

[37] *Chorzów Factory case (Germany v. Poland) [Claim for Indemnity] [Jurisdiction]* (PCIJ, Series A, No. 9, 1927), 31; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment*, [1997] ICJ Reports 7, para 110.

[38] G Gaja, 'General Principles of Law', n 36, 372.

[39] *South West Africa (Liberia v. South Africa),* Second Phase, Judge Tanaka Dissenting Opinion [1966] ICJ Reports 6, 299.

[40] FM Mariño Menéndez, *Derecho Internacional Público* (Trotta 1995) 367-368.

of society for the wellbeing of individuals.[41] As it has been examined above, Grahl-Madsen believed that constitutions around the world '[laid] down a more or less perfect right of asylum for individuals,'[42] a view shared by Weis, who stated that constitutions around the world '[confer] upon the individual a subjective right to asylum.'[43] Indeed, an exploration of constitutions around the world shows that the right to asylum is enshrined in most constitutions of countries across different legal traditions.[44] The constitutions of Angola, Bénin, Bolivia, Bulgaria, Burundi, Brazil, Cape Verde, Chad, China, Colombia, Costa Rica, Cuba, Democratic Republic of Congo, the Dominican Republic, Ecuador, Egypt, El Salvador, France, Germany, Guatemala, Guinea-Conakry, Honduras, Hungary, Italy, Ivory Coast, Mali, Mozambique, Nicaragua, Paraguay, Peru, Portugal, Spain and Venezuela all recognise the right to asylum. They all draw from the liberal-democratic tradition that emerged from the French Revolution changing the conception of the State and of the relationship between individuals and the State. The wording of constitutions reflects this tradition of protection. The broad range of beneficiaries of asylum reflects the historical tradition of the institution that offers protection on a variety of grounds, including but not only, those that give rise to refugee status.

This normative value of asylum was elaborated upon by the Costa Rican Supreme Court in a judgment of 1998. The Court stated that a decision on the case in question required an analysis of the constitutional nature of asylum. The Court understood that 'asylum is a legal principle of higher rank that ... turns the State's territory into an inviolable space for the protection of individuals of other countries when they are persecuted by reason of their political or ideological preferences or actions, a principle enshrined in article 31 of the Constitution, and that as such it constitutes a fundamental right [of individuals].'[45] Accordingly, the Court interpreted the protective nature of asylum as twofold: on the one hand, it protects the individual persecuted on political grounds, and on the other, it protects the 'fundamental values of the constitutional order, the tradition of protection of freedom of thought [and] freedom of expression'[46] that are at the basis of a democratic State founded on the rule of law.

In Ecuador, the Constitutional Court construes the right to asylum as a human right[47] and refers to the significant importance of asylum within the Constitutional framework 'insofar as [asylum] arises from the need to restore the fundamental human rights of individuals who have been forced to leave their countries of origin'.[48]

Despite the nuances and differences in the wording of constitutional provisions, asylum aims at the protection of the higher values on which the State itself is founded: national liberation, justice, democracy and human rights. These values are also at the core of international law, as enshrined in article 1 of the United Nations Charter on the purposes of the United Nations. Indeed, this conception of asylum does not exist exclusively within any given domestic legal order. Rather on the contrary, it is intimately linked with international law. Some constitutions explicitly include an express reference to the international legal framework where constitutional asylum exists. The extensive recognition of asylum in constitutions worldwide speaks to the value of this institution as one of the underlying principles in legal orders worldwide. And as such, it informs international law itself. In the context of the European Union, asylum has been recognised as a (legally binding) general principle of EU Law resulting from the constitutional traditions of its Member States. In the words of Advocate

[41] On the constitutional foundations of human rights, see M O'Boyle & M Lafferty, 'Constitutions and General Principles as Sources of Human Rights Law', in D Shelton (ed), *The Oxford Handbook*, n 83.
[42] A. Grahl-Madsen, *Territorial Asylum*, n 2, 24.
[43] P Weis, 'Territorial Asylum' (1966) 6(2) *Indian Journal of International Law* 173, 180.
[44] For an analysis of the right to asylum for individuals enshrined in national constitutions, see P Weis, 'Territorial Asylum', n 43, 180; and M-T Gil-Bazo, 'Asylum in the practice of Latin American and African States', *New Issues in Refugee Research*, Research Paper No. 249 (UNHCR 2013).
[45] *Leiva Durán v. Ministro de Relaciones Exteriores y Tribunal Penal del Primer Circuito Judicial de San José*, Costa Rica Supreme Court, decisión no. 6441-98, 4 Sept 1998.
[46] Ibid.
[47] *Case No 0056-12-IM & 0003-12-IA Acumulados*, Ecuador Constitutional Court, Judgment No 002-14-SIN-CC, 14 Aug 2014, 38. The author is indebted to Karina Sarmiento for sharing the full original versión of the judment.
[48] Ibid 42.

General Maduro in the *Elgafaji* case: '[the] fundamental right to asylum … follows from the general principles of Community law which, themselves, are the result of constitutional traditions common to the Member States.'[49] Furthermore, although the research into constitutional texts worldwide has shown that English-speaking countries do not have a tradition of constitutional asylum, it is undeniable that the protection of individuals from persecution does feature highly in their domestic legal orders as asylum is granted to refugees. In other words, asylum (conceived as protection) does play a fundamental role in the underlying legal conceptions of what a State is and what it exists for across the world. And as such, these traditions (however conceived and applied) still reflect today the principle of humanitarianism recognising 'the existence of duties that stem from membership in a single human community.'[50]

5. Reconciling international obligations of States: Asylum and other rules of international law

One of the contentious areas in the field of asylum relates to international disputes between States regarding the protection of individuals deemed to have committed crimes. As noted above, granting asylum falls within the domain of State sovereignty and this is reflected in the UN Declaration on Territorial Asylum, which –as noted above- confirms that '[it] shall rest with the State granting asylum to evaluate the grounds for the grant of asylum.'[51] If exceptions to the sovereignty of the State granting asylum exist, they must be found in treaties. In this regard, it is worth examining the options that States have when confronted with conflicting obligations of international law, namely, the duty to grant asylum to an individual and the obligation to surrender him in order to face prosecution or serve a conviction.

The case of Hissène Habré helps to examine this matter. Mr Habré, former President of the Republic of Chad in the 1980s who found asylum in Senegal, was sought in order to be tried for crimes of torture. The International Court of Justice examined the principle *aut dedere aut judicare* enshrined in article 7(1) of the UN Convention Against Torture (CAT)[52] in relation to Senegal. The consequence of this treaty obligation is not a prohibition to grant asylum, but rather a limitation on the right of States to do so. The Court ruled that 'Senegal must … take without further delay the necessary measures to submit the case to its competent authorities for the purpose of prosecution, *if it does not extradite* Mr. Habré.'[53] The Court noted that while prosecution is an obligation under the CAT, extradition is merely an option: '[e]xtradition is an option offered to the State by the Convention'[54] in order to facilitate State compliance with the Convention's purpose 'to prevent alleged perpetrators of acts of torture from going unpunished.'[55] Furthermore, extradition may be hindered if its requirements cannot be met. In the case in question, the Court recalls that the individual can only be extradited 'to a State which has jurisdiction in some capacity, pursuant to Article 5 of the Convention, to prosecute and try him,'[56] which allows extradition only to States who can claim jurisdiction on the basis of the territorial or nationality principles.[57] In this particular case, Senegal could therefore continue to grant asylum but such exercise of sovereignty is not absolute, but rather necessarily conditional to Senegal prosecuting Mr Habré for crimes of torture in compliance with article 7(1) CAT. The fact that the asylum State prosecutes an individual for crimes of international law does not mean that asylum ceases to be granted. On the contrary, prosecution in a case like this would be precisely the legal tool allowing a State to comply with both its international obligations of protection towards the individual (by not removing him to a country of persecution or where there

[49] Advocate General Maduro's Opinion in case C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921, para 21. For an analysis of the constitutional foundations of asylum as a general principle of EU Law, see M-T Gil-Bazo, 'The Charter of Fundamental Rights…', n 18, 46-48.
[50] M Gibney, *The Ethics and Politics of Asylum* (Cambridge University Press 2004) 231.
[51] UNGA Res 2312(XXII) 14 Dec 1967.
[52] Adopted 10 Dec 1984, entered into force 26 June 1987; 1465 UNTS 85.
[53] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* [2012] ICJ Reports 422, para 121 (emphasis added).
[54] Ibid para 95.
[55] Ibid para 120.
[56] Ibid.
[57] Article 5(1) CAT.

is a risk of prohibited treatment) *as well as* with its international obligations to fight against impunity for crimes of international law. Eventually, Mr Habré was tried by the Extraordinary African Chambers, established under an agreement between the African Union and Senegal to try international crimes committed in Chad.[58]

6. Conclusions

- Asylum is a sovereign right of States, which international human rights law instruments of regional scope recognize as a human right of individuals. Accordingly, States may be under an obligation of international law to grant asylum.
- Assessing the grounds for asylum rests with the State granting it.
- An obligation to grant asylum may arise from the principle of *non-refoulement* under certain circumstances. Given that this principle is a rule of Customary International Law, all States in the world may be under an obligation to grant asylum to individuals under certain circumstances.
- The nature of asylum as a general principle of international law imposes the duty on States to grant asylum under certain circumstances.
- Limitations to the power of States to grant asylum may exist under international treaties. When conflicting obligations arise, international law offers States means and mechanisms to comply with all relevant obligations.

[58] See <http://www.chambresafricaines.org/>