INTER-AMERICAN COURT OF HUMAN RIGHTS

REQUEST FOR AN ADVISORY OPINION

Submitted by the Republic of Ecuador

Concerning

"The Scope and Purpose of the Right of Asylum in Light of International Human Rights Law, Inter-American Law and International Law"

WRITTEN OBSERVATIONS OF LAW

Submitted by the

UNIVERSITY COLLEGE LONDON

'PUBLIC INTERNATIONAL LAW

PRO BONO PROJECT'

Pursuant Article 73(3) of the Rules of Procedure of the Inter-American Court of Human Rights

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The Public International Law Pro Bono Project at University College London

Working under the umbrella of the UCL Centre for Access to Justice, the UCL Public International Law Pro Bono Project ("the Project") brings together LLM and PhD students with a background in Public International Law (PIL). The Project provides highly motivated postgraduate students with opportunities to get first hand practical experience in various PIL subfields, with emphasis in international human rights law, international humanitarian law, and international criminal law.

The Project has established as one of its aims the direct participation in human rights systems, including the inter-American system, through amicus curiae submissions, the legal assistance of non-governmental organisations representing victims, and the direct representation of victims in contentious in procedures before regional courts and universal treaty bodies.

On this occasion, the UCL PIL Pro Bono Project respectfully submits a brief with written observations of law in accordance with conventional and procedural rules governing third party interventions before the Inter-American Court of Human Rights in advisory procedures. The brief concerns the advisory request submitted by Ecuador regarding "[t]he Scope and Purpose of the Right of Asylum in Light of International Human Rights Law, Inter-American Law and International Law."

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INTRODUCTION

Per article 64(1) of the American Convention on Human Rights (ACHR),[1] the Inter-American Court of Human Rights (IACtHR, "the Court") can be presented with advisory opinion requests from member states of the Organisation of American States (OAS). The requests must deal with questions relating to the interpretation of the Convention or of other international treaties concerning human rights in the Americas. As stated since its first advisory opinion, "[t]he advisory jurisdiction of the Court is closely related to the purposes of the Convention[,…] and is intended to assist the American States in fulfilling their international human rights obligations."[2]

In fulfilling that function of assistance to states, the Court's "Presidency may invite or authorize any interested party to submit a written opinion on the issues covered by the request."[3] The Court's openness to receive amicus briefs from civil society organisations and individuals is in step with the unusually broad scope of the advisory function of the IACtHR. The Court's case law and practice recognise the importance of civil society in aiding the tribunal to fulfil the defining purpose of its advisory jurisdiction.[4] "The court's advisory jurisdiction may be used to clarify the object, purpose, and meaning of international human rights norms and to provide the requesting party with a judicial interpretation of the law or issue in question."[5] The IACtHR has construed its advisory jurisdiction in a manner akin to the practice of the International Court of Justice (ICJ) regarding its own advisory function. In doing so, the IACtHR has emphasised some traits that distinguish its advisory jurisdiction from its contentious one,[6] and has clarified the specific implications of those characteristics in the international human rights law (IHRL) sphere.[7]

One of these particularities is the Court's flexibilisation of the consensual nature of its jurisdiction, which allows it to engage with advisory requests in a manner which maximises the purpose of its advisory jurisdiction. Thus, the Court is not bound to the strict terms in which the requesting state has submitted its questions.[8] Having in mind the scope and purpose of its advisory function, the

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1 American Convention on Human Rights (22 November 1969) 1144 UNTS 123, entered into force 18 July 1978(ACHR), Art. 64(1).

2 *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)* Advisory Opinion OC-1/82 of 24 September 1982, ("'Other Treaties" OC-1/82') para 25.

3 Rules of Procedure of the IACtHR (amended 2009), Art. 73(3).

4 *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14 of 19 August 2014, (*'Rights of Children in the Context of Migration* OC-21/14') para 29.

5 Jo M Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (CUP 2013), p 37.

6 *"Other Treaties"* OC-1/82 (n 2) para 23.

7 Ibid. para 24.

8 "[T]he Court finds that, not only is it not necessarily restricted to the literal terms of the requests submitted to it, but also, in exercise of its […] advisory jurisdiction and based on […] Article 2 of the Convention and the purpose of advisory opinions 'to contribute to compliance with their international commitments' in the area of human rights […], it may suggest the adoption treaties or other type of international norms on the issues that are the subject of those

Court may address questions in a manner which helps American states fulfil their human rights obligations.

It is in this vein that the UCL PIL Pro-Bono Project respectfully asks the Court to address Ecuador's request. Concretely, the Project suggests the IACtHR to issue an advisory opinion judgment where: (a) the Court finds that, for reasons of jurisdiction and admissibility, some of Ecuador's questions fall outside the tribunal's advisory mandate under the Convention and/or may impliedly request the Court to engage in an inappropriate exercise of its advisory jurisdiction; (b) the Court reformulates and/or addresses Ecuador's questions in a manner consistent with the purpose of its advisory jurisdiction; and (c) the Court sets the legal standards connected to the institution of asylum as a matter of international law and IHRL as these are matters relevant for the enjoyment of rights of thousands of asylum-seekers under the jurisdiction of OAS member states.

opinions, as [well as] measures of other nature that are necessary in order to ensure the effectiveness of human rights." *Rights of Children in the Context of Migration* OC-21/14, para 30.

1. JURISDICTION AND ADMISSIBILITY

Before the Court can engage with the substantial issues involved in a request for an advisory opinion, it must satisfy itself that it has jurisdiction to do so and that engaging with the questions posed to the tribunal does not constitute an inappropriate exercise of its jurisdiction (admissibility). This section first analyses whether the questions formulated by Ecuador fall within the jurisdiction *ratione materiae* and *ratione personae* of the Court. Second, the matter of admissibility is addressed and an assessment on whether the submitted questions follow procedural requirements under the Convention is outlined. Finally, this section offers conclusions regarding the scope of the IACtHR's jurisdiction vis-à-vis Ecuador submissions.

1.1. JURISDICTION

1.1.1. Jurisdiction *ratione materiae*

Article 64(1) ACHR states that "[t]he member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states." Therefore, the Court can be requested to exercise its advisory jurisdiction in order to interpret either (a) the ACHR, or (b) any international treaty concerned with the protection of human rights. While there is no doubt that, by referring to the interpretation of the ACHR, the Convention allows states to seek a pronouncement of the Court to resolve issues arising from the provisions therein, the reference to "other treaties concerning the protection of human rights in the American states" has required further clarification. In the *Other Treaties*[9] advisory opinion, the Court noted that the wording of article 64(1) must be interpreted as including:

> [A]ny provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty, and whether or not non-Member States of the Inter-American system are or have the right to become parties thereto.[10]

Therefore, the Court has jurisdiction to interpret the content and scope of obligations arising from any treaty as long as the specific provision to be interpreted concerns human rights and is

[9] *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights)* Advisory Opinion OC-1/82 of 24 September 1982.
[10] Ibid 12.

applicable in the Americas.[11] Any state that may ratify the Convention is understood to be an "American state".[12]

In light of this standard, the Court must determine whether the provisions invoked by the requesting state fall within the scope of article 64(1) ACHR. In its request for an advisory opinion, in addition to the ACHR, Ecuador has invoked several international treaties, both regional and global in scope: the International Covenant on Civil and Political Rights (ICCPR);[13] the Geneva Convention relating to the Status of Refugees[14] and its 1967 New York Protocol;[15] the Inter-American conventions on Extradition[16] and on Mutual Legal Assistance in Criminal Matters;[17] and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[18] There is no doubt that these treaties, whether regional or global in scope, have a human rights purpose and/or component and are open to accession to any OAS member state. For the purposes of the Court's jurisdiction, it can be concluded that these "concern" human rights in the Americas.

Ecuador has also invoked the Universal Declaration of Human Rights (UDHR)[19] and the American Declaration of the Rights and Duties of Man (ADRDM or "American Declaration").[20] These instruments are not treaties as a matter of international law. However, for the purposes of Article 64(1) of the ACHR different considerations should be considered:

The UDHR was originally envisioned as "a manifesto with primarily moral authority."[21] Over time, many of its provisions have evolved and acquired a legal weight that reaches beyond the threshold of "mere moral authority," possibly articulating customary international law. This is confirmed by both the ICJ and the authoritative opinion of the International Law Association (ILA). The ICJ

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[11] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99 of 1 October 1999, paras 72-76.
[12] *"Other Treaties"* … (n 2) para 35.
[13] International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976 (ICCPR)
[14] Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 150 entered into force 22 April 1954 ('Refugee Convention')
[15] Protocol relating to the Status of Refugees (31 January 1967) 606 UNTS 267, entered into force 4 October 1967
[16] Inter-American Convention on Extradition (25 February 1981) OASTS 60, entered into force 28 March 1992
[17] Inter-American Convention on Mutual Assistance in Criminal Matters (23 May 1992) OASTS 75, entered into force 14 April 1996.
[18] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85, entered into force 26 June 1987 ('CAT')
[19] Universal Declaration of Human Rights, Resolution 217 A(III); UN Doc A/810 91, UN General Assembly, 10 December 1948 ('UDHR')
[20] American Declaration of the Rights and Duties of Man, OAS Resolution XXX, Ninth International Conference of American States, (1992) Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II 82 doc 6 rev 1 at 17; (1949) 43 AJIL Supp 133, 1948
[21] United Nations Department of Public Information, *The International Bill of Human Rights* 1 (New York 1988).

has addressed the issue concerning the customary nature of the UDHR multiple times. In its Advisory Opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court held that human rights obligations could be imposed on states by virtue of their customary nature. The ICJ noted that the principles underlying the Convention "are recognised by civilised nations as binding on States, even without any conventional obligation."[22] In *Barcelona Traction* the ICJ likewise held that obligations that states owe to the international community as a whole may derive "from the principles and rules concerning the basic rights of the human person."[23] Similarly, in the *Hostages* case the World Court held that depriving individuals of their freedom was a blatant violation of the "principles of the Charter of the United Nations[and] the fundamental principles enunciated in the Universal Declaration of Human Rights."[24] The ILA has also concluded that "many if not all of the rights elaborated in the […] Declaration […] are widely recognized as constituting rules of customary international law."[25] The customary character of the core principles of the UDHR has too been echoed by a large number of legal scholars.[26]

The legal status of the American Declaration should be differently construed. While not initially intended to be legally binding, the ADRDM started to be regarded as such in 1981. The Inter-American Commission on Human Rights (IACHR), in the *Baby Boy* decision against the United States, stated that the abolition of legislation that criminalised abortion in Massachusetts did not violate article 1 of the Declaration, considered by the Commission to be the main relevant legal provision in the case before it.[27] The Commission held that by virtue of the entry into force of the Charter of the OAS, the ADRDM had acquired binding nature.[28] In following cases, the Commission maintained the same position.[29]

The IACtHR approached the matter in more nuanced fashion. In *Interpretation of the American Declaration of the Rights and Duties of Man*, the Court held that the American Declaration is not a treaty within the meaning of Article 64(1) ACHR as it was not originally intended to create legal

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[22] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion of May 28) [1951] ICJ Rep 15, 23.
[23] *Barcelona Traction, Light & Power Co, Ltd* (*Belgium v Spain*) (Second Phase) [1970] ICJ Rep 3, 32.
[24] *Case Concerning United States Diplomatic and Consular Staff in Teheran* (*United States v Iran)* (Judgment of May 24) [1980] ICJ Rep 3, 42.
[25] International Law Association, *Report of the Sixty-Sixth Conference* (Buenos Aires 1994).
[26] For a review of prominent commentators who consider that the UDHR is, in part or in its entirety, customary international law, see Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1995/96) 25 *Ga J Int'l & Comp L* 323-326.
[27] Organization of the American States, *Annual Report of the Inter-American Commission on Human Rights 1980-1981, Resolution No 23/81, Case 2141 (United States)*, 6 March 1981.
[28] Ibid paras 15-16.
[29] e.g., Organization of the American States, Inter-American Commission on Human Rights, *Resolution No 3/87, Case 9647 (United States)*, 22 September 1987.

obligations upon states.[30] However, the Court also noted in that opinion that the American Declaration is an authoritative interpretation of the general human rights obligations provided for in several provisions of the OAS Charter, and underlined the evolutionary character of the human rights commitments made by states in the 1948 Ninth International Conference.[31]

Thus, references made by Ecuador vis-à-vis the UDHR and the American Declaration are not immaterial to the Court's reasoning. The Court may take into consideration customary international law or other legal sources other than those mentioned in article 64(1) ACHR as long as dealing with such legal sources is necessary to render an advisory opinion on the interpretation of a relevant instrument under that conventional provision. This means that while the IACtHR has been conferred advisory jurisdiction only concerning treaty law, customary international law – where duly identified – may constitute applicable law. Thus, treaty provisions may be construed in light of customary (general) law, a possibility that is explicitly provided for in the provision on interpretation of the ACHR. Concretely, article 29(d) ACHR stipulates that "[n]o provision of [the] Convention shall be interpreted as […] excluding or limiting the effect that the American Declaration […] and other international acts of the same nature may have." (emphasis out of original text).

Article 29(d) ACHR[32] instantiates the general rule of treaty interpretation provided for in article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).[33] As noted by Gardiner, "[a]rticle 31(3)(c) concerns the circumstances in which rules from the broad sweep of international law may be brought into play in treaty interpretation."[34] According to the report issued by the Study Group on the Fragmentation of International Law adopted by the International Law Commission in 2006, article 31(3)(c) VCLT embodies the principle of systemic integration following which treaties should be construed as part of the broader international legal system.[35] Sources of the international legal system relevant for the applicability of the systemic integration principle "include other treaties, customary rules or general principles of law."[36] This reasoning

[30] *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89 of 14 July 1989, para 33.
[31] Ibid paras 34, 37-45.
[32] ACHR, Art. 29.
[33] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 ('VCLT') Art. 31(3)(c)
[34] Richard Gardiner, *Treaty Interpretation* (kindle edn, OUP 2008) s. 7.
[35] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (ILC Fragmentation Report) (13 April 2006) A/CN.4/L.682 ('ILC Fragmentation Report') s. 4, paras 17, 18.
[36] Ibid para 18.

also applies regarding the customary rule of non-refoulement, the *pro homine* principle, and the principle of non-discrimination, also invoked by the requesting state.

1.1.2. Jurisdiction *ratione personae*

Standing

The Court must determine whether it has jurisdiction *ratione personae* over the questions submitted by Ecuador. This requires the Court to determine the standing of the body submitting the request.[37] The request for an advisory opinion was submitted to the Court by Ecuador in accordance with Article 64(1) of the American Convention, which stipulates that:

> The Member States of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. […]

The Inter-American system relies on a two-track system of human rights protection since the ACHR was adopted and the Court was established.[38] Any member state of the OAS can request advisory opinions, [39] even if it is not a state party to the American Convention.[40] The applicant state, Ecuador, is a OAS member state and, thus, has the right to request the Court to issue advisory opinions on the interpretation of the American Convention or of other treaties concerning the protection of human rights in the Americas.[41]

Ultra vires jurisdiction ratione personae

The purpose of the Court's advisory jurisdiction is to "assist the American States in fulfilling their international human rights obligations."[42] As the Court stated in the *Juridical Condition and Rights of the Undocumented Migrants*, the Court's advisory opinions are not only applicable to American States that have ratified the American Convention, but are instead applicable to all American States.[43] States that are not parties to the ACHR may request an opinion under the Convention as the *ratione personae* pre-requisite is that the requesting state is an OAS member. States which are not parties

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[37] *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights*) Advisory Opinion OC-14/94 of 9 December 1994, para. 20.
[38] Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice* (CUP 2013), p.244.
[39] Article 64(1) of the ACHR
[40] *Right to Information* … (n4) para 42.
[41] See also *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14 of 19 August 2014.
[42] *"Other Treaties"* … (n 2) para 25.
[43] *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 of 17 September 2003, para 60.

to the OAS are excluded. In the aforementioned advisory opinion, the Court stipulated that "everything indicated in this Advisory Opinion applies to the OAS Member States that have signed either the OAS Charter, the American Declaration, or the Universal Declaration, or have ratified the International Covenant on Civil and Political Rights, regardless of whether […] they ratified the American Convention or any of its optional protocols."[44]

As formulated in article 34 VCLT, it is a customary international law rule that "a treaty does not create either obligations or rights for a third State without its consent."[45] The case law of the ICJ articulates this principle. Confirming the *Monetary Gold* principle in the *East Timor* case, the ICJ stated that "one of the fundamental principles of its Statute is that it cannot decide a dispute between States without the consent of those States to its jurisdiction."[46] In that case, the ICJ could not proceed to determine the merits of the dispute between Australia and Portugal without first questioning Indonesia's behaviour.[47] Since Indonesia was a non-party to the ICJ and the latter had no jurisdiction over Indonesia, it would run counter the *Monetary Gold* principle to adjudicate on the merits of the case.[48] In cases where the questions under the Court's consideration relate to third-party states' obligations or rights, the aforementioned analysis requires that the Court does not pronounce itself on these matters or that it reformulates the questions in a manner consistent with the scope of its *ratione personae* jurisdiction. As indicated, the Court has an inherent authority to "define or clarify and, in certain cases, to reformulate the questions submitted to it."[49]

As such, it is relevant to determine whether the request of Ecuador contains questions relating to the obligations and rights of third-party states and if so, whether they can be reformulated or should be stricken down.

Regarding questions A, B, D, E, F and G the Project submits that these do not refer explicitly to the rights and obligations of third-party states as these are neutrally drafted. For the Court to exercise its jurisdiction in a conventionally-consistent manner, it is sufficient for it to simply clarify that its opinion refers only to states within the meaning of article 64 ACHR, i.e. American states. As previously established, the Court has the ability to clarify a question when necessary.[50]

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[44] Ibid., emphasis added.
[45] VCLT (n 33) Art. 34.
[46] *East Timor (Portugal v. Australia)*, Judgement ICJ Reports 1995, para 26.
[47] Ibid., para 28.
[48] Ibid., para 35.
[49] *Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights)* Advisory Opinion OC-7/86 of 26 August 1986, para 12. Affirmed in "Right to Information" … (n 11) para 42.
[50] Ibid.

As regards question C, the Project respectfully submits that it should be reformulated by the Court. Inquiry C is inconsistent with the tribunal's jurisdiction, and a pronouncement in that regard would be *ultra vires*. Concretely, in question C Ecuador pretends the Court's opinion to refer to third-party states belonging to a "different regional legal system." However, it is the Project's position that the Court should engage in the clarification and reformulation of the question and should not merely strike it down on the basis of the tribunal's lack of jurisdiction *ratione personae*. The Court retains the authority to clarify and reformulate a question, even if the question is drafted in an inconsistent manner with the tribunal's jurisdiction, insofar as the reformulation brings the inquiry into the tribunal's judicial mandate.

Although part of question C refers to matters beyond the *ratione personae* jurisdiction of the Court, i.e. obligations of states belonging to a different regional system than the inter-American one, the other part of the question clearly refers to human rights obligations of OAS member states. Thus, the Court may exercise its reformulation and clarification discretion so as to set the legal standards vis-à-vis American states which, being a party to a specific convention on asylum, are presented with a request for asylum towards the individual seeking or who has been granted such protection, in the event that a third-party state (whose obligations cannot be determined by the IACtHR) interferes with its obligations vis-à-vis the asylum seeker/refugee.

In conclusion, with the exception and precisions noted, the Court enjoys jurisdiction to entertain the advisory request submitted by Ecuador.

1.2. ADMISSIBILITY

1.2.1. Procedural Requirements in Advisory Proceedings

Article 70(1) of the Rules of Procedure of the IACtHR (RoP) stipulates that "[r]equests for an advisory opinion under Article 64(1) of the Convention shall state with precision the specific questions on which the opinion of the Court is being sought."[51] Article 71 RoP provides that "[i]f […] the interpretation requested refers to other treaties concerning the protection of human rights in the American States, the request shall indicate the name of the treaty and parties thereto, the specific questions on which the opinion of the Court is being sought, and the considerations giving rise to the request."[52]

[51] Rules of Procedure of the Inter-American Court of Human Rights, Approved 2009, Art. 70.
[52] Ibid Art. 71.

In light of these requirements, it can be concluded that some of the questions posed by Ecuador fail to identify the relevant legal framework as well as the precise boundaries of the issues the Court is being asked to address. By referring to "a conduct that, in practice, restricts, reduces or impairs any form of asylum" and to "certain tenets of legal and ethical value," question D fails to identify both the precise issue at stake and the legal framework that Ecuador is requesting the Court to consider. Also, the generic reference to the "legal consequences on human rights and fundamental freedoms of persons affected," – which is often employed by Ecuador in its request – also fails to satisfy the test provided for in articles 70 and 71 of the RoP. Similarly, question G is unclear in identifying the legal framework against which the IACtHR is called upon to assess the state conduct.

Such questions would be prima facie inadmissible as they fail to specify the legal issue to be addressed by the Court or the legal framework that the Court is requested to consider. However, when the use of generic expressions or legal frameworks is limited to a part of a question, the Court may exercise its authority to reformulate the question as it deems appropriatein the interest of justice.[53]

1.2.2. The Court's discretion to decline the exercise of its advisory jurisdiction

In previous advisory opinions, the Court has held that even where it has jurisdiction and the request is admissible, the advisory jurisdiction is permissive in that "it empowers the Court to decide whether the circumstances of a request for an advisory opinion justify a decision rejecting the request."[54] Therefore, the Court may decide to decline the exercise of its advisory jurisdiction even when the jurisdictional and procedural requirements mentioned above have been satisfied. This stems from the wording of Article 64(2) ACHR, which establishes that the Court "may" – rather than "shall" – issue an advisory opinion.

The IACtHR, like the ICJ, has identified the notion of discretion with that of judicial propriety, i.e. whether the Court finds it appropriate to issue an advisory opinion based on a number of considerations (see below). In the ICJ context the issue of judicial propriety or justiciability is preceded by a determination of the nature of the questions submitted to it, said nature being either legal or political. As one legal scholar put it, "[o]n the specific question of 'legal questions', the

[53] *Juridical Condition* … (n 23) para 67.
[54] "*Other Treaties"* … (n2), para 28.

Court has held that it 'may give an opinion on any legal question, abstract or otherwise', thereby dissociating it somewhat from the debate on justiciability."[55]

While the IACtHR has not explicitly drawn this distinction, the matter should be addressed as some requests have impliedly been rejected on those grounds or because the request have been made on predominantly political grounds.[56] The matter of justiciability or judicial propriety will also be analysed below.

1.2.3. Nature of the questions submitted to the IACtHR

While neither the ACHR and the Court's Rules of Procedure, nor most of the case law explicitly address this point, it is commonly understood that questions that are not legal but predominantly political in nature would require the tribunal to engage in an inappropriate exercise of its advisory jurisdiction. Since the IACtHR's case law and relevant inter-American legal instruments do not refer to the issue, the following analysis mainly regards the practice of the ICJ concerning what constitutes an appropriate exercise of jurisdiction vis-à-vis the legal/political character of requests.

The ICJ has held that it "may give an opinion on any legal question, abstract or otherwise."[57] This statement is at the heart of other pronouncements of the ICJ as regards the admissibility of politically motivated questions.[58] In other words, the ICJ has argued that it is not concerned with the practical implications of its opinions as long as the submitted questions can be addressed from a strictly legal perspective, at least in the abstract. This is also what has been argued in the *Admission of a State* advisory opinion, where the ICJ held that:

> The Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision. It is not concerned with the motives which may have inspired this request, nor with the considerations which, in the concrete cases submitted for examination […]

[55] Gleider I Hernandez, *The International Court of Justice and the Judicial Function* (OUP 2014), p 75.
[56] *Request of Advisory Opinion submitted by the Secretary General of the OAS* (order of 23 June 2016) (Rejection of Advisory Request).
[57] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (Advisory Opinion of 28 May) [1948] ICJ Rep 57, 61.
[58] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion of 8 July) [1996] ICJ Rep 226, 236-7, paras 15-16; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July) [2004] ICJ Rep 136, 163, para 62; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion of 22 July) [2010] ICJ Rep 403, 416-17, paras 32-3.

> formed the subject of the exchange of views […] It is the duty of the Court to envisage the question submitted to it only in the abstract form which has been given to it.[59]

Conversely, the ICJ has repeatedly held that, in the absence of a legal question it would decline to exercise its advisory jurisdiction.[60] In the words of a prominent scholar, "[the ICJ] perceives itself as simply not competent to furnish answers to purely political questions that can only be settled by political means."[61]

Mutatis mutandis, the same framework of analysis is relevant in the IACtHR's context.[62] Based on the distinction between political and legal questions and the consequences thereof, the Court should satisfy itself that the questions posed to it by Ecuador are legal in nature. Concretely, the scope of question E appears to be very narrow as it refers to a specific situation whereby an asylum seeker has requested asylum to the host state on its diplomatic premises situated in a third state. Here, Ecuador is asking the Court to determine the legal responsibilities befalling the host and third state if the latter state undertakes actions that are liable to hinder the ability of the host state to comply with its obligations under the relevant asylum international legislation, and the consequences for the individual seeking asylum. The question is prima facie legal in nature, but also bears clear current political implications.

The advisory request of Ecuador should be construed in the overall context surrounding it at the time of filing. As is well-known, Ecuador has been embroiled in a dispute with the United Kingdom in the so-called Julian Assange matter. The dispute involves an arrest warrant issued by Swedish authorities in the context of criminal proceedings for the alleged rape of a woman in that country in 2010. Mr. Assange, the famous Wikileaks founder is wanted for interview purposes in connection to those proceedings. In 2012, Assange filed and was successful in obtaining an asylum request at Ecuador's embassy before the UK. He has been secluded in Ecuador's tiny embassy since then. The advisory request filed by Ecuador, even when drafted in general terms, could have implications regarding the Assange matter. Further, the request could be construed as being part

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[59] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (Advisory Opinion of 28 May) [1948] ICJ Rep 57, 61.

[60] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (First Phase) (Advisory Opinion of 30 March) [1950] ICJ Rep 65; *Western Sahara* (Advisory Opinion of 16 October) [1975] ICJ Rep 12, 18; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion of 8 July) [1996] ICJ Rep 226, 233-4; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July) [2004] ICJ Rep 136, 163, paras 59-60.

[61] Hernandez (n35), p. 79.

[62] Indeed, one scholar argues that '[a]nother argument put forward by States is that, when the underlying facts are based on a case in dispute, the international tribunal cannot or should not render an advisory opinion, because the request may be politically motivated. In such instances, the ICJ has held that any alleged political motivation for an advisory opinion request and any eventual "political implications" of the advisory opinion are irrelevant to the Court's determination of its competence to render the advisory opinion. The Inter-American Court, if confronted by a similar argument, should adopt the ICJ's well-founded position'. Pasqualucci (n1) p. 65.

of a broader legal and political strategy, of which it also makes part the proceedings before and the report issued by the UN Working Group on Arbitrary detentions on the matter.[63]

Thus, the Court should take into account that the request has political implications vis-à-vis states which are not members of the inter-American system. However, in their abstract formulation, the questions asked by Ecuador retain a fundamentally legal character that may have relevance beyond the narrow events surrounding the case of Mr Assange. Concretely, the legal matters indicated in the request have actual and important implications in the American context, particularly regarding policies adopted in the region vis-à-vis asylum-seekers coming to the hemisphere from all over the globe. These written observations address below the actual relevance of the matter, broadly approached, to states and institutions in the region.

Taking into account that the Court has the authority to clarify and reformulate the questions submitted to it in advisory requests, the Project respectfully suggests that the IACtHR should exercise that authority in a manner which allows it to address the broader matter of state obligations vis-à-vis asylum-seekers and refugees under the jurisdiction of American states.[64] This approach would allow the Court to not intervene in matters that are eminently political and may involve non-American states, while at the same time addressing legal concerns connected to problems with actual relevance from an IHRL perspective.

1.2.4. Judicial Propriety

The limits of the Court's discretion in exercising its advisory jurisdiction have been clarified through the Court's previous advisory opinions as well as in orders rejecting advisory requests. In *Other Treaties*, the Court underlined the existence of groups of limitations to the Court's advisory jurisdiction. The first group concerns the limitation ratione materiae to only interpret treaties directly involving the protection of human rights in a member state of the inter-American system.[65] The second group regards requests "likely to undermine the Court's contentious jurisdiction or, in general, to weaken or alter the system established by the Convention in a manner that would impair the rights of potential victims of human rights violations."[66] The third group regards the distinction between the Court's advisory jurisdiction and its contentious jurisdiction. According to the Court:

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[63] HRC Working Group on Arbitrary Detention, 'Opinion No. 54/2015 concerning Julian Assange (Sweeden and the UK) <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17012&LangID=E> accessed 29 April 2016

[64] *Juridical Condition*… (n 23) para 67.

[65] "*Other Treaties*" … (n 2) para 31.

[66] Ibid.

> [The tribunal] shall be particularly careful to avoid a situation in which a reply to the questions [...] could produce, under the guise of an advisory opinion, a determination of contentious matters not yet referred to the Court, without providing the victims with the opportunity to participate in the proceedings, [which] would distort the Convention system.[67]

In this regard, the Court takes into account whether a matter included in the request could potentially reach the tribunal in a contentious case.[68] However, as the Court held, "the existence of a difference concerning the interpretation of a provision does not, per se, constitute an impediment for exercise of the advisory function,"[69] showing that this limitation is not absolute. Another clarification on the interplay between the IACtHR's advisory and contentious functions should be made where the request is based on an underlying dispute between states. The Court has categorically dismissed the claim that it should decline to exercise its advisory jurisdiction in those cases.[70] In *Right to Information on Consular Assistance*, the United States claimed that Mexico had submitted a "contentious case in disguise,"[71] so as to circumvent the Court's lack of contentious jurisdiction over the United States.[72] The Court held that it could examine the ratione materiae of the request without interfering with underlying contentious cases.[73]

To date, the Court has rejected four advisory requests. In its last rejection, the Court outlined the factors that should be taken into account in deciding whether to exercise its advisory jurisdiction.[74] First, the advisory opinion should not covertly address what would otherwise be a contentious case,[75] or be meant to prematurely obtain a pronouncement on an issue which can eventually be submitted to the Court through a contentious case.[76] Secondly, a request should not be used as a mechanism to obtain an indirect pronouncement on a case in litigation or in dispute within a state's territory.[77] Thirdly, the request should also not serve as an instrument for domestic political

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[67] *Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights,* Advisory Opinion OC-12/91 of 6 December 1991, para 28. Re-affirmed in "*Reports of the Inter-American Commission on Human Rights" (Art 51 American Convention on Human Rights*) Advisory Opinion OC-15/97 of 14 November 1997, para. 37.
[68] *Juridical Condition* … (n 23), para 62.
[69] Ibid. and *Legal Status and Human Rights of the Child*, Advisory Opinion OC-17/02 of 28 August 2002, para 31.
[70] Pasqualucci (n 1) p.62.
[71] *Right to Information* … (n 4) para 46.
[72] Pasqualucci (n 1) p.62.
[73] *Right to Information* … (n 4) para 50.
[74] See Request for Advisory Opinion presented to the Secretary-General of the Inter-American Organisation, Resolution of the IACtHR of June 23, 2016. (only in Spanish)
[75] See *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/2002 of 28 August 2002, para 19 and *Article 55 of the American Convention on Human Rights*, Advisory Opinion OC-20/09 of 29 September 2009, para 14.
[76] *Right to Information* ... (n 4) para 45.
[77] Request for Advisory Opinion presented by the Republic of Costa Rica, Resolution of the Inter-American Court of Human Rights of 10 May 2005.

debate.[78] Fourthly, it should not exclusively encompass themes already dealt with by the Court through earlier jurisprudence.[79] Lastly, the request should not seek to resolve issues of fact, but should concern the interpretation of international human rights standards so as to allow their effective implementation.[80]

The ICJ has rejected many arguments as to why it should not entertain a request, claiming that there should be compelling reasons for refusal.[81] Moreover, it has been reluctant to discard a request based on the submitting body's motivations, arguing instead that it cannot judge for the organs who request an advisory opinion whether it will be useful or not.[82] The concept of judicial propriety has been debated at the ICJ in numerous cases, such as in the *Interpretation of Peace Treaties* and the *Namibia* cases.[83] As with the ICJ, the IACtHR's discretion to reject an advisory request is not without limits. The IACtHR held in *Other Treaties*:

> The Court must have compelling reasons founded in the conviction that the request exceeds the limits of its advisory jurisdiction under the Convention before it may refrain from complying with a request for an opinion. Moreover, any decision by the Court declining to render an advisory opinion must conform to the provisions of Article 66 of the Convention, which require that reasons be given for the decision.[84]

Indeed, the aim of the advisory opinion is not "to settle questions of fact, but rather to throw light on the meaning, object and purpose of international human rights norms. Here, the Court is performing an advisory function."[85] In the *Article 55* Advisory Opinion, the Court held that Argentina's request did not constitute mere academic speculation, but was related to a precise situation, the organisation and composition of the Court, a matter of general interest for the region.[86] The Court concluded that its opinion in that regard "could be useful."[87] Similarly, in the

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[78] *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Advisory Opi9nion OC-4/84 of 19 January 1984, para 30.
[79] Request for Advisory Opinion presented by the Inter-American Commission on Human Rights, Resolution of the Inter-American Court of Human Rights of 24 of June 2005.
[80] *Right to Informaiton* ... (n 4) para 47 and *Juridical Condition* ... (n 23) para 63.
[81] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion ICJ Rep 1971 and *Application for Review of Judgement, Article VI, Section 22 of the Convention on the Privileges and Immunities of the United Nations.*
[82] *Nuclear Weapons* … (n 37) para 17.
[83] Hernandez (n 35) p.79-80
[84] *"Other Treaties*" … (n 2) para 30.
[85] *Right to Information* … (n 4) para 47.
[86] *Article 55* … (n 54) para 15.
[87] Ibid., para 17.

Rights and Guarantees of Children Advisory Opinion, the Court stated that "[it] understands that its answer to the request submitted will be of specific usefulness in the context of a regional reality."[88]

In light of these determinations, the Project submits that the underlying problems at stake in the advisory request of Ecuador warrant the exercise of the Court's advisory jurisdiction both because of its relevance for the region, as well as because the setting of legal standards in this regard would be useful vis-à-vis the asylum-seekers and refugees in the Americas. That usefulness is connected to a specific factual context. Some of the main traits of that context are outlined in the following subsection.

Migrants and asylum seekers in the Americas

In 2015, around 63 million migrants resided in North-American and Latin-American and Caribbean countries.[89] The majority of international migrants in Latin America and the Caribbean (66%) originated from a country in the same macro-region, whereas 98% of the international migrants in North America came from different macro-areas.[90] The latest IACHR report on human mobility identified several factors as causes of increased migration flows, including growing socio-economic disparities, the gradual loss of labour guarantees, increased levels in criminal violence and the resulting erosion of human security, the deteriorating economic, social and political situation of different countries, as well as the impact of violence due to wars, armed conflicts and terrorism.[91]

As to asylum-seekers – which for all intends and purposes are themselves migrants – the UNHRC has noted that increasing levels of violence in certain Latin-American countries have produced an increased flow of refugees crossing the border into their neighbours' territories (especially the US).[92] For example, the Colombian conflict has produced over 350,000 refugees.[93] Moreover, 40,000 people crossed the border with Mexico and the US from the so called Northern Triangle of Central America (NTCA), i.e. Guatemala, El Salvador, and Honduras, mainly due to the widespread violence perpetrated in those countries by criminal groups.[94] By mid-2015, asylum

[88] *Rights and Guarantees of Children* … (n 21) para 27.
[89] United Nations Department of Economic and Social Affairs, 'Trends in international migration, 2015' (2015) < http://www.un.org/en/development/desa/population/migration/publications/populationfacts/docs/MigrationPopFacts20154.pdf> accessed 22 March 2017.
[90] Ibid.
[91] IACHR, 'Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System' (2015) para 17 <http://www.oas.org/en/iachr/reports/pdfs/HumanMobility.pdf> accessed 22 March 2017.
[92] UNHCR, *Global Report 2015*, p 96, at < http://www.unhcr.org/574ed7d54.html> (last accessed 22 March 2017).
[93] Ibid
[94] Ibid

applications filed by individuals coming from these countries, reached 55,000 applications globally, more than four times the number of filings in 2010.[95]

According to the UN Executive Committee of the High Commissioner's Programme, the Colombian situation has caused a large flow of asylum seekers into Ecuador.[96] 400 applications per month were filed before Ecuadorian authorities in 2016 alone. 167,000 unregistered Colombians are deemed to reside in Venezuela.[97] In June 2016, the UNHCR launched a Supplementary Budget Appeal to address the large influx of NTCA refugees coming into the United States.[98] Statelessness is endemic in the Caribbean. In Belize, asylum-seekers were left in vulnerable and dire conditions after the hurricane Earl.

Regional responses vis-à-vis the global migration influx are mixed. In 2016, Canada accepted 44,800 refugee applications for resettlement. Argentina has announced its availability to receive 1,600 Syrian refugees, while Chile stated it would receive 120 Syrian refugees.[99] According to the latest IACHR report on human mobility, "OAS member states, as of late 2014 […] were hosting 509,291 refugees and 259,712 persons in refugee-like situations; 237,052 asylum seekers had cases pending at some stage of the asylum process. 209,678 refugees, 258,148 persons in refugee-like situations and 104,820 asylum-seekers came from OAS member states."[100] The IACHR noted that policies implemented by states to control influxes, such as the widespread use of detention and summary deportation proceedings, have been ineffective and unnecessarily oppressive.[101]

In conclusion, setting legal standards that could serve as basis for the design and implementation of policies regarding asylum-seekers and refugees in the region is useful and necessary. The OAS member states would greatly benefit from an advisory opinion broad in scope which, taking into account and using as starting point Ecuador's request, analyses the human rights obligations that American states hold vis-à-vis asylum-seekers and refugees under their jurisdiction.

1.3. CONCLUSION

The Project respectfully submits that the IACtHR enjoys jurisdiction to entertain Ecuador's advisory request with the specific limitations that were highlighted above regarding question C.

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[95] Ibid

[96] UN High Commissioner for Refugees, UN Executive Committee of the High Commissioner's Programme, *Overview of UNHCR's operations in the Americas*, Regional update- Americas of 23 September 2016 at < http://www.refworld.org/country,,UNHCR,,ECU,,57f256634,0.html9> (last accessed 22 March 2017).

[97] Ibid.

[98] Ibid.

[99] Ibid.

[100] 'Human Mobility Inter-American Standards...' (n 81) para 24.

[101] Ibid para 27.

The Project submits that, on the basis of failing to meet specificity requirements, the Court should abstain from addressing (or declares as inadmissible) questions D and G as posed by Ecuador.

The Project also suggests that, taking into account the purpose of the Court's advisory jurisdiction and the admissibility analysis offered previously, the tribunal exercises its authority to clarify and reformulate questions A, B, C, F, and E, and that these be reformulated in a manner consistent with the Court's judicial mandate. The Project respectfully requests that the Court engages the legal issues underlying the advisory petition in a useful manner for states, inter-American institutions, asylum-seekers and refugees under the jurisdiction of American states. Thus, the Project suggests that the Court engages with the following matters and issues when reformulating and clarifying the scope of the questions to be addressed in its advisory opinion:

a) The concept of asylum and refuge in inter-American and international law, and the interplay of these institutions with the principles of equality and non-discrimination, the pro homine principle, and human rights guarantees protected by inter-American and international human rights treaties to which American states are parties to.

b) Concerning diplomatic asylum, whether an application requesting such protection could be refused on the basis of that such request is filed at the diplomatic premises of the requested state. Also regarding diplomatic asylum, the legal consequences and implications for an OAS state (which is a party to a specific convention on asylum or refuge) in the event that a third-party state (whose obligations cannot be determined by the Court for lack of a jurisdictional basis) interferes with its obligations vis-à-vis the asylum seeker/refugee.

c) The content of the right to asylum and its implications vis-a-vis human rights obligations of OAS member states, be them a part to the ACHR or not.

2. ASYLUM AND REFUGE IN PUBLIC INTERNATIONAL LAW

Since the Project is respectfully requesting the Court to embark in a deep and broad exercise of clarification and reformulation of the questions submitted by the requesting state, the questions which ultimately would be addressed by the Court are not yet available. Considering the themes and issues which the Project is suggesting the Court to address in its opinion, sections (2) and (3) offer legal analysis and information concerning the institutions of asylum and refuge (hereinafter only "asylum law" for ease of reference) as regulated in international law and IHRL. These substantive considerations are offered with the purpose of assisting the IACtHR in fulfilling its advisory function.

2.1. INTRODUCTION – THE SUBSTANTIVE CONTENT OF ASYLUM AND REFUGEE LAW: UTILITY OF A STATUS-BASED PARADIGM

The substantive content of asylum law, as constituted through authoritative sources of international law,[102] imposes positive obligations on states to ensure the exercise of rights by individuals. The precise legal content of a state's obligations under international law vis-à-vis the natural person seeking to rely on the law is dependent on the legal status of the natural person. A natural person who has attained the status of "refugee" will be able to exercise treaty and customary-based rights against states – for instance, the right of access to courts, per article 16 of the Refugee Convention.[103] Conversely, those who enjoy "asylum-seeker" status outside the territory or jurisdiction of the sending state will not be able to exercise that same article 16 right until such time as they can meet the definition of a refugee.

Reliance on this paradigm provides a structural framework through which the totality of the law on asylum can be analysed. Regional human rights courts, as well as international courts, draw upon the status of natural persons in order to correctly apply the law. For instance, the Inter-American Court of Human Rights categorises and defines terms of status in the *Rights and Guarantees of Childrn* Advisory Opinion[104] to assist in the exposition of substantive issues raised in the judgment. Envisaging the corpus of asylum law through a status-based paradigm creates consistency with existing IACtHR's case law. This is because the Court has already addressed the question of the legal status and human rights obligations in relation to migrants, which asylum-seekers usually are themselves. The determination of the status and rights of asylum-seekers as a

[102] United Nations, *Statute of the International Court of Justice*, 18 April 1946 ('ICJ Statute') Art. 38(1)
[103] Refugee Convention (n 14) Art. 16
[104] *Rights and Guarantees of Children*… (n 4) para 49

matter of international law and IHRL can be characterised as a necessary complement to the Court's case law.

2.2. MINIMUM OBLIGATIONS

2.2.1. To whom are they owed?

State obligations vis-à-vis asylum-seekers and refugees are recognised by international law. The content of these obligations is contained within a number of treaties, notably the Refugee Convention.[105] Furthermore, certain obligations contained within relevant treaties are considered as having crystallised into customary international law, in accordance with the conditions set out by the ICJ in *North Sea Continental Shelf.*[106] Specifically, because the core obligations of the Refugee Convention are considered have customary status, they are binding upon all states regardless of whether they have ratified that treaty or entered reservations thereto.

Obligations under the Refugee Convention are only predicated upon states as before individuals meeting the definition of refugee.[107] Some obligations are predicated upon asylum-seekers though, which shows that there is a process-based logic underlying the refugee legal regime. Due to the humanistic nature of refugee law, states can exercise, but are not under any duty to do so, the same actions towards asylum seekers who do not meet the definition of refugee. However, some obligations vis-à-vis asylum-seekers do not form part of the set minimum obligations binding on states under customary and treaty law. In other words, obligations under the Refugee Convention which have attained the status of customary law constitute a floor, but states may grant additional protection to asylum-seekers if they so choose as this is not prohibited by general refugee law.[108]

Granting protection under asylum law is considered to be a non-hostile act. Because of this, objections to grants of protection are not sanctioned acts as a matter of international law, even if that protection is granted under a framework providing for additional safeguards established in favour of asylum-seekers vis-à-vis the customary floor of the Refugee Convention. This is consistent with a purposive construction[109] of the Refugee Convention, which object and purpose is the protection of human rights of those fleeing persecution for a variety of broad reasons,[110] i.e. race, religion, nationality, membership of a particular social group or political opinion. That object

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[105] Refugee Convention (n 14)
[106] ICJ, *North Sea Continental Shelf* (Judgment) [1969] ICJ Rep 3
[107] Refugee Convention (n 14) Art. 1
[108] María-Teresa Gil-Bazo, 'Asylum as a General Principle of International Law' [2015] *International Journal of Refugee Law*, 2015, Vol. 27, No. 1, 7, (emphasis in original)
[109] VCLT (n 33) Art. 31(1).
[110] Refugee Convention (n 14) Preamble, Art. 1.

and purpose allows for the protection of individuals whom might not be otherwise beneficiaries of protection under a strict interpretation of the Refugee Convention.

In connection with this point, there are a number of issues deserving of analysis regarding the article 1 of the Refugee Convention.[111] The first matter relates to whether the criteria for having a "well-founded fear of being persecuted" is limited to the five specific reasons stated in the Convention, namely race, religion, nationality, membership of a particular social group or political opinion. Based on the ordinary meaning given to the terms of article 1(2), the inclusion of merely the word "for" before the list – rather than e.g. "for example" – could be taken to imply that the list is exhaustive. The Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook) indicates that, for instance, persecution based on gender[112] including cases of Female Genital Mutilation (FGM) could constitute well-founded fear of being persecuted. However, the causal link "for reasons of" and the five conventional grounds must "be a relevant contributing factor, though it need not be shown to be the sole, or dominant, cause."[113] The UNHCR Handbook indicates that states may require this causal link to be explicit, meaning that a state with a strict definition of causation could seek to subvert a minimum standard by failing to find a causal link between the persecution and one of the five persecution headings.

Most recent international instruments not only define the term "refugee" but also provide for the circumstances in which the benefits of refugee status shall be denied. The UDHR prohibits the invocation of the right of asylum "in the case of prosecutions genuinely arising from non-political crimes," [114] whilst the Refugee Convention provides that the provisions of the Convention do not apply to anyone regarding whom there are "serious reasons for considering that […] he has committed a serious non-political crime outside the country of refuge" in article 1 F (b).[115] Most states have introduced a perfunctory approach to answering the difficult question inherent in the ambiguous nature of the terms "serious" and "non-political" and have based it almost exclusively on the length of the imposable prison sentence. While challenges connected to the meaning of these terms will likely continue over time, it appears that the term "serious" is not limited to crimes extraditable under treaty.[116] Nor is the reverse true: that an offence is extraditable does not guarantee that it meets the definition's standard. A margin of discretion is effectively enjoyed by each state in determining what constitutes a "serious" or "non-political" crime, but that

[111] Ibid Art. 1.
[112] UNHCR 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status' (2011) 81
[113] Ibid 83.
[114] UDHR (n 19) Art. 14.
[115] Refugee Convention (n 14) Art. 1 F(B)
[116] Goodwin-Gill, Guy S & McAdam, J, *The Refugee in International Law* (3rd edn., OUP 2007) 175

determination must be made on the basis of the ordinary meaning and within the legal context and purpose ascribed of the Refugee Convention.[117] Each State thus may determine whether the criminal character of the applicant outweighs his character as a bona fide asylum-seeker.[118] Within the backdrop of ambiguity inherent in the discretion afforded to states, the UNHCR in its Guidelines has made clear that exclusions must be applied proportionately to their objective in order to ensure that their application is "consistent with the overriding humanitarian object and purpose" of the 1951 Convention.[119]

2.2.2. The Principle of Non-Refoulement

The principle of non-refoulment (NR) is solidly grounded in IHRL and refugee law, and is articulated in treaty, doctrine, and customary international law. The principle of NR provides protection for individuals fleeing persecution.[120] The primary source of NR is article 33(1) of the 1951 Refugee Convention (and its 1967 Protocol extending the ratione personae scope of that legal framework), which places an obligation on states not to "expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[121]

The NR principle is expressed in subsequent treaties that provide complementary protection. Article 3 CAT prohibits returning a refugee "where there are substantial grounds for believing that he would be in danger of being subjected to torture,"[122] and is provided for more broadly (albeit implicitly) in the ICCPR. In this context, the non-devolution prohibition extends to situations where individuals may face cruel, inhuman or degrading treatment or punishment.[123] The principle of NR finds support in the Geneva Convention,[124] and is also embodied in regional instruments such as the ACHR.[125]

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[117] Ibid 176
[118] ibid
[119] UNHCR Guidelines No 5 2003 'Exclusion', para24 <http://www.unhcr.org/publications/legal/3f7d48514/guidelines-international-protection-5-application-exclusion-clauses-article.html> accessed 29 April 2017.
[120] Guy S. Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of *Non-Refoulement*.' (2011) 23(3) Intl J Refugee L 444.
[121] Refugee Convention (n 14) Art. 33.
[122] CAT (n 18) Art. 3.
[123] ICCPR (n 19) Art.7 See also Goodwin-Gill et al. (n 116) 209.
[124] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Convention of 12 August 1949), Art.45
[125] ACHR (n 1) Art.22(8)

While some fifty states are still not party to the Refugee Convention, the customary nature of NR ensures its universal applicability. The wealth of treaty law and subsequent state practice confirms the principle's customary status.[126] The opinio juris in favour of NR's customary status has been considered "so overwhelming […] that the requirement of state practice should consequently be sensibly reduced."[127]

NR applies to those who meet the definition of refugee under article 1(a)(2) of the Refugee Convention regardless of whether a Refugee Status Determination (RSD) has been completed or not. That definition does not refer to an individual as "formally recognised as having a well-founded fear of persecution," but simply states that the term will apply to any person "owing to well-founded fear of being persecuted."[128] Given that NR is not limited to those formally recognised as refugees, whether all states mutually recognise the granting of refugee status is, from a refoulement perspective, irrelevant.[129] Thus, as the UNHCR Handbook states "a person is a refugee […] as soon as he fulfils the criteria contained in the definition […] he does not become a refugee because of recognition, but it is recognised because he is a refugee."[130]

Extradition agreements must be read subject to the prohibition on NR. Developments in human rights law at the conventional and customary level prohibit exposing individuals to the risk of torture, cruel, inhumane or degrading treatment or punishment by way of their extradition.[131] Multilateral treaties such as the Inter-American Convention on Extradition[132] also provide support for this position while the Executive Committee of the UNHCR has recognised that refugees should be protected in relation to extradition where they have a well-founded fear of persecution.[133] The terminology "in any manner whatsoever" expressed in article 33(1) of the Refugee Convention further demonstrates that NR must be broadly construed.

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[126] Lauterpacht, E. & Bethlehem, D., 'The Scope and Content of the Principle of Non-Refoulement: Opinion' in Feller, E., Turk, V. and Nicholson, F., eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), 141, para 196

[127] Comments 'a la Kirgis' see Messineo, F. Non-refoulement Obligations in Public International Law: Towards a New Protection Status? In Satvinder Juss (ed), *Research Companion to Migration Theory and Policy*, (Ashgate, 2013) P18

[128] Lauterpacht, E. & Bethlehem, D. The Scope and Content of the Principle of Non-Refoulement: Opinion' in Feller, E., Turk, V. and Nicholson, F., eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), 116, para 90.

[129] Lauterpacht, E. & Bethlehem, D. The Scope and Content of the Principle of Non-Refoulement: Opinion' in Feller, E., Turk, V. and Nicholson, F., eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003), 116, para 90.

[130] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. (Geneva, Re-edited January 1992) available from: http://www.unhcr.org/4d93528a9.pdf at para 28.

[131] Lauterpacht, E et al. (n 126) 112, para 75

[132] Article 4(5); see also Lauterpacht, E et al. (n 126) 112, para 72.

[133] Executive Committee of the High Commissioners Programme, 'Problems of Extradition Affecting Refugees No.17 (XXXI) 1980' para (c) <http://www.refworld.org/docid/3ae68c4423.html> accessed 24 April 2017.

The reference in article 33(1) of the Refugee Convention "to the frontiers of territories where his life or freedom would be threatened" as opposed to "states" has the effect of making immaterial the legal status of the place to which the person may be sent. Instead, the issue is whether the place is somewhere where the person would be at risk, indicating that the principle of non-refoulment will apply even where the refugee is within their country of origin but under the protection of another state.[134]

NR, as recognised by the ICCPR Human Rights Committee[135] and the CAT Committee,[136] also includes protection in instances of "indirect refoulement" where the individual faces being returned to territories where he faces the risk of being expelled to other territories where a risk of persecution exists. While the so-called "chain-refoulement" is complicated by the fact that the initial returning state may not be breaching its non-refoulement obligations where a threat of persecution does not exist, as a matter of state responsibility it may be jointly liable for a further removal of an individual to territories where they face threats to their life or freedom.[137]

Finally, the NR obligation is capable of being altered through the doctrine of assurances. Assurances do not relieve states of their obligation to non-refoule; rather, the obligation to non-refoule is seen as being complied with by means of assurances. The obligation to non-refoule cannot be contracted out of, but "guarantees may be appropriate to ensure that the individual will not be exposed to the death penalty or an unfair trial."[138] However, that sort of assurance is not sufficient when there exists a risk in respect to torture or cruel, inhuman, or degrading treatment.[139]

2.3. DIPLOMATIC ASYLUM IN INTERNATIONAL LAW

Territorial and diplomatic asylum are two separate concepts and should be distinguished. Territorial asylum relates to cases where "the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty. The refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State."[140] Conversely, "[i]n the case of diplomatic asylum, the refugee is within the territory of the State where the offence

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[134] Lauterpacht, E et al. (n 126) 122, para 113/114.
[135] UNHRC, General Comment No.31 (2004) para 12.
[136] UN Committee Against Torture, General Comment No.1 (1997) para 2.
[137] Goodwin-Gill, Guy S & McAdam, J 2007. *The Refugee in International Law Third Edition.* (Oxford, Oxford University Press.) P252/253. See also United Nations General Assembly Resolution 56/83 (2002). Responsibility for Internationally Wrongful Acts. Available from: https://www.ilsa.org/jessup/jessup11/basicmats/StateResponsibility.pdf at art 47.
[138] Goodwin-Gill at al. (n 116) 261-262.
[139] Ibid
[140] ICJ, *Asylum Case (Columbia v Peru)* (Judgment) 1950 ICJ Rep 266, 274

was committed. A decision to grant diplomatic 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 recognized unless its legal basis is established in each particular case."[141]

Regarding whether the tradition of diplomatic asylum has any legal character in international law, this should be analysed in light of the following three principles: (i) diplomatic asylum is not a separate doctrine but shares a core content with other institutions of asylum law, (ii) this core content is articulated through the concept of fundamental human rights obligations, and (iii) this articulation is capable of potentially including expanded human rights obligations.

First, regarding diplomatic asylum as sharing a core content with other aspects of asylum law, the strengthening or weakening of other aspects of the law can affect the legal validity of specific forms of asylum law through state practice. For instance, in the fifteenth and sixteenth centuries an increase in the practice of diplomatic asylum could be explained "by the demise of more traditional forms of asylum, such as the abolition of cities of refuge and the falling into disuse of church sanctuary."[142] Similarly, in the modern era, the effect of extradition treaties could serve to weaken the strength of territorial asylum, which in turn could cause an increase in practice of diplomatic asylum.

Secondly, regarding the nature of the content of asylum law, particularly the articulation of its core content through the prism of human rights, this could contribute towards norms of asylum law gaining the status of customary law more easily than international norms not filtered through this prism. It is important to note, however, that in terms of the creation of a customary norm, a human rights prism may sometimes work against the opinio juris requirement for the crystallisation of customary international law. This is because territorial states may respect asylum granted by the sending state not because they believe themselves legally obliged to do so under international law, but because they are giving effect to extra-legal considerations, such as moral, political or philosophical conceptions of human rights. For instance, during the Spanish Civil War, when natural persons found asylum in diplomatic missions in Madrid, "the official position of the Franco regime was that although Spain was under no obligation to recognise the right to asylum, it would

[141] Ibid 274–275
[142] Maarten Den Heijer 'Diplomatic Asylum and the Assange Case' [2013] *Lieden Journal of International Law* 26 401

act in accordance with international humanitarian practice on the matter and thus respect asylum granted to political offenders."[143]

The tradition of diplomatic asylum does not satisfy the criteria required in order to be considered a customary legal norm in international law, according to Article 38(1)(b) of the ICJ's Statute.[144] In order for an international legal norm to acquire the status of customary international law, widespread state-practice and opinio juris is required. With regard to state practice, exercise of the tradition of diplomatic asylum by states who view themselves as legally obliged to do so is acutely rare outside of Latin America and attempts at codifying the concept outside that region have remained inconclusive.[145] This does not mean that states outside of the Latin-American region cannot grant diplomatic asylum as, per the Lotus presumption, a state is at liberty to do what is not prohibited from doing by a positive rule of international law. There is no need to identify a positive right on the part of the sending state; instead, there would need to be a positive prohibition to grant this kind of protection. The two most likely sources of any such prohibition are diplomatic law and the prohibition of intervention in the affairs of another state. It is not self-evident that these legal frameworks prohibit a sending state from granting diplomatic asylum, at least as a general rule. If positive prohibitions on the granting of diplomatic asylum exist, the existence of general or regional customary international law could modify the validity of the prohibition. Regarding a prohibition on the granting of diplomatic asylum provided by general diplomatic law, the rule regularly highlighted in this regard is article 41(3) VCDR which states that diplomatic premises "must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law."[146]

The definition of "functions" is subject to the provisions of article 3(1) (a) through (e) VCDR. However, that list is not exhaustive. Only literal (e) could be considered as being incompatible with a general rule allowing states to grant diplomatic asylum, namely "promoting friendly relations between the sending State and receiving State." But it is evident from the consistent practice of States that not every act of a diplomatic mission that the territorial state disagrees with is to be categorised as incompatible with the promotion of friendly relations. Especially since the act is considered legal under international law on the basis of the Lotus presumption.

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[143] Ibid 403
[144] ICJ Statute (n 102) Art. 38(1)(b)
[145] Maarten Den Heijer (n 142) 404
[146] Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 ('VCDR') Art. 41(3)

Regarding the prohibition on the intervention in the affairs of another state, per the *Asylum* case, as previously mentioned, it is the stated view of the ICJ that the practice of diplomatic asylum is indeed a violation of the prohibition in intervention in matters exclusively within the competence of the receiving state. There are a number of problems, however, with treating this view as absolutely authoritative. The ICJ recognised that a state does not violate the prohibition on intervention if refusing to surrender a wanted suspect, the only distinction between territorial asylum and diplomatic asylum therefore is the geographical location of diplomatic premises, which in any case are fictionally equated to being the territory of the sending state. Further, diplomatic law does not impose specific limitations on the granting of diplomatic asylum. If diplomatic law is lex specialis, authoritative to the extent that it applies to legal acts that take place on diplomatic premises, then it should be considered whether a negative allowance of diplomatic asylum in the lex specialis overrides the general law on asylum.

It is worth considering whether the tradition of diplomatic asylum could form part of a system of regional customary law, much in the same way as Soviet scholars argued the Brezhnev Doctrine formed part of a separate, but coexisting body of regional customary international law amongst socialist nations.[147] Mainstream consensus, even during the Cold War, rejected the concept of regional customary international law as embodied by the Brezhnev Doctrine. However, after the Cold War, some have gone as far as to decry it as "an obvious mockery of legal theory."[148] Furthermore, the post-cold war directional trend of homogenization in the content of international norms held by the majority of nation-states, would indicate a shift away from the existence of regional customary law. Even if regional customary international law relating to diplomatic asylum is found to exist in the Latin-American context, that rule would not be binding on third states.

In conclusion, the evolution of asylum as an institution of public international law is continually informed by its foundational basis rooted in humanistic norms. This is evidenced by the inclusion of a clear minimum standard placed upon states, yet an open-ended maximum standard which allows states to expand their concept of asylum – to the extent that it does not intervene in the domestic affairs of another state or violates a specific international law rule. The latter caveat ensures that any conception of diplomatic asylum having legal force on the international plane is, under a narrow conception of the institution of asylum, answered in the negative, and under a broad conception, limited only to certain regions of the world.

[147] See, for example, Grigory Tunkin
[148] Vladimir Duro Degan, *Sources of International Law* (The Hague, Martinus Nijhoff 1997) 248

3. ASYLUM AND REFUGE IN INTER-AMERICAN HUMAN RIGHTS LAW

In the context of the Americas, the migration phenomenon is characterised by mixed migration flows that, as the IACHR has observed, poses major challenges to states in the region.[149] The IACHR has repeatedly acknowledged the existence of inadequate measures in the screening and identification process of individuals that form part of these movements, and has pointed out that there are serious deficiencies in terms of due process guarantees and the conditions of immigration detention. This is particularly relevant because within mixed migration flows there are people migrating on their own volition (mainly for economic reasons), and others who are forced to migrate because their lives, safety and/or liberty are in jeopardy. In the Inter-American context forced migration can be a result of various forms of persecution based on race, religion, nationality, membership to a given social group or political opinion, armed conflict, generalized violence or human rights violations, or other circumstances that have seriously disrupted public order, like disasters (natural and human-made). It may also be the result of circumstances where individuals are physically transported across borders without their consent, as in the case of human trafficking[150].

The IACHR has laid out the standards that should direct member states' policies concerning migrants, asylum seekers, refugees, persons in need of complimentary protection, stateless persons, victims of human trafficking, and internally displaced persons. In this context, it is important to bear in mind that individuals who seek international protection when applying for refugee status are in a particularly vulnerable situation, usually associated with the reasons why they fled their countries and the invisibility they report to suffer while their status is not defined. Therefore, the procedure of refugee status determination can only achieve its purpose of protection if its design and implementation is based on the fundamental premise that its rationale is protecting life, integrity and individual freedom.[151]

3.1. DEFINITIONS

3.3.1. Migrants

There is not a generally accepted definition of the term "migrant" at the international level.[152] However, the term refers both to people who move either internationally or internally. An

[149] IACHR, Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards. November 4, 2016, para 44.
[150] Ibid para 3.
[151] Ibid para 44.
[152] Ibid para 124.

international migrant is a person that crosses his or her state's internationally recognised borders with the intention of settling down, either temporarily or permanently, in a different country. Internal migrants migrate from one place to another within the country of which he or she is a national, to settle there either temporarily or permanently. The IACHR also recognises the existence of what it calls "stateless migrants" as any person who is outside his or her state of birth or habitual residence. [153]

3.3.2. Refugees

What differentiates refugees from other international migrants is the cause that drove them to emigrate, which is a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."[154] Regional particularities called for an expansion of the definition of "refugee" in the Americas and to include "persons who have fled their countries because their life, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."[155] This scope has been supported by the IACtHR.[156] This approach reflects a trend in the region to consolidate a more inclusive definition that must be taken into account by the states when assessing asylum-seekers' applications.

It is important to indicate that a person is a refugee as soon as she meets the requirements set out in the definition, and thus, recognition of refugee status is not constitutive but declarative in character. This means that refugee status is not acquired because of recognition, but recognized because of the virtue of being a refugee.[157]

3.3.3. Asylum Seeker

The IACHR defines asylum seeker as a person who has requested recognition of his or her refugee status or condition, and whose petition has not yet been decided.[158]

3.3.4. Complementary Protection

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153 Convention on the Status of Stateless Persons (adopted 28 September 28, entered into force on 6 June 1960) Art. 1. In resolution 2665 (XLI-O/11) the OAS General Assembly reaffirmed the importance of the United Nations Convention's concept of the status of stateless persons.
154 Refugee Convention (n 14) Art. 1.
155 Cartagena Declaration on Refugees (22 November1984) 3.
156 *Case Pacheco Tineo family v. Bolivia. Preliminary Objections, Merits, Reparations and Costs* (IACtHR) para.141
157 IACHR, 'Human Rights of Migrants…' (n 91) para 132
158 ibid; *Rights of Children in the Context of Migration* OC-21/14 (n 4) para 49.

Complementary protection, or subsidiary protection, are legal mechanisms used in cases where persons in need of international protection do not meet the established requirements to be granted refugee status. These mechanisms make it possible to regularize the stay of persons who are not recognized as refugees but whose return would be contrary to the general obligations of non-refoulement contained in various human rights instruments.[159]

3.3.5. Internally Displaced Person

Internally displaced persons (IDP) are individuals or groups of people who have been forced to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.[160] Within the definition of IDPs given by the Guiding Principles, the use of the expression "in particular" means that the list therein is not an exhaustive, meaning that there can also be other possible causes of internal displacement, like the development projects on a large scale that may lead to the arbitrary displacement of persons.[161]

The basic premise underlining the protection regime devised by regional instruments vis à vis migrants is that they find themselves in a vulnerable situation as subjects of human rights. This situation of vulnerability "has an ideological dimension and occurs in a historical context that is distinct for each State and is maintained by de jure [inequalities between nationals and aliens in the laws] and de facto [structural inequality] situations." This leads to the establishment of differences in their access to public resources managed by the state.[162] There are also cultural biases about migrants that lead to the reproduction of the circumstances of their vulnerability such as ethnic prejudices, xenophobia, and racism.[163] Moreover, the General Assembly of the United Nations notes that it is important to bear in mind "the situation of vulnerability in which migrants frequently find themselves, owing, inter alia, to their absence from their State of origin and to the difficulties they encounter because of differences of language, custom and culture, as well as the

[159] IACHR, 'Human Rights of Migrants…' (n 91) para 133.
[160] UN Report of the Representative of the Secretary General on Internally Displaced Persons, Francis M. Deng, submitted pursuant to resolution 1997/39 of the Commission on Human Rights, Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2 of 11 February 1998, Introduction: Scope and Purpose.
[161] IACHR, 'Human Rights of Migrants…' (n 91) para 141.
[162] See *Juridical Condition and Rights of the Undocumented Migrants* OC-18/03 (n 43) para 112; *Case of Pacheco Tineo Family* (n 156) para 128.
[163] *Juridical Condition and Rights of the Undocumented Migrants* OC-18/03 (n 43) para 113.

economic and social difficulties and obstacles for the return to their States of origin of migrants who are non-documented or in an irregular situation."[164]

This situation exposes migrants who are undocumented or in an irregular situation to "potential or real violations of their rights and, owing to their situation, suffer a significant lack of protection for their rights".[165] Given the situation of vulnerability in which migrants may find themselves, special duties may arise from the general obligations to respect and to ensure rights. These duties will vary depending on the particular needs of protection of the subject of law, owing either to his personal situation or to the specific situation in which he finds himself.[166]

It should be noted that States are not prevented from taking action against migrants who do not comply with national laws. However, any measure must respect human rights since states must ensure the exercise of human rights within their territory, without any discrimination based on regular or irregular status, nationality, race, gender or any other reason.[167]

3.2. CORE PRINCIPLES

3.2.1. Principles of equality and non-discrimination

That a person finds herself in a regular situation in a state is not a prerequisite for that state to respect and ensure the principles of equality and non- discrimination. States may not discriminate or tolerate discriminatory conduct against migrants. States may, however, accord distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals. This distinct treatment must be reasonable, objective, and proportionate. Distinctions could be made inter alia regarding the exercise of political rights and limitations connected to mechanisms regulating entry and departure to a given state may be imposed human rights are not disproportionately affected.[168] Under international law, certain limits apply regarding the application of migratory policies that impose, in proceedings on the expulsion or deportation of aliens, strict observance of the guarantees of due process, judicial protection and respect for human dignity, whatsoever the legal situation or migratory status of the migrant may be.[169]

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[164] United Nations General Assembly, Resolution A/RES/54/166 on "Protection of migrants" of 24 February 2000.
[165] *Case of Pacheco Tineo Family* (n 156) para 128; Cfr.
Case of Vélez Loor v. Panama. Preliminary objections, Merits, reparations and costs (IACtHR) para 98; also *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs* (IACtHR) para 152.
[166] *Case of Pacheco Tineo Family* (n 156) para 128; *Case of the Pueblo Bello Massacre v. Colombia. Merits, reparations and costs* (IACtHR) para 111; *Case of the Santo Domingo Massacre v. Colombia* (IACtHR) para 188.
[167] *Juridical Condition and Rights of the Undocumented Migrants* OC-18/03 (n 43) para 118.
[168] Ibid paras 118, 119.
[169] *Case of Pacheco Tineo Family* (n 156) para 129.

When dealing with migrants, it is important to identify core state duties underpinning the respect and protection of their personal security and life. The right to due process is one such core duty. According to the IACtHR, this right refers to "all the requirements that must be observed in the procedural stages in order for an individual to be able to defend his rights adequately vis-à-vis any [...] act of the State that could affect them. That it to say, due process of law must be respected in any act or omission on the part of the State bodies in a proceeding, whether of an administrative, punitive or jurisdictional nature".[170] It is important to consider that all measures adopted to control migratory flows, among which detention can be included, should never be enforced for punitive purposes. This is because the state can only exercise punitive powers as strictly necessary to protect fundamental rights from the most serious attacks that harm or endanger them.[171] Thus, detention would only be justified once an individual evaluation has been carried out in order to determine the possibility of using less restrictive measures.[172]

For the above reasons, all personal circumstances of each person must be assessed on an individual basis in the context of a process that may lead to expulsion or deportation. This assessment must be carried out without any discrimination based on nationality, colour, race, sex, language, religion, political opinions, social status or other condition.[173]

Moreover, from the situation of vulnerability in which migrants find themselves follows the prohibition of devolution enshrined in article 22(8) ACHR. In this regard, the Court has stated that an alien cannot be returned or deported to "a country, regardless of whether or not it is his country of origin" in which "his right to life or personal freedom" are "in danger of being violated because of his race, nationality, religion, social status, or political opinions." Consequently, if the preceding norms are "complemented by the international corpus juris applicable to migrants, it may be considered that, under the inter-American system, the right of any alien, and not only refugees or asylees, to non-refoulement is recognized, when his life, integrity and/or freedom are in danger of being violated, whatsoever his legal status or migratory situation in the country where he is."[174] This imposes upon states the obligation to make a prior or preliminary assessment in order to determine if such a risk exists. If that risk is verified as being plausible, the individual cannot be refouled to her country of origin.[175]

[170] Ibid para 130.
[171] Ibid para 131.
[172] Ibid.
[173] Ibid para 133.
[174] Ibid para 135.
[175] Ibid para 136.

Regarding the particular category of refugees and asylum seekers, the reasons that drove them to migrate qualify their situation and impose upon states specific obligations regarding their protection. In the specific context of the Americas, the "the Latin American asylum tradition" has arisen as a result of the adoption of a series of treaties related to territorial and diplomatic asylum, as well as on non-extradition on political grounds.[176] Article 22(7) ACHR provides that "[e]very person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the States and international conventions, in the event he is being pursued for political offenses or related common crimes." Thus, there are two cumulative criteria necessary for the existence or exercise of this right: (a) "[…] in accordance with the legislation of the State[…]," in other words, of the State in which asylum is requested, and (b) "[…] in accordance with […] international conventions." This concept, included in the text of Article 22(7) of the Convention, understood in conjunction with the recognition of the right to non-refoulement of article 22(8), defines the interrelationship between the scope and content of these rights and international refugee law.[177]

As regards the second criterion set forth in subsection (b) of Article 22(7) ACHR, the IACHR has stated that international conventions should be read as the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. In relation to those treaties, the IACHR noted that the 1951 Refugee Convention defined certain criteria by which an individual qualified as a "refugee" and that international law had developed to a level in which there was recognition of a right of a person seeking refuge to a hearing in order to determine whether that person met the criteria set for in the convention.[178]

The vulnerability upon which the refugee status regime is premised determines inter alia that the main consequence of this status is the applicability of the non- refoulment principle. The meaning and scope of this principle is broader in meaning and scope under the inter-American system "*due to the complementarity that exists in the application of international refugee law and international human rights law*."[179] This principle constitutes the basis of the system of international protection of asylum-seekers. This principle is also a customary norm, and is enhanced in the inter-American system by the recognition of the right to seek and receive asylum.[180]

[176] Ibid para 137.
[177] Ibid para 142.
[178] IACHR, 'Human Rights of Migrants…' (n 91) para 425.
[179] *Case of Pacheco Tineo Family* (n 156) para 151.
[180] Ibid.

As previously mentioned, this principle protects all persons regardless of their legal status or migratory situation. Article 33 of the 1967 Protocol establishes that "no contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Due to the principle of non-refoulement, individuals cannot be turned back at the border or expelled without an adequate and individualised analysis of their application.[181] States must ensure that those who request asylum have access to fair and efficient asylum proceedings before adopting any decision to expel them. States are also prevented from deporting or retuning those requesting asylum in cases where there is a possibility that he or she may risk prosecution. Likewise, states cannot deport these persons to a country from which they may be returned to the country where they suffered this risk (the so-called "indirect refoulement.")[182]

The determination of refugee status is of utmost importance. The nature of the rights that could be affected by an erroneous determination of the risk or an unfavourable outcome in the asylum application process determines that the guarantees of due process are applicable, as appropriate, to this type of proceeding which is usually of an administrative character. Thus, proceedings must be predictable, and the decision-making process must be implemented in a fashion which prevents arbitrariness.[183]

More specifically, the right to seek and to receive asylum established in Article 22(7) of the American Convention, coupled with Articles 8 and 25 of that instrument, entitles a person applying for refugee status to be heard by independent and impartial decision-makers at all stages of proceedings which may lead to the recognition of refugee status, expulsion or deportation of asylum-seekers.[184]

3.3. THE INTER-AMERICAN SYSTEM, ASYLUM AND REFUGE

3.3.1. Overview

In the context of refugees and asylum seekers, given their aforementioned condition of vulnerability, the inter-American system has established a number of safeguards necessary for to ensure their protection, which are included in the American Convention on Human Rights in its

[181] IACHR, 'Report on the situation of the human rights of applicants for asylum under the Canadian system for the determination of refugee status' OEA/Ser.L/V/II.106. Doc. 40. Rev. 1 (28 February2000) para 111.
[182] *Case of Pacheco Tineo Family* (n 156) para 153.
[183] Ibid para 158.
[184] Ibid para 155. Costs.

articles 1 (obligation to respect rights), 2 (domestic legal effects), 5 (Right to humane treatment), 8 (right to fair trial), 14 (right to reply), 17 (rights of the family), 19 (rights of the child), 22 (Freedom of Movement and residence - which include the right to seek and be granted asylum 21.7), 24 (right to equal protection), 25 (right to judicial protection), 31 (recognition of other rights), 62.3 (jurisdiction of the Court), and 63.1 (remedies).

The American Declaration also develops the content of rights and duties relevant for asylum-seekers. Those rights include inter alia article I (right to life, liberty and personal security), II (right to equality before law), VI (right to a family and to protection thereof), VIII (right to residence and movement), XVII (right to recognition of juridical personality and civil rights), XVIII (right to a fair trial), XXIV (right of petition), XXV (right of protection from arbitrary arrest - which includes right to have the legality of his detention ascertained), XXVI (right to due process of law), and XXVII (right of asylum).

Bearing in mind that the IACHR has identified a tendency of countries in the region to push out their borders and control immigration outside their territory,[185,] the complementary element of the obligation to protect human rights becomes vital since it compels states to broadly construe those rights. This was stressed in the *Juridical Condition and Rights of the Undocumented Migrants*, where the IACtHR held that the migratory status of a person could not be used as justification for depriving her of the enjoyment and exercise of human rights. The criterion goes hand in hand with the rule found in the American Declaration regarding the migration policies of state members and their consistency with human rights instruments.

The Court has also held that the obligation to respect human rights entails the obligation "not to violate," by commission or omission, the rights recognised by the Inter-American system. This reinforces the idea that obligations under the Inter-American system not only include a restriction of the exercise of state power but also does implies a duty to ensure,[186] to prevent,[187] and to investigate, prosecute and punish.[188] All these obligations define the duties that states in the region must ensure when interacting with its nationals and the migrants in their territory (including refugees and asylum seekers).

There is also a recognition of "minimum guarantees" in regards to the proceedings where asylum and refugee status are decided, which are included under the umbrella of the Due Process right

[185] Ibid 72.
[186] *Case of Velásquez Rodríguez v. Honduras* (IACtHR) para 63.
[187] *Case of González et al. ("Cotton Field") v. Mexico* (IACtHR) para.63.
[188] *Case of Barrios Family v. Venezuela* (IACtHR) para 174.

and the equal treatment before law principle. Furthermore, additional guarantees must be observed: the right of every person to be informed of the charges against him or her, the right of defence against any charges against him or her, the possibility of requesting and receiving legal assistance, translation and interpretation assistance, the right to consular assistance, the right to submit the decision to review and the right to be duly notified of the deportation decision.[189] In case of applying a different treatment between migrants or nationals, or between different migrants, states must prove that treatment is reasonable, objective and proportionate.[190]

3.3.2. Obligations of states to acknowledge 'refugee status' and conclusion

The right to apply for and be granted asylum in the Inter-American system overlaps with the right to freedom of movement and residence.[191] This right binds states to various obligations, including the obligation to not expel from the territory any national or to deprive her of the right to enter it. The Court has held that the right of movement and residence is an indispensable condition for the free development of an individual, which can be breached if the state in question does not provide means to allow for that right to be exercised.[192] This means that the right does not only imply a negative right (to not interfere), but also to positively ensure the means to allow a person to reside and move within its territory without harassment or threats.

However, this right should not be confused with the right to seek and receive asylum, even if these concepts have common origins and implications. The right of asylum in the context of the Americas has its grounds in the tradition of diplomatic asylum and non-extradition on political grounds, and the recognition of those rights codified in human rights instruments.[193] The adoption of the 1951 Convention and its 1967 Protocol established the basic principles for the protection of refugees. The ACHR adopted those concepts in articles 22(7) and 29(b).

The Inter-American Commission of Human Rights has established that the right to asylum contains two accumulative conditions that must be satisfied for the recognition and respect of the right: (i) this right must be regulated in accordance to the laws of the country where the asylum has been sought, and (ii) with the international instruments.[194] This criteria gives states the ability to determine its own regulations for the purpose of determining asylum/refugee status, as long as

[189] *Case of Pacheco Tineo Family* (n 156) para 133.
[190] *Juridical Condition and Rights of the Undocumented Migrants* OC-18/03 (n 43) paras 119, 121.
[191] ADHR, Art. 22.
[192] *Case of Valle Jaramillo v. Colombia* (IACtHR) para 139.
[193] Ibid.
[194] IACHR, Report No. 51/96 para 153-55.

those procedures contemplate the requirements of the 1951 Convention, its Protocol and other international treaties..

It must be stressed that the Court has held that once a person is given the refugee status "this protects the person to whom this has been recognised beyond the borders of that State,"[195] which obliges other states to respect that status and to take it into account when adopting their own migratory measures. This marks a great difference with what has been provided in other regions, as the Court has stated that the status of a refugee shall be respected and considered by other states when applying migratory measures, especially in cases of deportation.

This approach has implications vis-à-vis the concept of inter-American public order, in that decisions made by one state condition the content and scope of obligations of other states in the Americas. Thus, the Court should establish a legal framework regarding rights and duties connected to the institution of asylum from the perspective of both the Convention-based system, as well as from the OAS Charter-based system. This would ensure coherence, consistency and regional recognition of the rights of asylum-seekers and refugees within the jurisdiction of any American state. The issuance of an advisory opinion in those terms would result in an invaluable contribution to both states and human rights victims in the region.

[195] Ibid para. 150