INTER-AMERICAN COURT OF HUMAN RIGHTS

ADVISORY OPINION OC-25/18
OF 30 MAY 2018
REQUESTED BY THE REPUBLIC OF ECUADOR

THE INSTITUTION OF ASYLUM AND ITS RECOGNITION AS A HUMAN RIGHT IN THE INTER-AMERICAN SYSTEM OF PROTECTION (INTERPRETATION AND SCOPE OF ARTICLES 5, 22.7 AND 22.8 IN RELATION TO ARTICLE 1(1) OF THE AMERICAN CONVENTION ON HUMAN RIGHTS)

The Inter-American Court of Human Rights (hereinafter referred to as "the Inter-American Court", "the Court" or “the Tribunal”), composed of the following Judges*:

Eduardo Ferrer Mac-Gregor Poisot, Chairman;
Eduardo Vio Grossi, Vice President;
Humberto Antonio Sierra Porto, Judge;
Elizabeth Odio Benito, Judge, and
L. Patricio Pazmiño Freire, Judge;

Also present:

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

in accordance with Article 64(1) of the American Convention on Human Rights (hereinafter referred to as "the American Convention" or "the Convention") and with Rules 70 to 75 of the Rules of Procedure of the Court (hereinafter "the Regulations"), the Court issues the following Advisory Opinion, which is structured as follows:

* Judge Eugenio Raúl Zaffaroni did not attend the 124th Regular Session of the Inter-American Court for reasons of force majeure, which was accepted by the plenary. For this reason, he did not participate in the deliberation and signing of this advisory opinion.

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I.
THE APPLICATION FOR CONSULTATION

1. On 18 August 2016 the Republic of Ecuador (hereinafter referred to as "Ecuador", "the State of Ecuador" or "Requesting State"), based on Article 64(1)[1] of the American Convention, and pursuant to Rules 70(1) and 70(2)[2] of the Rules of Procedure, submitted an application for an Advisory Opinion concerning "the institution of asylum in its various forms and the legality of its recognition as a human right of all persons in accordance with the principle of equality and non-discrimination" (hereinafter 'the request' or 'the consultation').

2. Ecuador outlined the considerations that led to the consultation and noted that:

> Since their origins as independent republics, the States of Latin America have affirmed their increasing concern for the protection of the basic human rights, such as the rights to life, personal integrity, safety and liberty, of those who have committed politically-motivated offenses or been victims of acts of political persecution or discrimination. In the case of political offenders, these individuals have frequently been accused of ordinary crimes in order to prevent the granting of this protection, or to terminate such protection so that they may be subjected to punitive measures under the appearance of judicial proceedings. Consequently, both Latin American constitutions and the so-called inter-American system have established the institutions of territorial asylum, comparable to refuge, and diplomatic asylum in diplomatic missions among other places legally designated for this purpose.
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> The institution of diplomatic asylum [was] Initially conceived as a power of the State that grants asylum, and was transformed into a human right following its enshrinement in various human rights instruments such as the American Convention on Human Rights (Article 22(7)), and the American Declaration of the Rights and Duties of Man (Article XXVII). [This is] an institution that has been specifically codified by regional treaties, the first of these being the 1889 Montevideo Treaty on International Penal Law, and the most recent the 1954 Caracas Conventions on Diplomatic Asylum and on Territorial Asylum. These instruments on diplomatic and territorial asylum, combined with the mechanism of non-extradition on political grounds, are now known as *the Latin American asylum tradition*.
>
> Ecuador considers that, when a State grants asylum or refuge, it places the protected person under its jurisdiction, either by granting him asylum in application of Article 22(7) of the

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1 Article 64 of the American Convention: "1. 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. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments."

2 The relevant parts of Article 70 of the Rules of Procedure of the Court state that: "1. Requests 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. 2. Requests for an advisory opinion submitted by a Member State or by the Commission shall, in addition, identify the provisions to be interpreted, the considerations giving rise to the request, and the names and addresses of the Agent or the Delegates".

*** Translator's note: The Court has not issued an official English translation at the time of publication (13 September 2018). The original Advisory Opinion can be found at: http://www.corteidh.or.cr/docs/opiniones/seriea_25_esp.pdf*

American Convention on Human Rights, or by according him refugee status under the 1951 Geneva Convention.

Consequently, Ecuador understands that these international instruments have expressed the will of the international community as a whole to recognize asylum as a right that is exercised universally and by any method or form that it takes under the laws of the State granting asylum and/or the provisions of international conventions.

In the opinion of Ecuador, all the provisions [such as Article 5 of the 1951 Convention] confer unity and continuity on the right to asylum or refuge so that the recognition of this right is materialized to the extent that the principle of equality and non-discrimination is strictly complied with, and the protection granted is the same in all circumstances and without any distinctions of an unfavorable nature. Therefore, no adverse distinction between asylum and refuge is admissible because, from a legal point of view, the important element is that the person concerned is prot ected by the jurisdiction of the host State.

Articles 22(7) of the American Convention on Human Rights and 14(1) of the Universal Declaration of Human Rights establish the right of asylum without distinguishing or differentiating between the different methods, forms or categories of asylum[,...] granting of this right is a prerogative of the host State, supported by the right inherent in its sovereignty to evaluate the situation. Consequently, in ultimate instance, it is the State granting asylum that has the capacity to decide to accord this right to those who have well-founded fears of being real or potential victims of acts of politically-motivated persecution, or of any type of discrimination that they perceive to be a real or potential threat to their life or personal integrity, liberty and safety; [...] In this situation, the host State plays an important political and social role by providing protection to political offenders and victims of discrimination, and it protects them by means of its laws and institutions, because such persons are under its jurisdiction.

[Accordingly, for Ecuador] all forms of asylum are, of necessity, universally valid, and this condition is the inevitable consequence of the universality of the legal principle of non-refoulement, the absolute nature of which covers asylum granted under a universal [1951] convention, but also asylum provided under a regional agreement or the domestic law of a State.

[The State of Ecuador stressed that, in accordance with] Article 41 of its Constitution, recognizes both rights: that is, the right to seek asylum and the right to seek refuge and this includes, in each case, diplomatic asylum and territorial asylum. In addition, Ecuador is a signatory of the Conventions on Diplomatic Asylum and on Territorial Asylum under the inter-American system, as well as a State party to the 1951 Geneva Convention relating to the Status of Refugees and its 1967 New York Protocol.

Similarly, asylum, in any form or category, also gives rise to other obligations *erga omnes*, such as the obligation of a State that is not a signatory to a specific asylum convention not to cause any kind of obstruction, impediment or interference that would prevent the State that is a signatory to that convention from complying with the commitments and obligations that allow it to ensure effective and timely protection of the fundamental rights of the asylum-seeker or refugee.

The norms of interpretation contained in Article 29 of the American Convention and Article 5(1) of the International Covenant on Civil and Political Rights, as well as in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, together with the *pro homine* principle allow a broad scope and content to be attributed to Article 22(7) of the American Convention, as regards the different forms of asylum and the achievement of this norm's universality.

The Inter-American Court has made important rulings on several norms and principles of human rights that appear in the American human rights declarations and conventions and that, directly or indirectly, have an impact on the effective application of Article 22(7) of the American Convention on Human Rights.

Based on these provisions, Ecuador seeks to clarify the nature and scope of the institution of asylum and, to this end, to determine the interpretation that ensures the most effective implementation of Article 22(7) of the American Convention on Human Rights.

3. Based on the above, Ecuador submitted the following specific questions to the Court:

a) Taking into account, in particular, the principles of equality and non-discrimination based on any social condition established in Articles 2(1), 5 and 26 of the International Covenant on Civil and Political Rights, the *pro homine* principle, and the obligation to respect all human rights of every person in every circumstance and without adverse distinctions, as well as Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, Article 29 of the American Convention on Human Rights, and Articles 28 and 30 of the Universal Declaration of Human Rights: Is it admissible that a State, group, or individual execute actions or adopt a conduct that, in practice, signifies disregard for the provisions established in the human rights instruments mentioned above, including Article 5 of the Geneva Convention relating to the Status of Refugees and thus attributes to Articles 22(7) and XXVII of the American Convention and of the American Declaration of the Rights and Duties of Man, respectively, a restricted content as regards the form or method of asylum, and what should be the legal consequences on human rights and fundamental freedoms of persons affected by such a regressive interpretation?

b) Is it admissible that a State, which is not a party to a specific convention on asylum, obstructs, prevents or restricts the action of another State that is a party to that convention, so that the latter is unable to fulfill the obligations and commitments it assumed under that instrument, and what should be the legal consequences of this conduct for the person who has been granted asylum?

c) Is it a admissible that a State, which is not a party to a specific convention on asylum, or which belongs to a different regional legal system from the one based on which asylum was granted, hand over the person who has been granted asylum or refugee status to the agent of persecution, violating the principle of *non-refoulement*, on the pretext that the person granted asylum loses this condition because he is in a country outside the said legal system due to exercising his right to freedom of movement, and what should be the legal consequences of this conduct on the right of asylum and the human rights of the person granted asylum?

d) Is it admissible that a State adopt a conduct that, in practice, restricts, reduces or impairs any form of asylum, arguing that it does not consider valid certain tenets of legal and ethical value such as the principles of humanity, the dictates of the public conscience, and universal morality, and what should be the legal consequences of the disregard for such tenets?

e) Is it admissible that a State refuse asylum to a person who requests this protection in one of its diplomatic missions alleging that granting it would be misusing the premises occupied by the Embassy, or that granting it in this way would be extending diplomatic immunity unduly to a person who does not have diplomatic status, and what should be the legal consequences of these arguments on the human rights and fundamental freedoms of the person concerned, taking into account that he could be a victim of political persecution or acts of discrimination?

f) It is admissible that the host State refuse a request for asylum or refuge, or revoke the status granted, because complaints have been filed or legal proceedings have been opened against the said person, when there are clear indications that those complaints are politically-motivated and that handing him over could lead to a chain of events that would result in him suffering serious harm; namely, capital punishment, life imprisonment, torture or cruel, inhuman or degrading treatment?

g) Whereas States have the power to grant asylum and refuge based on express provisions of international law that recognize these rights for humanitarian reasons, and on the need to protect the weakest and most vulnerable when certain circumstances cause such persons to have well-founded fears for their safety and liberty. And, whereas States may exercise this prerogative pursuant to Article 22(7) of the American Convention, Article 14(1) of the Universal Declaration of Human Rights, explicit provisions of the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol of New York, as well as regional conventions on asylum and refuge, and their domestic laws, provisions that recognize the host State's right to evaluate each request, which includes the assessment and appraisal of all the elements and circumstances that give rise to the fears of the asylum-seeker and give grounds for his search for protection, including any ordinary offenses that the agent of persecution seeks to attribute to him, as this is reflected in Articles 4(4) and 9(c) of the Inter -American Conventions on Extradition, and on Mutual Legal Assistance in Criminal Matters, respectively.

Therefore, based on the preceding premises and in light of the obligation *erga omnes* prohibiting torture, as established in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Articles 5, 7 and 8 of the 1969 American Convention on Human Rights (which establish the right to humane treatment, the right to personal liberty, and the right to a fair trial, respectively), if a mechanism of the United Nations System responsible for the protection of human rights determines that the conduct of a State may be interpreted as disregard for the right to evaluate the situation exercised by the host State, thus causing the undue continuation of the asylum or refuge, and, on this basis, this mechanism has established that the procedure followed by the said State entails the violation of the procedural rights of the person granted refugee status or asylum established in the articles of the American Convention cited above and also in Articles 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights (the right

not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right to liberty and security of person, so that no one shall be subjected to arbitrary arrest or detention; the right of all persons deprived of their liberty to be treated with respect for the inherent dignity of the human person, and the right of all persons to equality before the courts and tribunals, as well as other judicial guarantees, respectively): Is it admissible that the State which has been the subject of a decision or ruling of a multilateral mechanism belonging to the United Nations System in which it is attributed with responsibility for violating the rights established in Articles 5, 7 and 8 of the American Convention, and Articles 7, 9, 10 and 14 of the International Covenant on Civil and Political Rights of a person who has been granted asylum or refuge requests judicial cooperation in criminal matters from the host State without taking into account the said ruling, or its responsibility in the impairment of the rights of the person granted asylum?

4. The requesting State appointed Ms María Carola Iñiguez Zambrano as its agent, Under-Secretary of Supranational International Organizations of the Ministry of Foreign Affairs, and Ambassador Claudio Cevallos Berrazueta as its alternate agent for this application. In addition, Ecuador appointed Ambassador Pablo Villagómez and Mr. Baltasar Garzón Real as its advisors.

II.
COURT PROCEEDINGS

5. By Notes of 17 November 2016, the Registry of the Court (hereinafter “the Secretariat"), in accordance with the provisions of Article 73(1) of the Rules of Procedure[3] shared the consultation with the other member States of the Organization of American States (hereinafter referred to as "OAS"), the Secretary General of the OAS, the President of the Permanent Council of the OAS, the Chairman of the Inter-American Juridical Committee and the Inter-American Commission on Human Rights (hereinafter referred to as "the Inter-American Commission" or "the Commission"). In these communications it was reported that the President of the Court, in consultation with the Tribunal, had set 31 March 2017 as the deadline for the submission of written comments on the application mentioned above. Likewise, following the instructions of the President and in accordance with the provisions of Article 73(3) of the said Regulations,[4] the Secretariat, by means of notes of 22 November 2016, the Court invited various international organizations and civil society and academic institutions of the region to submit, in the aforementioned period, their written opinion about the points submitted for consultation. Finally, an open invitation was made through the website of the Inter-American Court to all interested parties to present their written opinion about the points submitted for consultation. The previously established term was extended until 4 May 2017, so there was approximately six months to submit presentations.

6. The deadline was met and the following written observations were received by the Secretariat:[5]

3 Rule 73(1) of the Rules of Procedure of the Court: "Upon receipt of a request for an advisory opinion, the Secretary shall transmit copies thereof to all of the Member States, the Commission, the Permanent Council through its Presidency, the Secretary General, and, if applicable, to the OAS organs whose sphere of competence is referred to in the request.".

4 Article 73 (3) of the Rules of Procedure of the Court: "The Presidency may invite or authorize any interested party to submit a written opinion on the issues covered by the request. If the request is governed by Article 64(2) of the Convention, the Presidency may do so after prior consultation with the Agent. .”

a. Written comments submitted by OAS States: (1) Argentine Republic (hereinafter referred to as "Argentina"); (2) Belize; (3) Plurinational State of Bolivia (hereinafter referred to as "Bolivia"); (4) Republic of Guatemala (hereinafter referred to as "Guatemala"); (5) Jamaica; (6) United Mexican States ("Mexico"), and (7) Republic of Panama ("Panama");

b. Written Observations submitted by OAS bodies: Inter-American Commission on Human Rights;

c. Written comments submitted by international organizations: Office of the United Nations High Commissioner for Refugees (UNHCR);

d. Written comments submitted by intergovernmental and state agencies, international and national associations, non-governmental organizations and academic institutions: 1) Institute of Public Policy and Human Rights (IPPDH) of MERCOSUR; 2) Interamerican Association of Public Defenders (AIDEF); 3) Public Defender of União de Brasil; 4) Human Rights Commission of the Federal District of Mexico; 5) Norwegian Refugee Council; 6) International Directorate Center (CEDIN); 7) Asylum Access Ecuador; 8) Spanish Association for International Human Rights Law; 9) Camex Oxlajuj Ix Consulting and International Mission of Verification (MIV); 10) International Legal Office for Cooperation and Development (ILOCAD) and other interested parties that signed the document; 11) Without Borders IAP; 12) Mexican Commission for the Defense and Promotion of Human Rights; 13) Central American University José Simeón Cañas; 14) Center for Human Rights at the Catholic University Andrés Bello; 15) Faculty of Law and Political Science of the University of San Buenaventura Cali; 16) Department of Constitutional Law of Externado University of Colombia; 17) Autonomous Technological Institute of Mexico (ITAM); 18) Center of Human Rights of the Pontifical Catholic University of Ecuador; 19) Faculty of Legal and Social Sciences of Rafael Landívar University; 20) School of Law of the Universidad EAFIT Medellín; 21) Tijuana Law School of the Autonomous University from Baja California; 22) University College London "Public International Law Pro Bono Project"; 23) Centro Universitário Antônio Eufrásio de Toledo of Presidente Prudente; 24) Clinic of Human Rights and Environmental Directorate of the State University of Amazonas; 25) Migrant, Refugee and Human Trafficking Clinic of the Public Interest Group of Northern University; 26) Faculty of University of Rio de Janeiro, Janeiro State; 27) Legal Clinic for Human Rights of the Pontificia Universidad Javeriana-Cali; 28) International Migrants Bill of Rights Initiative Georgetown University Law Center; 29) Faculty of Law of the University of Costa Rica; and 30) the Law Faculty of the University of Sao Paulo.

e. Written comments submitted by individuals from civil society: 1) Martha Cecilia Olmedo Vera; 2) Luis Peraza Parga; 3) Teachers and researchers from Pontifícia Universidade Católica do Paraná, Centro Universitário Autônomo do Brasil and Faculdade Campo Real; 4) José Benjamín González Mauricio and Rafael Ríos Nuño; 5) Jorge Alberto Pérez Tolentino; 6) María-Teresa Gil-Bazo from Newcastle University; 7) Bernardo de Souza Dantas Fico; 8) Ivonei Souza Trindade; 9) Gloria María Algarín Herrera, Lizeth Paola

5 The request for an advisory opinion submitted by Ecuador, the written and oral comments from participating States of the Inter-American Commission and international and government agencies, international associations and national academic institutions, non-governmental organizations and individuals from civil society may be consulted on the Court's website via the following link: http://www.corteidh.or.cr/cf/jurisprudencia2/observaciones_oc.cfm?nId_oc=1704

Charris Díaz, Ana Elvira Torrenegra Ariza and Andrea Rodríguez Zavala of Andrea Rodríguez Zavala Abogados law firm; 10) Alejandro Ponce Martínez and Diego Corral Coronel of the Quevedo & Ponce Law Firm; 11) Sergio Armando Villa Ramos; 12) José Manuel Pérez Guerra; 13) María del Carmen Rangel Medina and Dante Jonathan Armando Zapata Plascencia; 14) David Andrés Murillo Cruz; 15) Juan Carlos Alfredo Tohom Reyes, Wendy Lucia To Wu, Juan José Margos García and Mario Alfredo Rivera Maldonado; and 16) Manuel Fernando García Barrios.

7. Once the written procedure concluded, on 15 June 2017 the Presidency of the the Court, in accordance with the provisions of Article 73.4 of the Regulations,[6] issued a Resolution[7] through which he convened a public hearing and invited OAS member states, the OAS Secretary General, the President of the OAS Permanent Council, the President of the Inter-American Juridical Committee, the Inter-American Commission and the members of various international organizations, civil society, academic institutions and people who sent written observations, with the purpose of presenting their oral comments to the Court regarding the query.

8. The public hearing was held on 24 and 25 August 2017, in the context of the 119th session of the Council of Ministers, Ordinary Sessions of the Inter-American Court of Human Rights, held in San José, Costa Rica.

9. The following persons appeared before the Court:

1) For the requesting State, the Republic of Ecuador: Rolando Suárez, Deputy Minister of Foreign Affairs, Political Integration and International Cooperation; Pablo Villagómez, Head of the Ecuadorian Mission to the European Union; Carola Iñiguez, Under-Secretary for Multilateral Affairs, Ministry of Foreign Affairs; Ricardo Velasco, Director of Human Rights at the Procuraduría General del Estado; Claudio Cevallos, Ambassador of Ecuador in Costa Rica; Pablo Salinas, First Secretary of the Ecuadorian Mission to the European Union; Carlos Espín, and Alonso Fonseca, advisors;

2) For the State of Argentina: Mr Javier Salgado, Director of the International Directorate for Human Rights Litigation, and Gonzalo L. Bueno, Legal Adviser to the International Directorate for Human Rights Litigation;

3) For the Plurinational State of Bolivia: Mr Jaime Ernesto Rossell Arteaga, Deputy Attorney for Defense and Legal Representation of the State, and Roberto Arce Brozek, Director General of Human Rights and the Environment;

4) For the United Mexican States: Mr Alejandro Alday González, Consultant for the Ministry of Foreign Affairs; Melquíades Morales Flores, Ambassador of Mexico in Costa Rica, and Óscar Francisco Holguín González, in charge of legal, political and press affairs at the Mexican Embassy in Costa Rica;

6 Article 73 (4) of the Rules of Procedure of the Court:"At the conclusion of the written proceedings, the Court shall decide whether oral proceedings should take place and shall establish the date for a hearing, unless it delegates the latter task to the Presidency. Prior consultation with the Agent is required in cases governed by Article 64(2) of the Convention."

7 See Request for Advisory Opinion OC-25. Call to hearing. Order of the President of the Inter-American Court of Human Rights of 15 June 2017. Available at: http://www.corteidh.or.cr/docs/asuntos/solicitud_15_06_17_esp.pdf

5) For the Inter-American Commission on Human Rights: Mr Luis Ernesto Vargas Silva, Commissioner; Mr Álvaro Botero Navarro, and Ms Selene Soto Rodriguez, Advisors;

6) For the United Nations High Commissioner for Refugees (UNHCR): Mr Juan Carlos Murillo González, Head of the Regional Legal Unit for the Americas, and Mr Luis Diego Obando, Legal Officer;

7) For the Inter-American Association of Public Defenders (AIDEF): Mrs Marta Iris Muñoz Cascante, Director of Public Defense of the Republic of Costa Rica, and Coordinator of Central America; Ms Sandra Mora Venegas, and Mr Abraham Sequeira Morales;

8) For the Human Rights Commission of the Federal District of Mexico: Mr Federico Vera Pérez, Executive Director of Legislative Affairs and Evaluation of the CDHDF;

9) For the Norwegian Refugee Council: Mr Efraín Cruz Gutiérrez;

10) For Asylum Access Ecuador: Mr Xavier Gudiño and Mrs Daniela Ubidia;

11) For the Consejería Camex Oxlajuj Ix and the International Verification Mission (MIV): Mayra Alarcón Alba, Executive Director of Consejeria Camex Leticia Gutierrez; Father Juan Luis Carbajal; Sergio Blanco and Patricia Montes;

12) For the International Legal Office for Cooperation and Development (ILOCAD) and other
stakeholders who subscribe to the document: Mr Baltasar Garzón Real and Mr Alan Aldana;

13) From the Law School of EAFIT University Medellín: Mrs Laura Aristizábal Gutiérrez; Mariana Duque R., and Mariana Ruiz Uribe;

14) From the Tijuana Law School of the Autonomous University of Baja California: Elizabeth Nataly Rosas Rábago; Sofía Arminda Rascón Campos, and Mr
Samuel Cabrera Gutierrez;

15) For University College London 'Public International Law Pro Bono Project': Mr Luis F. Viveros Montoya, Mrs Frania Colmenero Segura and Mrs Kimberley Trapp;

16) For the 'Centro Universitário Antônio Eufrásio de Toledo de Presidente Prudente': Gabriel D'Arce Pinheiro Dib and Guilherme de Oliveira Tomishima;

17) For the 'Clinica de Direitos Humanos e Direito Ambiental' of the Universidad del Estado
de Amazonas: Ms Sílvia Maria da Silveira Loureiro and Ms Victoria Braga Brasil;

18) For the ‘Núcleo de Estudos e Pesquisa em Direito Internacional’ of the Faculty of Law of the State University of Rio de Janeiro: Mr Raphael Carvalho de Vasconcelos and Lucas Albuquerque Arnaud de Souza Lima;

19) For the Legal Clinic for Human Rights of the Pontificia Universidad Javeriana, Cali: Mr Raúl Fernando Núñez Marín, and Mr Iván Darío Zapata;

20) Mrs Maria-Teresa Gil-Bazo of the University of Newcastle;

21) Mr Bernardo de Souza Dantas Fico;

22) Andrea Rodríguez Zavala and Ana Elvira Torrenegra Ariza from the law firm of Andrea Rodríguez Zavala Abogados;

23) Mr Diego Corral Coronel for the law firm Quevedo & Ponce;

24) Mr Sergio Armando Villa Ramos;

25) Mrs Wendy Lucía To Wu and Mr Juan José Margos García, representing also Juan Carlos Alfredo Tohom Reyes and Mario Alfredo Rivera Maldonado; and

26) Mr Manuel Fernando García Barrios.

10. Supplementary written submissions were received after the hearing from:[8] 1) the State of Ecuador; (2) the International Legal Office for Cooperation and Development (ILOCAD); (3) the 'Human Rights and Environmental Law Clinic' of the Universidad del Estado de Amazonas; 4) the 'Núcleo de Estudos e Pesquisa em Direito Internacional' of the Faculty of Law of the University of Barcelona State University of Rio de Janeiro; (5) EAFIT University School of Law Medellín and 6) Mrs María-Teresa Gil-Bazo from the University of Newcastle.

11. For the purposes of this request for an advisory opinion, the Court examined, took into account and analysed 55 written submissions, as well as the 26 submissions presented at the hearing and interventions by States, OAS bodies, international organizations, State agencies, non-governmental organizations, academic institutions and individuals from across civil society (*supra* paras. 6 and 9). The Court appreciates these valuable contributions which were made on the different subjects submitted for consultation for the purpose of the issuance of this advisory opinion.

12. The Court commenced deliberation of the present advisory opinion on 28 May 2018.

III.
JURISDICTION AND ADMISSIBILITY

A. General considerations

13. Article 64(1) of the American Convention marks one of the aspects of the function of the Inter-American Court, by establishing that:

8 The supplementary submissions are available on the Court's website at the following link: http://www.corteidh.or.cr/cf/jurisprudencia2/observaciones_oc.cfm?nId_oc=1704

> 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. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

14. The consultation submitted to the Court by the requesting State is based on the aforementioned Article 64(1) of the Convention. Ecuador is a member state of the OAS and is therefore empowered by the Convention to request an advisory opinion from the Inter-American Court.

15. The central purpose of this advisory function is for the Inter-American Court to issue a opinion on the interpretation of the American Convention or other treaties concerning the protection of human rights in the American States, thus establishing its scope of operation. The Court has considered that Article 64.1 of the Convention, which refers to the power of the Court to issue an opinion on "other treaties concerning the protection of human rights in the American States", is broad and non-restrictive[9] (infra para. 38).

16. Accordingly, Articles 70[10] and 71[11] of the Rules of Procedure govern the formal requirements that must be observed in order for an application to be considered by the Court. These articles impose on the State or applicant body the following requirements: i) state the questions with precision; ii) identify the provisions to be interpreted; iii) identify the considerations giving rise to the request, and iv) the names and addresses of the Agents or the Delegates.

17. It is necessary to note that Article 73 of the Rules of Procedure of this Court,[12] which stipulates the procedure to be followed for the advisory procedure, does not contain specific

9 *Cfr.* "Other Treaties" Object of the Consultative Function of the Court (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of 24 September 1982, Series A No. 1, point one, and *Gender identity, equality and non-discrimination against same-sex couples*. State obligations in relation to the change of gender identity, and the rights derived from a same-sex relationship (interpretation and application of the scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in conjunction with Article 1 of the American Convention on Human Rights). Advisory Opinion OC-24/17 of 24 November 2017. Series A No. 24, para. 17.

10 Article 70 of the Rules of Procedure of the Court establishes that: "Interpretation of the Convention 1. Requests 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. 2. Requests for an advisory opinion submitted by a Member State or by the Commission shall, in addition, identify the provisions to be interpreted, the considerations giving rise to the request, and the names and addresses of the Agent or the Delegates [...] ".

11 Article 71 of the Rules of Procedure of the Court provides that: "Interpretation of Other Treaties 1. If, as provided for in Article 64(1) of the Convention, 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".

12 The article states: "Procedure: 1.Upon receipt of a request for an advisory opinion, the Secretary shall transmit copies thereof to all of the Member States, the Commission, the Permanent Council through its Presidency, the Secretary General, and, if applicable, to the OAS organs whose sphere of competence is referred to in the request. 2. The Presidency shall establish a time limit for the filing of written comments by the interested parties. 3. The Presidency may invite or authorize any interested party to submit a written opinion on the issues covered by the request. If the request is governed by Article 64(2) of the Convention, the Presidency may do so after prior consultation with the Agent. 4. At the conclusion of the written proceedings, the Court shall decide whether oral proceedings should take place and shall establish the date for a hearing, unless it delegates the latter task to the Presidency. Prior consultation with the Agent is required in cases governed by Article 64(2) of the Convention."

provisions concerning the process of admissibility, and as a result the Court retains the right to at any stage of the procedure discontinue the processing of an application, and even to resolve not to address the request at the stage of issuing the opinion itself. In fact, on two occasions the Court has decided not to respond to the consultation despite the fact that the request had been processed for consultation.[13]

18. The Court recalls that on several occasions it has indicated that compliance with the regulatory requirements for the formulation of a consultation does not imply that the Court is obliged to issue an advisory opinion.[14] In determining the appropriateness of addressing the consultation, the Court must take into account considerations that go beyond purely formal issues and that relate to characteristics recognised by the Court in the exercise of its advisory role.[15]

19. This broad margin of appreciation cannot, however, be confused with a simple discretion as to whether or not to issue the requested opinion. To refrain from answering a question the Court has to have decisive reasons, derived from the fact that the request exceeds the limits established by the Convention for its competence in that field. Furthermore, if the Court considers that it should not

13 One of these requests was submitted by Costa Rica on 22 February 1991 for the purpose of a study on the compatibility of a draft law amending two articles of the Code of Criminal Procedure and of the Creation of the High Court of Criminal Cassation in process before its Legislative Assembly, with Article 8.2.h. of the aforementioned Convention. The Court decided not to respond to the request on the grounds that doing so could result in an advisory opinion on certain cases pending before the Commission with a view to resolving them in a covert manner, by means of the State party's alleged violation of Article 8, paragraph 2 (h), of the Convention. However, the Court processed the request, received observations and, subsequently, issued a negative decision. *Cfr. Compatibility of a Bill with Article 8.2.h of the American Convention on Human Rights.* Advisory Opinion OC-12/91 of 6 December 1991. Series A No. 12. The Inter-American Commission presented a request on the compatibility with the American Convention of legislative or other measures that deny access to resources to persons who have been sentenced to death. Some of the States and organizations that submitted observations following the request opposed its admissibility, considering that it was a contentious case in disguise. After receiving observations, the Court decided to use its discretion not to respond to the consultation, considering that it had already pronounced and issued its position on the matters that the Commission consulted in previous decision concerning the imposition of the death penalty and its execution, both in contentious cases and provisional measures, as well as its advisory opinions. *Cfr. Request for an Advisory Opinion presented by the Inter-American Commission on Human Rights*. Order of the Inter-American Court of Human Rights of 24 June 2005.

14 *Cfr. The right to information on consular assistance within the framework of the guarantees of due legal process.* Advisory Opinion OC-16/99 of 1 October 1999. Series A No. 16, para. 31; *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. Series A No. 21, para. 25; *Ownership of rights of legal persons in the inter-American system of rights (Interpretation and scope of Article 1(2), in conjunction with Articles 1(1), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62.3 of the American Convention on Human Rights, as well as Article 8.1(A) and (B) of the Protocol of San Salvador).* Advisory Opinion OC-22/16 of 26 February 2016. Series A No. 22, para. 21, and Advisory Opinion OC-24/17, *supra*, para. 20.

15 *Cfr.* Advisory Opinion OC-1/82, *supra*, para. 25; *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. Series A No. 15, para. 39; *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of 28 August 2002. Series A No. 17, para. 19; *Juridical Status and Rights of Undocumented Migrants*. Advisory Opinion OC-03/18 of 17 September 2003. Series A No. 18, para. 50; *Control of Legality in the Exercise of the Powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 51 of the American Convention on Human Rights)*. Advisory Opinion OC-19/05 of 28 November 2005. Series A No. 19, para. 17; *Article 55 of the American Convention on Human Rights.* Advisory Opinion OC-20/09 of 29 September 2009. Series A No. 20, para. 14, and *Environment and human rights (state obligations in relation to the environment within the framework of the protection and guarantee of the rights to life and personal integrity - interpretation and scope of Articles 4.1 and 5.1, in relation to Articles 1.1 and 2 of the American Convention on Human Rights).* Advisory Opinion OC-23/17 of 15 November 2017. Series A No. 23, para. 20, and Advisory Opinion OC-24/17, *supra*, para. 20.

respond to a request for an advisory opinion it must give reasons for the decision, as required under Article 66 of the Convention.[16]

20. During the procedure relating to this request for an advisory opinion, several written and oral observations presented a number of considerations regarding the jurisdiction of the Court to issue the present advisory opinion, as well as relating to the admissibility and appropriateness of the questions asked. In particular, some observations warned about the scope of the *ratione personae* of the Court in relation to questions in the request referencing the obligations of third States that are not members of the inter-American human rights system. Additionally, several observations underscored that the request would be trying to give response to specific events of a political nature. Also, some observations considered that certain questions asked by Ecuador would not meet the requirements of admissibility provided for in Articles 70 and 71 of the Rules of Procedure of the Inter-American Court, insofar as they did not adequately specify convention provisions, or other relevant treaties, whose interpretation is required, and/or that the questions conditioned the response of the Court to certain factual considerations.[17] In particular, with regard to one of the questions ('d'), it was held that, while it is true that moral postulates illuminate legal norms, "certain tenets of legal and ethical value such as the principles of humanity, the dictates of the public conscience, and universal morality" do not emanate from any international instrument, nor would they be legal postulates justiciable by themselves.[18] Notwithstanding these objections, it was noted that, if the Court were to address the central issues underlying the application, specifically the right to seek and receive asylum, the advisory opinion could positively contribute to the protection of human rights in the region.

21. In this regard, the Court recalls that, as an organ with jurisdictional and consultative functions, the power inherent to its attributions allows it to determine the scope of its own competence (*compétence de la compétence* / *Kompetenz-Kompetenz*), and this applies equally in the framework of the exercise of its consultative function, in accordance with the provisions of Article 64(1) of the Convention.[19] Thus, the circumstance of seeking recourse to the Court presupposes the recognition by the consulting State(s) that the Court has the power to decide on the scope of its competence in this regard.

22 However, the Court notes that the request submitted by the State of Ecuador has the following characteristics: i) only questions 'a' and 'g' specify the legal provisions to be analyzed; ii) contains questions regarding the interpretation of different legal provisions that involve several regional and international instruments;[20] (iii) all questions include factual assumptions and

16 *Cfr.* Advisory Opinion OC-1/82, *supra*, para. 30.

17 Written comments submitted by Mexico; School of Law of the Universidad EAFIT Medellín; faculty of Tijuana Law of the Autonomous University of Baja California; Central American University José Simeón Cañas; University College London "Public International Law Pro Bono Project"; Center for Human Rights of the University Andrés Bello Catholic, and Faculty of Legal and Social Sciences of the Rafael Landívar University.

18 Written comments submitted by Mexico.

19 *Cfr.* Case of the Constitutional Court v. Peru. Competence. Judgment of 24 September 1999. Series C No. 55, para. 33, and Advisory Opinion OC-24/17, *supra*, para. 15.

20 In effect, the request for an advisory opinion submitted by the State of Ecuador contains questions regarding the interpretation of different legal provisions that involve the following regional and international instruments: American Convention on Human Rights (Articles 5, 7, 8, 22.7, 29); American Declaration of Rights and Duties of Man (Article XXVII); Universal Declaration of Human Rights (Articles 7, 13, 14.1, 28, 30); Convention on the Status of Refugees, 1951 (Articles 5, 33); Protocol on the Refugee Statute of 1967; Declaration on Territorial Asylum, adopted by the General Assembly of the UN in Resolution 2312 (XXII), of 14 December 1967 (Articles 1.1, 1.3, 2.1, 2.2, 3.1); International Covenant on Civil and Political Rights (Articles 2.1, 5.2, 7, 9, 10, 14, 26); Vienna Convention on the Law of Treaties (Articles 31, 32); Convention against Torture and Other Cruel, Inhuman

constraints but do not expressly mention any specific dispute or controversy which the State may engage in internationally or domestically; (iv) questions 'b' and 'c' refer to, *inter alia*, factual presuppositions, specifically "a State, outside a particular asylum convention" or "a State belonging to a regional legal system other than that on the basis of which asylum was granted"; and (v) question 'd' is formulated in vague and abstract terms.

23. Therefore, taking into account the criteria outlined above, the Court shall examine the requesting state's questions, and make the pertinent considerations in the following order: a) the formal requirement to specify the provisions that must be interpreted; b) the *ratione personae* competence; c) the competence over the regional and international instruments involved; d) the origin of the request for an advisory opinion, and e) the formal requirement to formulate the questions with precision and to identify underlying legal interpretations of general interest.

B. The formal requirement to specify the provisions to be interpreted

24. The consultation raises seven specific questions for the Court's consideration for which the opinion of the Court is sought, and also indicates the considerations that give rise to the consultation and the name and address of its agents, thereby complying with the respective requirements of the formal regulatory framework.

25. As for the regulatory requirement concerning the need to specify the provisions that should be interpreted, as previously noted, only two of the seven questions formulated, i.e. those identified with sub-paragraphs 'a' and 'g', include legal provisions to be interpreted (*supra* paragraph 22). Thus, the remaining five questions would not comply with the formal requirement to specify the provisions to be interpreted (*supra* para. 16), rendering these *prima facie* inadmissible. However, it is appropriate to go beyond the formalism that would preclude considering questions that could be of legal interest for the protection and promotion of human rights.[21] In this regard, the Court notes that the questions identified as 'b', 'c', 'e' and 'f' make specific reference to asylum, to the status of asylum or refugees and to *non-refoulement*. Therefore, it is possible to understand that, according to the nature of the questions raised, those relate to the interpretation of the same provisions brought for consultation in the first question, including Articles 22(7) and 22(8) of the American Convention and XXVII of the American Declaration.

26. On the other hand, the Court considers that the question identified with the letter 'd' is inadmissible *in toto*, in as much as in addition to not complying with the requirement to specify provisions, the question is formulated in vague and abstract terms that do not allow for the interpretation of specific treaty provisions, since it refers to "tenets of legal and ethical value such as the principles of humanity, the dictates of the public conscience, and universal morality" and "what should be the legal consequences of the disregard for such tenets?".

27. In addition, with respect to the question under the letter 'g', the Court notes that it is a complex question in that it encompasses a number of issues that could be related to the provisions under interpretation and others that exceed this connection. In this sense, the Court considers that, as drafted, question 'g' comprises two distinct issues with different meanings, which can be clearly distinguished. On the one hand, reference is made to the scope of the "right of qualification in

or Degrading Treatment or Punishment; Inter-American Convention on Extradition (Article 4.4); Inter-American Convention on Mutual Assistance in Criminal Matters (Article 9.c). Also, the query references in a generic way "Regional Conventions on asylum and refuge".

21 *Cfr.* Advisory Opinion OC-1/82, *supra*, para. 25, and Advisory Opinion OC-24/17, *supra*, para. 20.

favour of the host State" and to "the possibility that a State requests judicial cooperation in criminal matters from the asylum State". On the other hand, the question refers to consequences that result from non-compliance by "[a] State which has been the subject of a decision or ruling of a multilateral mechanism belonging to the United Nations System" and in particular when said mechanism establishes that "the conduct of [that] State may be interpreted as disregard for the right to evaluate the situation exercised by the host State". In view of this, the Court considers that the question referred to the legal value and the consequences of decisions taken within the framework of treaty bodies or special procedures of the universal system for the protection of human rights that establish international responsibility and are beyond the scope of this Court's jurisdiction. Both are governed by their own normative framework and mandate and are therefore not admissible. The other matters may be the subject of this advisory opinion.

28. Ultimately, the Court considers that the content of the questions raised is directed mainly to the interpretation of asylum as a human right contemplated in terms of Article 22.7 of the American Convention and Article XXVII of the American Declaration, and the international obligations that arise for States in the event of protection being sought at the diplomatic mission of a State.

C. *Ratione personae* competence

29. As regards "third States", the Court notes that, even when questions 'b' and 'c' can be redirected to the interpretations of provisions in the conventions, they mention, as a factual presupposition of the consultation, "a State, which is not a party to a certain convention on asylum" (questions 'b' and 'c'), or "a State that belongs to a regional legal regime different from that on which asylum was granted" (question 'c').

30. In this regard, the Court recalls that the interpretations made in the framework of its consultative role engages the member states of the OAS, regardless of whether or not they have ratified the American Convention,[22] since advisory opinions constitute a source that, by their very nature, contribute to achieving the effective respect and guarantee of human rights, especially in a preventive manner. In particular, they are a guide to be used to resolve issues relating to the observance of human rights and thus avoid possible violations.[23] The Court's advisory jurisdiction does not extend to the human rights protection obligations of States outside of the inter-American system, even if these States are parties to a treaty which is subject to the Court's interpretation.[24]

31. Such questions may be resolved by the Court insofar as they concern the responsibilities of States that may or may not be party to the conventions on asylum (hereinafter "Latin American conventions", "inter-American conventions" or "regional conventions" on asylum), but which make up the community of OAS Member States. It is in the general interest that the scope of such consultations should not therefore be limited to specific Member States.[25]

32. Without prejudice to the foregoing, it is not possible to ignore the fact that the very nature of the subject matter of the consultation implies the potential involvement of third States in their international relations with a member State of the OAS following an asylum application, especially in the case of diplomatic or extraterritorial asylum, or its obligations derived from the principle of *non-refoulement*. The considerations that the Court makes in this document insofar as they relate to

22 *Cfr.* Advisory Opinion OC-18/03, *supra*, para. 60, and Advisory Opinion OC-22/16, *supra*, para. 25.
23 *Cfr.* Advisory Opinion OC-21/14, *supra*, para. 31, and Advisory Opinion OC-24/17, *supra*, para. 27.
24 *Cfr.* Advisory Opinion OC-1/82, *supra*, para. 21 and decisive point one.
25 *Cfr.* Advisory Opinion OC-16/99, *supra*, para. 41, and Advisory Opinion OC-23/17, *supra*, para. 35.

third States does not imply a determination by the Court as to the scope of the obligations of States that are not members of the inter-American system of protection of human rights, since such a determination would exceed the competence of the Court. Rather, the Court's considerations are subject to the framework of the regional system itself, which nonetheless certainly contributes to the development of international law. In short, it is up to the Court to determine the obligations of an American State vis-à-vis other Member States of the OAS and the people under their jurisdiction.

D. Competence over the regional and international instruments involved

33. With respect to the various international instruments mentioned in the consultation, the Court deems it necessary to make some clarifications on the scope of its competence in each case.

34. With regard to the American Convention, the Court has already established that the advisory function allows it to interpret any rule of that treaty, no part or aspect of that instrument shall be excluded from the Court's scope of interpretation. In this sense, it is clear that the Court has, by virtue of being the "ultimate interpreter of the American Convention", the power to issue, with full authority, interpretations of all the provisions of the Convention, including those of a procedural nature.[26]

35. In addition, Article 64.1 of the American Convention authorizes the Court to render advisory opinions on the interpretation of the American Declaration, within the limits set out of its competence in relation to the OAS Charter (hereinafter "the Charter") and the Convention as well as other treaties concerning the protection of human rights in the American Member States.[27] Therefore, when the Court interprets the Convention in the course of exercising its advisory function, it is entitled to resort to the American Declaration when appropriate in accordance with Article 29(d) of the Convention.

36. The Court has already emphasized that, in the American Convention, there is a tendency to integrate the regional system and the universal human rights protection system. In effect, the preamble expressly recognizes that the principles underlying the treaty have also been enshrined in the Universal Declaration of Human Rights and that "they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope". Similarly, several provisions of the Convention refer to other international conventions or international law, without restricting them to the regional level, including Article 22. In fact, both the Convention and the American Declaration make express reference to other international conventions (infra para. 139), an aspect that will be developed further in this document. The Court has analysed the wording of Article 29, which contains the rules of interpretation of the Convention, and found that the article "is contrary, quite clearly, to restricting the regime of human rights protection in light of the source of the obligations assumed by the State".[28]

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26 *Cfr.* Advisory Opinion OC-20/09, *supra*, para. 18, and Advisory Opinion OC-23/17, *supra*, para. 16.

27 *Cfr. Interpretation of the American Declaration of the Rights and Duties of Man under Article 64 of the American Convention on Human Rights.* Advisory Opinion OC-10/89 of 14 July 1989. Series A No.10, first and only decisive point.

28 Advisory Opinion OC-1/82, *supra*, para. 42.

37. The Court understands, and has previously issued advisory opinions on this understanding,[29] that the Universal Declaration of Human Rights can be of use in the exercise of its advisory function, in particular in terms of Article 29(d) of the American Convention, insofar as it establishes certain principles that are common to all nations and of universal value. The Court notes that it has rightly been stated that the Universal Declaration "states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family".[30]

38. Similarly, the Court recalls that Article 64.1 of the Convention, when referring to the faculty of the Court to issue an opinion on "other treaties concerning the protection of human rights in the American states" is broad and not restrictive. Thus, it has stated that:

> [...] the advisory jurisdiction of the Court can be exercised, in general, with regard to any 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 the principal purpose of such a treaty is, and whether or not non-Member States of the Inter-American system are or have the right to become parties thereto.[31]

39. Therefore, the Court will next examine whether the other international treaties invoked by Ecuador can be catalogued as "other treaties concerning the protection of human rights in the American States", under the terms of Article 64.1 of the Convention.

40. The International Covenant on Civil and Political Rights,[32] as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[33] (hereinafter referred to as the "Convention against Torture") are treaties adopted under the auspices of the United Nations concerning the protection of human rights that American States are subject to. It should be noted that the Court has already ruled on the interpretation of the International Covenant on Civil and Political Rights as part of its advisory role in Advisory Opinion OC-16/99[34] and Advisory Opinion OC-18/03.[35]

41. While the Convention relating to the Status of Refugees, adopted in Geneva in 1951 (hereinafter referred to as "the 1951 Convention"), and its Protocol, adopted in New York in 1967 (hereinafter referred to as the "1967 Protocol"), did not originally constitute human rights treaties *stricto sensu*, it cannot be ignored that their main purpose is to protect the human rights of persons when such protection is not available in their countries of origin. It is also important to highlight the interaction between these instruments and human rights protection regimes. According to the terms

29 The Court has already issued a decision on the Universal Declaration of Human Rights as part of its advisory function in: *The legal status and rights of undocumented migrants.* Advisory Opinion OC-18/03 of 17 September 2003. Series A No. 18, para. 55.

30 Proclamation of Tehran, proclaimed by the International Conference on Human Rights in Tehran on 13 May 1968, UN Doc. A/CONF.32/41 p. (1968), point 2.

31 Advisory Opinion OC-1/82, *supra*, decisive point one, and Advisory Opinion OC-24/17, *supra*, para. 17.

32 The following 31 OAS member states are party to this treaty adopted on 16 December 1966, entry into force 23 March 1976: Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, United States of America, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

33 The following 25 OAS member states are party to this treaty adopted on 10 December 1984, entry into force 26 June 1987: Antigua and Barbuda, Argentina, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, United States of America, Panama, Paraguay, Peru, Dominican Republic, Saint Vincent and the Grenadines, Uruguay and Venezuela.

34 *Cfr.* Advisory Opinion OC-16/99, *supra*, para. 109.

35 *Cfr.* Advisory Opinion OC-18/03, *supra*, para. 55.

of its preamble, the objective of the Convention relating to the Status of Refugees is to ensure international protection through recognition of the right of asylum, as well as providing refugees with "the widest possible exercise of these fundamental rights and freedoms". Also, that same objective is contained in the 1967 Protocol, insofar as it extends the geographical scope initially provided for by the 1951 Convention. Both the 1951 Convention[36] and the 1967 Protocol[37] were ratified by 28 and 29 member states of the OAS, respectively.

42. In this regard, the Court understands that, notwithstanding the special character of international treaties insofar as they focus on the international protection of asylum seekers and refugees, an integrative vision, such as that postulated by the American Convention itself (supra para. 36) and adopted by this Court in Advisory Opinion OC-21/14,[38] provides an understanding of the international protection regime from a human rights perspective, while giving due consideration to the value of its specialty. In the regional system, both because of its historical roots and the development of the legal tradition of inter-American law, the connection between the two is undeniable. In particular, the Court notes that the inter-American instruments recognize the right to seek and receive asylum, as well as the principle of *non-refoulement*. The refugee protection regime cannot exist separately from the human rights regime so that, with the parallel processes of international positivisation and progressive interpretative development by monitoring mechanisms, the international protection regime has become imbued with a human rights approach. An example of this is the incorporation of due process guarantees in refugee status determination procedures. It is along these lines that the Court understands that both conventions concern the protection of human rights in American States and that, by reason of this, they are within its scope of the Court's interpretative competence.

43. As for the Inter-American Convention on Extradition, adopted in Caracas in 1981, and the Inter-American Convention on Mutual Assistance in Criminal Matters, adopted in Nassau in 1992, this request for an advisory opinion concerns the interpretation of the provisions contained in their respective Articles 4.4 and 9.c. The Inter-American Convention on Extradition is a multilateral treaty of the inter-American system, the purpose of which is "strengthening international cooperation in legal and criminal law matters" and "to ensure that crime does not go unpunished, and to simplify procedures and promote mutual assistance in the field of criminal law". For its part, the Inter-American Convention on Mutual Assistance in Criminal Matters is also a treaty of the inter-American system, the purpose of which is to contribute ""to seek the solution of political, juridical, and economic problems that may arise among [the Member States of the OAS]".[39] Thus, the main object of both regional treaties is not the protection of human rights, even though the

36 The Convention relating to the Status of Refugees, adopted in Geneva on 28 July 1951, entered into force on 22 April 1954. The following 28 OAS member states are party to this treaty: Antigua and Barbuda, Argentina, Bahamas, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, San Cristóbal and Nevis, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, and Uruguay.

37 The Protocol relating to the Status of Refugees, adopted in New York on 31 January 1967, entered into force on 4 October 1967. The following 29 OAS member states are party to this protocol: Antigua and Barbuda, Argentina, Bahamas, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, United States of America, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay and Venezuela. States that have not ratified or acceded to the 1951 Convention and its Protocol are: Barbados, Cuba, Grenada, Guyana and Saint Lucia. It should be noted that all Latin American States are parties to the Protocol, with the exception of Cuba.

38 See Advisory Opinion OC-21/14, *supra*, paras. 58-60.

39 Preamble to the Inter-American Convention on Mutual Assistance in Criminal Matters.

preamble to the Inter-American Convention on Extradition states that its purpose will be carried out "with due respect to the human rights embodied in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights". Notwithstanding the foregoing, the Court notes that both provisions, while dealing with the scope of extradition, relate to the interpretation that this Court has to make regarding the protection derived from the right to seek and receive asylum and the principle of *non-refoulement*, and it is therefore to that extent that the Court will consider these provisions.

44. Finally, regarding "the inter-American asylum conventions" and the Declaration on Territorial Asylum, adopted by the General Assembly of the United Nations on 14 December 1967, the Court considers that these international instruments of varied content and legal effect serve as a guide to interpreting[40] Article 22.7, so that they are taken into consideration as part of the international *corpus juris* on asylum matters.

45. In conclusion, the Court considers that it has the power to rule in its field of competence on all international instruments brought before it for consultation by the State of Ecuador, insofar as they concern the protection of human rights in the American States, and therefore fall within the jurisdiction of the Court, as well as on account of the Convention's reference in Article 22 to international conventions (*supra* para. 36 and *infra* para. 142).

E. The merits of the request for an advisory opinion

46. In addition to the formal requirements set out in the Convention and the Regulations, the Inter-American Court of Human Rights has developed jurisprudential criteria relating to the applicability and appropriateness of processing or responding to a request for an advisory opinion. In particular, the Court has specified in its jurisprudence[41] certain elements that, if present, could lead to the option not to process or respond to the request. Thus, the Court has found that a request: (a) must not mask a contentious case[42] or seek to obtain prematurely a pronouncement on a topic or matter that could eventually be submitted to the Court through a contentious case;[43] (b) should not be used as a mechanism to obtain an indirect ruling on a matter in dispute or in controversy at the domestic level;[44] (c) should not be used as an instrument of internal political debate;[45] (d) should not exclusively cover issues that the Court has already ruled on in its jurisprudence;[46] and (e) should not seek to resolve questions of fact, instead the request should seek to unravel the meaning, purpose

40 *Cfr.* Advisory Opinion OC-21/14, *supra*, para. 60, and Advisory Opinion OC-24/17, *supra*, para. 60.

41 *Cfr.* Request for an Advisory Opinion from the Secretary-General of the Organization of American States (OAS). Resolution of the Inter-American Court of Human Rights of 23 June 2016, Recital 6.

42 *Cfr.* Advisory Opinion OC-12/91, *supra*, para. 28; Advisory Opinion OC-16/99, *supra*, paras. 46 and 47, and Request of Advisory Opinion presented by the Inter-American Commission on Human Rights. Decision of the Inter-American Court of Human Rights of 24 June 2005, Recital 5.

43 See Advisory Opinion OC-16/99, *supra*, para. 45, and Request for Advisory Opinion submitted by the Inter-American Commission on Human Rights. Resolution of the Inter-American Court of Human Rights of 24 June 2005, Recital 6.

44 *Cfr.* Request for an Advisory Opinion submitted by the Republic of Costa Rica. Decision of the Inter-American Court of Human Rights of 10 May 2005, Recital 13.

45 *Cfr. Proposal for the Modification of the Political Constitution of Costa Rica Related to Naturalization*. Advisory Opinion OC-4/84 of 19 January 1984. Series A No. 4, para. 30, and Request for an Advisory Opinion from the Republic of Costa Rica. Resolution of the Inter-American Court of Human Rights of 10 May 2005, Recital 11.

46 *Cfr.* Request for an Advisory Opinion submitted by the Inter-American Commission on Human Rights. Resolution of the Inter-American Court of Human Rights of 24 June 2005, Recitals 7 to 12, and Request for an Advisory Opinion submitted by the Inter-American Commission on Human Rights. Decision of the Inter-American Court of Human Rights of 27 January 2009, Recitals 7 and 15.

and reason of international human rights norms and, above all, assist the Member States and bodies of the OAS in complying fully and effectively with their international obligations.[47] However, the criteria developed are not an exhaustive list, nor do they constitute insurmountable limitations, given that it is for the Court to assess the relevance of exercising its advisory role for each specific application.

47. Furthermore, the advisory jurisdiction of the Court should not, in principle, be exercised through abstract speculation without foreseeable applicability to concrete situations that justify the interest in the Court's issuance of an advisory opinion.[48] In sum, it is up to the Court to weigh the legitimate interests of the requesting party with the general objectives served by the advisory function.

48. As anticipated, some comments submitted during the proceedings considered that this request for an advisory opinion would be inappropriate because of its alleged relationship with a specific factual situation in which the State of Ecuador finds itself, even though said scenario was not mentioned by the requesting State (*supra* paras. 20 and 22). In particular, they referred to the case of Julian Assange, founder of WikiLeaks, who in 2012 was granted asylum in Ecuador's embassy in the United Kingdom and remains there at the time of the issuance of this advisory opinion.

49. It is therefore for the Court to consider, *inter alia*, whether there is an improper attempt to use the advisory function to resolve a contentious issue.[49] In order to resolve the question as to whether this assumption of fact could in itself lead the Court to not consider the request, it is necessary to examine the Court's position on the matter.

50. The Court recalls that, according to its jurisprudence, the mere fact that contentious cases that relate to the subject of the consultation exist, or that there may be petitions before the Inter-American Commission or proceedings before the International Court of Justice, is not sufficient for the Court to refrain from answering the questions submitted for consultation, due to its nature as an autonomous judicial institution.[50] The interpretive work that this Court must fulfill, in the exercise of its function as an advisory body, differs from its contentious jurisdiction in that there is no dispute between two parties to solve.[51] The central purpose of the advisory function is to obtain a judicial interpretation of provisions of the Convention, or of other treaties relating to the protection of human rights in the American states.[52]

51. On the other hand, as has already been noted by the Court, its advisory powers should not, in principle, abstract speculation without foreseeable applicability to concrete situations that justify the interest in the Court's issuance of an advisory opinion (*supra* para. 47). Thus, the use of certain examples serves the purpose of providing a particular context or illustrating the different

47 *Cfr.* Advisory Opinion OC-16/99, *supra*, para. 47; Advisory Opinion OC-18/03, *supra*, para. 63, and Opinion OC-24/17, *supra*, para. 22.

48 *Judicial Guarantees in States of Emergency (Arts. 27.2, 25 and 8, American Convention on Human Rights)*. Advisory Opinion OC-9/87 of 6 October 1987. Series A No. 9, para. 16, and Advisory Opinion OC-24/17, *supra*, para. 20.

49 *Cfr.* Advisory Opinion OC-12/91, *supra*, para. 28, and Advisory Opinion OC-18/03, *supra*, para. 62.

50 See Advisory Opinion OC-16/99, *supra*, paras. 45-65; Advisory Opinion OC-18/03, *supra*, paras. 62-66; Advisory Opinion OC-23/17, *supra*, para. 26, and Advisory Opinion OC-24/17, *supra*, para. 24.

51 *Cfr.* Advisory Opinion OC-15/97, *supra*, paras. 25 and 26, and Advisory Opinion OC-24/17, *supra*, para. 54.

52 *Cfr. Restrictions on the death penalty (Arts. 4.2 and 4.4 American Convention on Human Rights)*. Advisory Opinion OC-3/83 of 8 September 1983. Series A No. 3, para. 22, and Advisory Opinion OC-24/17, *supra*, para. 54.

interpretations that may exist on the legal question that is the subject of the consultation, without this implying that the Court is issuing a ruling on the situation raised in these examples.[53] In addition, the latter allow the Court to demonstrate that its advisory opinion does not constitute mere abstract speculation and that the interest in it is justified by the benefit that it may bring to the international human rights protection system.[54] The Court, in addressing the issue, acts in its capacity as a human rights court guided by international instruments that govern its consultative competence and proceeds to conduct a strictly legal analysis of the issues raised before it.[55]

52. In sum, the Court has understood that, while it should not lose sight of the fact that its role essentially involves the exercise of its interpretative powers, consultations should serve a practical purpose and be predictable in their application, at the same time the Court shall not limit itself to an extremely precise factual premise that makes it difficult for the decision to disassociate itself from a specific case, which would be detrimental to the general interest that could be served by a request for consultation.[56] This ultimately requires a delicate legal assessment to discern the substantial purpose of the request so that the matter may achieve the aims of widespread validity and relevance to all American States, beyond the reasons that may have originated the petition and beyond the particular facts that gave rise to it.

53. In particular, the Court notes that no cases have been reported to the inter-American system on the matters subject to consultation. Accordingly, the Court considers that, without ruling on any specific matter which may have been raised in the present consultative procedure, it is appropriate to proceed with the consideration of the substantial purpose underlying this request, in order to address the general interest in the Court ruling on a matter of legal significance at the regional level, namely the right to seek and receive asylum. In this regard, the response to the present request for an advisory opinion will allow the Court to clarify and specify through the interpretation of the relevant legal framework the scope and content of the right to seek and receive asylum within the inter-American system, as well as the obligations of the OAS Member States in relation to persons who are under its jurisdiction in search of international protection for various reasons and, ultimately, contribute to the norm's development in international human rights law.

F. The formal requirement to formulate in a precise manner the questions and the underlying legal interpretations of general interest

54. As already stated, the burden rests on the requesting State to state the questions with precision (*supra* paragraph 16). The Court notes that all the questions asked by Ecuador contain factual references that relate to certain State actions in relation to which the Court is asked to determine whether or not such a course of action is in conformity with the international normative framework, as well as what the "legal consequences" may be that could follow from such conditions. In this regard, it is necessary to recall that, in the exercise of its advisory role, the Court is not called on to resolve questions of fact, but to unravel the meaning, purpose and reason for international human rights norms.[57] The Court's advisory role exists "ato assist the OAS Member

53 *Cfr.* Advisory Opinion OC-16/99, *supra*, para. 49, and Advisory Opinion OC-23/17, *supra*, para. 27.
54 *Cfr.* Advisory Opinion OC-16/99, *supra*, para. 49, and Advisory Opinion OC-18/03, *supra*, para. 65.
55 *Cfr.* Advisory Opinion OC-17/02, *supra*, para. 35, and Advisory Opinion OC-24/17, *supra*, para. 60.
56 See Advisory Opinion OC-16/99, *supra*, paras. 38-41.
57 *Cfr. International responsibility for issuing and enforcing laws in violation of the Convention (Arts. 1 and 2). American Convention on Human Rights).* Advisory Opinion OC-14/94 of 9 December 1994. Series A No. 14, para. 23, and Advisory Opinion OC-24/17, *supra*, para. 22.

States and organs to comply fully and effectively with their relevant international obligations.[58] If the request were to be dealt with on the basis of Ecuador's wording, it would distort the aims of the Court's consultative function, "since the questions it posed did not turn solely on legal issues or treaty interpretation; that State's position was that a response to the request required that facts in specific cases be determined".[59]

55. In this regard, the Court recalls that it is not necessarily bound by the literal terms of the inquiries made to it in the manner in which they are formulated. Thus, in the exercise of its powers inherent in the competence granted by Article 64 of the Convention, it may need to clarify or elucidate and, in certain cases, rephrase the questions posed to it, in order to determine with clarity the substance of its interpretative task. This involves examining whether it is possible to couple the question or questions submitted to the interpretation of the provisions of the American Convention or other treaties concerning the protection of human rights in the American States, in order to provide effective guidance for States.

56. Therefore, in order to more effectively exercise its advisory role, and bearing in mind that this role consists in essentially interpreting and applying the American Convention or other treaties over which it has jurisdiction, the Court deems it pertinent to proceed to reformulate in general and encompassing terms those questions that are found to fall within the Court's advisory competence, in relation to the relevant legal provisions, as follows:

> (a) Taking into account the principles of equality and non-discrimination (as set out in Articles 2.1, 5 and 26 of the International Covenant on Civil and Political Rights), the *pro homine* principle and the obligation to respect human rights, as well as Articles 31 and 32 of the Vienna Convention on the Law of Treaties, Article 29 of the American Convention on Human Rights, Articles 28 and 30 of the Universal Declaration of Human Rights, and Article 5 of the Geneva Convention relating to the Status of Refugees, does the Court consider it correct that Article 22(7) of the American Convention and Article XXVII of the American Declaration encompass in the human right to seek and receive asylum the different modalities, forms or categories of asylum developed in international law (including diplomatic asylum), in accordance with Article 14.1 of the Universal Declaration of Human Rights, the Geneva Convention on the Statute Refugees of 1951 and its New York Protocol of 1967, as well as regional conventions on asylum and norms pertaining to the domestic legal system of Member States of the OAS?
>
> b) In a situation of diplomatic asylum, what are the international obligations for the host State deriving from the American Convention and from the American Declaration?

57. In conclusion, the Court emphasizes that these two questions comprise in essence the most important issues raised by Ecuador's petition to the Court.

58. The Court further considers it necessary to recall that, in accordance with international law, when a State is party to an international treaty, such as the American Convention, said treaty binds all its organs, including its judicial and legislative bodies,[60] so that a breach by one of these organs

58 *Cfr.* Advisory Opinion OC-1/82, *supra*, para. 39, and Advisory Opinion OC-24/17, *supra*, para. 22.
59 Advisory Opinion OC-16/99, *supra*, para. 46.
60 *Cfr. Case of Fontevecchia and D`Amico v. Argentina. Merits, Reparations and Costs.* Judgment of 29 November 2011. Series C No. 238, para. 93, and Advisory Opinion OC-24/17, *supra*, para. 26.

will give rise to international responsibility on the part of the State.[61] It is for this reason that the Court considers it necessary for the various organs of the State to observe compliance with the conventions,[62] also in relation to the guidance issued by the Court in the exercise of its non-contentious or consultative competence, which undeniably shares with its contentious jurisdiction the purpose of "the protection of the fundamental rights of human beings" in the inter-American human rights system.[63]

59. Furthermore, all organs of OAS Member States, including those of States that are not parties to the Convention but that are obliged to respect human rights by virtue of the OAS Charter (Article 3.1) and the Inter-American Democratic Charter (Articles 3, 7, 8 and 9), benefit from a source of law in the form of the Court's interpretation of a convention provision[64] through its advisory opinion which, by its very nature, contributes especially in a preventive manner to the effective respect and guarantee of human rights and, in particular, acts as a guide for the resolution of issues related to the respect and guarantee of human rights and the prevention of possible violations, in the framework of international human rights protection.[65]

60. This Court recalls that it has the power to structure its decisions in the manner it deems proper in the interests of the law and for the purposes of the advisory opinion. Taking into account the above, in order to adequately address the two questions expressed above, the Court has decided to structure the present opinion in two chapters. The Court will firstly address the question of the right to asylum and its scope as a human right in the inter-American system and, subsequently, the Court will determine the State obligations associated with a situation of diplomatic asylum.

IV.
THE RIGHT TO SEEK AND RECEIVE ASYLUM IN ACCORDANCE WITH ARTICLES 22.7 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS AND XXVII OF THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN

61. In this chapter, the Court will interpret Article 22(7) of the American Convention and XXVII of the American Declaration. To this end, the Court shall first establish the scope of asylum to be used in this Decision and then divide its analysis into (a) the historical development of asylum; (b) the core asylum concept and its particularities according to the institution's various modalities; (c) the crystallization of asylum as a human right in international instruments; (d) the legislation adopted at the national level of the various modalities of asylum; and (e) the human right to seek and receive asylum within the framework of the inter-American system.

62. The provisions that the Court is required to interpret in this advisory opinion are Article 22(7) of the American Convention and Article XXVII of the American Declaration, to be read in conjunction with Article 14 of the Universal Declaration of Human Rights, the 1951 Geneva

61 *Cfr. Case of Velásquez Rodríguez v. Honduras.* Background. Judgment of 29 July 1988. Series C No. 4, para. 164, and Advisory Opinion OC-24/17, *supra*, para. 26.

62 *Cfr. Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs.* Judgment of 26 September 2006. Series C No. 154, para. 124, and Advisory Opinion OC-24/17, *supra*, para. 26.

63 *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights.* Advisory Opinion OC-2/82 of 24 September 1982. Series A No. 2, para. 29, and Advisory Opinion OC-24/17, supra, para. 26.

64 *Cfr.* Case of Gelman v. Uruguay. Sentencing Compliance Supervision. Resolution of the Inter-American Court of Human Rights of 20 March 2013, Recitals 65 to 90, and Advisory Opinion OC-24/17, *supra*, para. 27.

65 *Cfr.* Advisory Opinion OC-21/14, *supra*, para. 31, and Advisory Opinion OC-24/17, *supra*, para. 27.

Convention relating to the Status of Refugees and its 1967 New York Protocol, as well as with the Latin American conventions on asylum, and norms pertaining to the domestic legislation of OAS Member States.

63. The relevant inter-American provisions establish the following:

> Article 22 of the American Convention. Right of Movement and Residence
> [...]
> 7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes. [...]
>
> Article XXVII of the American Declaration. Right to asylum
>
> Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.

64. As can be seen, the human right on which the Court will focus its interpretive work is the "right of asylum", described in general terms, and its various normative components in accordance with the provisions cited above. However, given that the term 'asylum' remains an ambiguous concept in both national and international law insofar as the term manifests different meanings, the Court is called upon to interpret whether Article 22(7) of the American Convention and Article XXVII of the American Declaration encompass as a right the various modalities of asylum, i.e. territorial asylum, refugee status in accordance with the 1951 Convention, and diplomatic asylum; or if, on the contrary, the right of asylum in those inter-American instruments is limited to several, but not all, of these concepts.

65. For the Court, asylum is the guiding concept that includes all the institutions linked to the international protection of persons forced to flee their country of nationality or habitual residence. As mentioned above, the institution of asylum manifests itself through a variety of different concepts or modalities. For the purposes of this advisory opinion, the Court will establish its understanding of the classification of asylum.

66. Asylum in its strict meaning, also referred to as political asylum,[66] is the protection that a State offers to persons who are not its nationals when their life, personal integrity, security and/or freedom are or could be in danger, as a result of persecution for political offences, or for political reasons. Asylum in the strict sense of the word coincides with the "Latin-American tradition of asylum" (*infra* paras. 78-93).

67. However, depending on the place where protection is provided, asylum in the strict sense of the term can in turn be classified into the following modalities:

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66 The terminology of "political asylum" was used in different Latin American conventions to refer to diplomatic asylum, while "political refuge" was adopted as a term synonymous with territorial asylum, despite the fact that all these institutions were granted for the benefit of persons persecuted for political or related crimes or for political motives. Thus, diplomatic asylum has also been referred to as political asylum and territorial asylum has sometimes been referred to refuge or political refuge. This classification contributed to the confusion of terminology and the dichotomy asylum-shelter. The Court therefore considers that political asylum encompasses both territorial asylum and diplomatic asylum, and is referred to as "political" because of the subject matter it seeks to protect, i.e. persecution for political or related offences, or for political reasons, beyond the place where it is granted (*infra* para. 88).

(i) *Territorial Asylum*: the protection that a State provides in its territory to persons who are nationals or habitual residents of another State where they are persecuted for political reasons, because of their beliefs, opinions or political affiliation or because of acts that may be considered to be political crimes or related ordinary crimes. Territorial asylum is intrinsically linked to the prohibition of extradition for political or ordinary offences committed for political ends.

(ii) *Diplomatic asylum*: protection provided by a State within its legations, warships, military aircraft and camps, to persons who are nationals or habitual residents of another State where they are persecuted for political reasons, for their beliefs, opinions or political affiliation or for acts that may be considered political offences or related common crimes.

68. *Asylum in the form of 1951 Refugee Convention status, according to the traditional definition and its expanded regional definition of the Cartagena Declaration*,[67] concerns the protection of a person concerned who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. The term 'refugee' also applies to persons who have fled their countries of origin because their life, security or freedom have been threatened by widespread violence, foreign aggression, internal conflict, massive human rights violations or other circumstances which have seriously disturbed public order.

69. Taking into account the above classification, the issue that the Court has to clarify in this section is whether, on the basis of the interpretative guidelines of international human rights law, it is possible to understand that Article 22(7) of the American Convention and Article XXVII of the American Declaration, which are the provisions concerning the human right to seek and receive asylum, also encompass the different modalities, forms or categories of asylum developed in international law (including diplomatic asylum), contained in Article 14.1 of the Universal Declaration of Human Rights, the 1951 Geneva Convention relating to the Status of Refugees and its New York Protocol of 1967, as well as the regional conventions on asylum, and the internal legislation of the OAS Member States.

70. The answer to this question ultimately depends on the conclusions that the Court arrives at with regard to the various interpretative ambiguities that have given rise to this procedure, the way in which the inter-American provisions were written as regards the following aspects: (i) the meaning of the term asylum itself; (ii) the factor "foreign territory"; and (iii) the conditioning factor "in accordance with the legislation of each country/State; and with international conventions".

71. In order to start its interpretive work, the Court considers it pertinent, as a prelude, to show that asylum as a concept has changed over time, given that it derives from a number of similar institutions that have existed throughout history, but which acquired particular nuances depending

67 *Cfr.* Convention on the Status of Refugees, *supra*, Article 1.A.2), and Declaration of Cartagena on Refugees, adopted by the "Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems", held in Cartagena, Colombia, from 19 to 22 November 1984, which was sponsored by the Government of Colombia and co-sponsored by the Faculty of Law of Universidad Cartagena de Indias, the Regional Center for Third World Studies and the United Nations High Commissioner for Refugees, Third Conclusion. See also, Advisory Opinion OC-21/14, *supra*, para. 49.m).

on the period. Asylum went from being a humanitarian institution, to later acquiring a markedly religious character and is now recognized as a legal institution, that varies as to scope and nuance, both in international law and domestic law. Once a recognized legal institution, asylum began to be codified in treaties of a purely interstate nature and, later, in human rights instruments. The Court will therefore refer to the recognition of asylum as a human right in international instruments, both under regional and universal regimes, to finally focus specifically on its interpretive function according to the terms described above. The scope of state obligations will be discussed in the later chapter that addresses the second question.

A. Historical development of asylum

A.1 Origins

72. While it is complex to establish with certainty the exact timing of its occurrence, according to some scholars, asylum has existed since ancient times among peoples such as the Egyptians and the Hebrews through the so-called "cities of refuge". Also, among the Greeks, there was the custom to grant protection to any person who took refuge in temples due to the sacred character of places of worship (statues, altars and temples of the gods). In this case, the guarantee of asylum was a matter of divine right, i.e. it did not derive from moral or legal principles, or humanitarian considerations, but rather from fear and superstition related to the punishment of the divinity if the enclosures in which the protected persons were located were violated. This type of asylum is known by scholars as "pagan asylum".

73. The modern etymology of the expression asylum comes from the Greek word *ásylos*, which means "inviolable place". The practice of asylum in Christianity began with the erection of the first temples of this faith coinciding with Christianity becoming the official religion of the Roman Empire. From there, the inviolability of the asylee derived from, first, the respect for the position of the priest who interceded on behalf of the persecuted, and after from the inviolability of the sacred character of the enclosure (churches, convents, cemeteries). With this, canonical or ecclesiastical asylum was born.

74. With the passage of time, however, the concept of ecclesiastical asylum lost strength. The emergence of independent and sovereign states in Europe led to an increase in the protection of individuals within the territory of the receiving State, so that territorial asylum began to gain ground, while extradition of common criminals became more prevalent. The modern legal framework of asylum has its origin in the French Revolution and the French Constitution of 1793, when asylum ceased to be a religious tradition and acquired its civil character and political content, and became closely linked to the concept of sovereignty and the exercise of extradition. The incompatibility of political ideals in the 19th century, resulting from national construction processes, gave rise to great migration flows through Europe of people seeking protection. Reflecting these developments, laws and treaties distinguished between common crimes and political crimes, and the notion of political asylum developed. However, despite the recognition of asylum in favour of the politically persecuted in relation to specific decisions to deny extradition to certain persons in post-revolutionary Europe, this did not lead to a general progressive and vigorous development of the concept of asylum in the internal jurisdictions of European countries, nor through international conventions.

A.2 Emergence and evolution of diplomatic asylum

75. Diplomatic or extraterritorial asylum appears with the birth of nation-states and the establishment of permanent diplomacy in Europe in the 15th and 16th centuries, as a result of the installation of embassies and the granting of personal privileges to ambassadors, who from then on enjoyed, among other things, the inviolability of their property (housing and transport). Diplomatic asylum progressed during this time, while religious or ecclesiastical asylum declined, the latter being a precursor to diplomatic asylum, due to the inviolability of sacred spaces, as explained above (*supra* para. 73). It is important to note that, after the 1648 Congress of Westphalia, and the consequent consolidation of diplomacy in the 16th and 17th centuries in European states, the need arose to establish certain rules relating to the immunity of the person of the ambassador, as well as the inviolability of their properties. As a result, the ambassador's residence began to be guarded, and the diplomatic mission was consolidated as a safe place, completely isolated from the exercise of the jurisdiction of the receiving State. The inviolability of diplomatic premises was initially a matter of customary practice but became codified in the Vienna Convention on Diplomatic Relations, which overcame the fiction of considering a diplomatic mission the territory of the country it represented.

76. Diplomatic asylum was initially granted to common criminals, given that inviolability did not only affect the missions and the residence of the ambassador, but extended to the entire district in which the residence was located (*franchise des quartiers or jus quateriorum*), although the latter concept ended in the 18th century due to abuses committed in practice. The ambassadors' custom of receiving different people in legations soon led to major conflicts concerning the scope of the diplomatic mission's prerogatives, so that diplomatic asylum began to fall into disuse in Europe in the 19th century, while extradition consolidated further. Despite resistance by the territorial governments in recognizing it as such, diplomatic asylum for those accused of political crimes continued to be granted in some European cases throughout the 19th and 20th centuries.

77. Despite the decline of the institution of diplomatic asylum in Europe due to greater political stability, it crystallized further in Latin America as a response to the constant crises resulting from the incipient independence of Latin American States. So while diplomatic asylum was born in Europe, due to political circumstances it was later developed in the legislation of Latin American countries, where this issue was given a broader impetus, in particular by the creation of international treaties on the subject.

A.3 The so-called "Latin American tradition of asylum" and non-extradition for political or related offences

78. The development of territorial and diplomatic asylum in Latin American countries dates back to the end of the 19th century, when States, after gaining their independence, began to organize themselves politically and to adopt bilateral or multilateral treaties to regulate asylum for the benefit of politically persecuted persons, at the same time as they established the rule of non-extradition in the case of persons who, according to the qualification of the requested State, are persecuted for political crimes, or common crimes prosecuted for a political purpose or reason. Under this doctrine, the aim is to respect the principle that those accused of crimes of a common nature shall submit to justice systems operating under the rule of law and to avoid impunity, and, on the other hand, not to cripple revolutionary and self-determination movements, as well as freethinkers.

79. However, as Colombia pointed out in its arguments in the Asylum Case (*Colombia v. Peru*) before the International Court of Justice, the institution of asylum in the Americas was born as a result of the coexistence of two phenomena derived from law and politics: on the one hand, the power of democratic principles, respect for the individual and freedom of thought; and on the other, the unusual frequency of revolutions and armed struggles that endangered the security and lives of the people on the losing side.[68]

80. Asylum was thus progressively regulated, generally as a result of or in response to inter-State conflicts that arose as a result of specific events. In this first stage, which marked the so-called "Latin American tradition of asylum",[69] asylum was incorporated into multilateral instruments, in such a way that it was regulated as a State's sovereign right to grant protection to those persons it deemed appropriate to protect.

81. An example of this was the Treaty on International Criminal Law, which was signed by the plenipotentiaries of Argentina, Bolivia, Paraguay, Peru and Uruguay in Montevideo on 23 January 1889, during the First South American Congress of Private International Law, which was adopted after two incidents relating to diplomatic asylum. The first concerned a Peruvian General in May 1865 at the United States Embassy in Peru while the second concerned the protection afforded to a group of Peruvian asylum-seekers living with the acting *chargé d'affaires* of France in Peru. These cases highlighted the need to adopt certain rules of common understanding, while providing flexibility in the search for solutions.

82. This multilateral instrument clearly established that extradition would not extend to political offences, and classified such offences in the second paragraph of Article 23 as those that the requested nation considers in accordance with their laws, applying in any case the most favourable rule to the requested person. The treaty also establishes the inviolability of asylum for persons persecuted for political offences (Article 16) and regulates both territorial asylum (Articles 15 and 18) and diplomatic asylum (Article 17). With regard to the latter, it also established that this fact must be brought to the attention of the territorial State, which may require that the persecuted person be brought outside the national territory as soon as possible, for which purpose it must provide the necessary guarantees. From the foregoing it follows that, if the person is required for common crimes, that person must be handed over to local authorities by the head of the legation. In addition, the asylum-seeker is required to behave in a manner that does not infringe the public peace of the State against which the crimes were committed.

83. On 20 February 1928, the Havana Convention on Asylum was adopted at the Sixth International Conference of American States, with the purpose of regulating the concept of diplomatic asylum.[70] It reiterates that persons accused or convicted of ordinary offences may not benefit from diplomatic asylum and must therefore be surrendered to the authorities of the territorial State (Article 1). As for persons persecuted for political crimes, who may apply for asylum in legations, this treaty makes progress in establishing some rules shall be respected "to the extent in

68 *Cfr.* International Court of Justice (ICJ), Arguments, Oral Arguments, Documents, *Asylum Case* (Colombia v. Peru). Vol I, p. 25, quoted in the Report of the Secretary-General of the United Nations to the General Assembly on the Question of Diplomatic Asylum, 22 September 1975, Part II, para. 11.

69 *Cfr. Case of the Pacheco Tineo Family v. Bolivia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of 25 November 2013. Series C No. 272, para. 137 and Advisory Opinion OC-21/14, *supra*, para. 74.

70 This Convention, which entered into force on 21 May 1929, has 16 State Parties: Brazil, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and Uruguay.

which allowed, as a right or through humanitarian toleration, by the usages, the conventions or the laws of the country in which granted" (Article 2). These rules refer to: (i) the granting of asylum only in cases of emergency and for the time strictly necessary for the asylee to be put in a different position of security; (ii) the communication of the granting of asylum to the territorial State or the State in which the offence was committed; (iii) the power of the latter State to require that the asylee be removed from the national territory within the shortest possible time; (iv) the power of the asylum-granting State to require the necessary guarantees for the asylee to leave the country; and (v) the prohibition of the asylee from engaging in acts contrary to public tranquility. The treaty does not define what is meant by ordinary or political crime, nor does it specify which state has the right to define it.

84. Subsequently, on 26 December 1933, the Convention on Political Asylum of Montevideo[71] on the regulation of diplomatic asylum was adopted, the objective of which was to modify Article 1 of the Havana Convention.[72] The Convention also specified that the asylum State is responsible for "classifying the political crime" (Article 2).

85. Subsequently, the Treaty on Asylum and Political Refuge of Montevideo was adopted on 4 August 1939.[73] This treaty, which regulates both the territorial and diplomatic aspects of asylum, was based on a draft prepared by the Minister of Foreign Affairs and Worship of the Argentine Republic, in response to the renewed interest in regulating asylum with greater precision and in connection with the civil war in Spain.[74] Although none of the treaties adopted had the intention of repealing the previous one, the purpose of this treaty was to adopt more robust and detailed regulations in order to provide a normative response to new situations that had arisen,[75] stressing that its scope of application was extended from protecting persons persecuted for political or related common crimes to protecting them and those persecuted for political reasons, a criterion that was maintained in the two Caracas Conventions of 1954. The treaty reiterates some previously regulated matters relating to diplomatic asylum, such as the fact that the names of asylum-seekers must be communicated immediately to the territorial State; that asylum-seekers are not allowed to engage in acts that disturb public tranquility or that tend to participate in or influence political activities, the violation of which will result in the cessation of asylum; that the territorial State may require that the asylum-seeker be removed from the national territory as soon as possible; and that the asylum-seeking State may, in turn, demand the necessary guarantees to enable the asylum-seeker to leave the country. It adds that the asylum-seeking State "does not incur a duty [having granted diplomatic asylum] to admit asylum-seekers to its territory" (Article 1). It also contains considerations on mass flows (Article 8) and the case of severance of diplomatic relations (Article 10), and provides that

71 This Convention, which entered into force on March 28, 1935, has 16 State Parties: Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and Cuba.

72 The American Institute of International Law was requested by the Council of the Pan-American Union to prepare a project on diplomatic asylum for the Seventh International Conference of American States, which was adopted on 26 December 1933. The document was not signed by the United States of America, which expressly stated that it did not recognize or endorse the doctrine of asylum as part of international law.

73 This Convention has 6 State Parties: Argentina, Bolivia, Chile, Paraguay, Peru, and Uruguay. The Treaty entered into force among the High Contracting Parties in the order in which they deposited their respective ratifications (Article 18).

74 *Cfr.* Report of the Secretary-General of the United Nations to the General Assembly on the Question of Diplomatic Asylum, 22 September 1975, Part II, para. 63.

75 Report of the Secretary-General of the United Nations to the General Assembly on the Question of Diplomatic Asylum, 22 September 1975, Part II, para. 64.

any dispute shall be settled through diplomatic channels, arbitration or a court decision recognized by both parties (Article 16).

86. Finally, the Conventions on Diplomatic Asylum[76] and Territorial Asylum[77] were both adopted on 28 March 1954 in Caracas. In particular, the Convention on Diplomatic Asylum was adopted after the judgment of the International Court of Justice of 20 November 1950 in the Asylum Case (*Colombia/Peru*), following the asylum granted to Mr. Victor Raúl Haya de la Torre at the Colombian Embassy in Peru. The analysis of this case by the International Court of Justice exposed the lack of precise and concrete regulation of various aspects of diplomatic asylum, which led the Latin American States to regulate, once again, this institution. Indeed, a few months after the decision of the International Court of Justice, the Council of the Organization of American States adopted a resolution declaring that the right to asylum was a "legal principle of the Americas" enshrined in international conventions and included as a fundamental right in the American Declaration.[78] This resolution also recommended that the Inter-American Juridical Committee give priority to the study of this issue, on the basis of which it prepared two draft conventions on territorial and diplomatic asylum, which, after various amendments, were adopted in 1954.[79] These two instruments constitute the most comprehensive conventions on asylum in the Latin American region. The Convention on Territorial Asylum has been ratified by 12 States and the Convention on Diplomatic Asylum has been ratified 14 States.

87. The Convention on Diplomatic Asylum maintains the position that it is a right of the State to grant asylum, so it is not obliged to grant it or to declare why it denies it.[80] On the other hand, it expands the places where diplomatic asylum may be granted;[81] it settles the question as to whether it is the asylum State that is unilaterally responsible for determining the nature of the crime or the reasons for the persecution, taking into account the information that the territorial government offers it;[82] the requirement of urgency as a prerequisite for the granting of such a permit, which must also be assessed by the asylum State;[83] and seeks to regulate in more detail the termination of diplomatic asylum, in particular that the territorial State may, at any time, require that the asylum-seeker be removed from the country by granting a *laissez-passer* and guarantees that his or her life, liberty or personal integrity will not be endangered.[84] That is to say, the territorial state obliges itself in this treaty framework to guarantee the departure of asylum-seekers to a foreign territory, on the understanding that protection is strictly indispensable for a period of time.

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76 The Convention on Diplomatic Asylum, which entered into force on 29 December 1954, has 14 State Parties: Argentina, Brazil, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela.

77 The Convention on Territorial Asylum, which entered into force on 29 December 1954, has 12 State Parties: Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Panama, Paraguay, Uruguay, and Venezuela.

78 *Cfr.* OAS, Archives, vol. 3, No. 2, 1951, p. 119, cited in the Report of the Secretary General of the United Nations to the General Assembly on the Question of Diplomatic Asylum, 22 September 1975, Part II, para. 74.

79 See Report of the Secretary-General of the United Nations to the General Assembly on the Question of Diplomatic Asylum, 22 September 1975, Part II, paras. 74-78

80 Article II.

81 The second paragraph of Article I defines the term "legation" as meaning the seat of an ordinary diplomatic mission, the residence of the heads of mission and the premises designated by them for the accommodation of the asylees when the number of asylees exceeds the normal capacity of the buildings.

82 Articles IV and IX.

83 Articles V, VI and VII.

84 Articles V, XI, XII and XIII.

88. Until the 1954 Conventions, the term "asylum" was used exclusively to refer to the specific form of "diplomatic asylum", also known as "political asylum", relating to that granted by States in embassies, legations, warships and military camps or aircraft, while the term "political refuge" referred to protection granted in a foreign territory. This partly explains the "asylum-refuge" dichotomy and its implications for the protection of refugees in the region.[85]

89. On the other hand, extradition treaties, bilateral or multilateral, which concern international cooperation in judicial matters, generally incorporate as an exception to extradition political offences or related offences, or a common offence pursued for a political purpose or reason.[86] In this regard, the Court notes that Article 4(4) of the Inter-American Convention on Extradition[87] establishes that extradition is inadmissible "When, as determined by the requested State, the offense for which the person is sought is a political offense, an offense related thereto, or an ordinary criminal offense prosecuted for political reasons". It also prevents any interpretation of the treaty as a limitation of the right to asylum (Article 6). Likewise, Article 9.c of the Inter-American Convention on Mutual Assistance in Criminal Matters[88] provides that the requested State may refuse assistance when it considers that "The request refers to a crime that is political or related to a political crime, or to a common crime prosecuted for political reasons;". The Court notes, however, that there is no uniformity in the conceptualization of what constitutes a political or related crime in judicial and administrative practice.

90. With the evolution of international law, progress has been made in codifying certain exclusions in special treaties, that is to say, crimes that cannot be considered political. In particular, Article 13 of the Inter-American Convention against Terrorism[89] provides that "Each state party shall take appropriate measures, consistent with the relevant provisions of national and international law, for the purpose of ensuring that asylum is not granted to any person in respect of whom there are reasonable grounds to believe that he or she has committed an offense established in the international instruments listed in Article 2 of this Convention." For its part, Article XII, paragraph 2, of the Inter-American Convention against Corruption[90] provides that "each of the offenses to which this Article applies shall be deemed to be included as extraditable offenses in any extradition treaty existing between or among the States Parties." Similarly, in the universal system, Article 44 of the United Nations Convention against Corruption[91] stipulates that "[e]ach of the offences to

85 *Cfr. Case of the Pacheco Tineo Family v. Bolivia*, *supra*, footnote 162.

86 For example, it is included in Article 3(a) of the United Nations Model Treaty on Extradition, A/RES/45/116, 14 December 1990, available at: http://www.un.org/documents/ga/res/45/a45r116.htm

87 The Inter-American Convention on Extradition, which entered into force on 28 March 2002, has six State Parties: Antigua and Barbuda, Costa Rica, Ecuador, Panama, Saint Lucia, and Venezuela.

88 The Inter-American Convention on Mutual Assistance in Criminal Matters, which entered into force on 14 April 1996, has 28 State Parties: Antigua and Barbuda, Argentina, Bahamas, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela.

89 The Inter-American Convention against Terrorism, which entered into force on 7 October 2003, has 24 State Parties: Antigua and Barbuda, Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, United States of America, Grenada, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Trinidad and Tobago, Uruguay, and Venezuela.

90 The Inter-American Convention against Corruption, which entered into force on 3 June 1997, has 34 State Parties: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Suriname, Trinidad and Tobago, United States of America, Uruguay, and Venezuela.

91 The United Nations Convention against Corruption, which entered into force on 14 December 2005, has 186 State Parties, of which 31 are OAS Member States: Antigua and Barbuda, Argentina, Bahamas, Belize, Bolivia, Brazil,

which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. […] A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence."

91. Furthermore, the Court considers that, while the institution of political asylum seeks to protect persons persecuted for political offences or common crimes related to political offences, or for political reasons, and that the prohibition of extradition, in such cases, is a mechanism to guarantee such protection, such a concept cannot be used as a means of encouraging, procuring or ensuring impunity in cases of serious human rights violations. To understand the opposite would have the consequence of denaturing the concept. In other words, the protection provided through asylum and the prohibition of extradition in cases of political offences or related crimes cannot be designed to protect persons seeking to evade their responsibility as the material or intellectual perpetrators of international crimes.[92] Thus, the Court has previously affirmed that extradition is an important instrument in the criminal prosecution of serious human rights violations, and thus a mechanism for combating impunity.[93] Based on the norms of international law that establish the duty to investigate and prosecute, a State may not grant direct or indirect protection to those prosecuted for crimes involving serious violations of human rights through the improper application of legal provisions that violate relevant international obligations.[94]

92. Likewise, the nature and seriousness of grave and systematic human rights violations gives rise to a duty on the part of the international community to eradicate impunity and a duty of inter-State cooperation for this purpose. The Court therefore considers that the States of the region are called upon to cooperate in good faith, either by extraditing or prosecuting in their territories those responsible for such acts,[95] without prejudice to the international obligations to which they are subject (*aut dedere aut judicare* principle).

93. The adoption of a catalogue of treaties related to the legal institution of asylum with typically Latin American connotations, as well as the non-extradition clause for political crimes or political motives, led to what is commonly referred to as "the Latin American tradition of asylum".[96] It should be noted that this Latin American tradition focused protection on cases of persecution of a person for the commission of political offences, or common offences related to them, or for political reasons, and considered that the decision to grant asylum rested with the State, which had the prerogative to grant the asylum. Subsequently, the traditional concept of Latin American asylum

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Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Ecuador, El Salvador, United States of America, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Saint Lucia, Trinidad and Tobago, Uruguay, and Venezuela.

92 *Cfr.* Inter-American Commission on Human Rights (CIDH), Annual Report of the Inter-American Commission on Human Rights 2000, Chapter VI, Special Studies, *Recommendation on Asylum and its Relation to International Crimes*, OEA/Ser./L/V/II.111, Doc. 20 Rev., 16 April 2000, available at: http://www.cidh.oas.org/asilo.htm

93 *Cfr. Case of Goiburú et al. v. Paraguay. Merits, Reparations and Costs.* Judgment of 22 September 2006. Series C No. 153, para. 132; *Case of the Mapiripán Massacre v. Colombia. Sentencing Compliance Supervision.* Resolution of the Inter-American Court of Human Rights of 8 July 2009, Recital 40, and *mutatis mutandi*, *Case of Wong Ho Wing v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of 30 June 2015. Series C No. 297, para. 119.

94 *Cfr. Case of Goiburú et al. v. Paraguay, supra*, para. 132, and *Case of Manuel Cepeda Vargas v. Colombia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of 26 May 2010. Series C No. 213, para. 166.

95 *Cfr. Case of Goiburú et al. v. Paraguay, supra*, paras. 131-132, and *Case of Herzog et al. v. Brazil. Preliminary Objections, Merits, Reparations and Costs.* Judgment of 15 March 2018. Series C No. 353, para. 296.

96 *Cfr. Case of Pacheco Tineo Family v. Bolivia, supra*, para. 137, and Advisory Opinion OC-21/14, *supra*, para. 74.

has evolved in consonance with the normative development of the inter-American human rights system (*infra* para. 112).

A.4 Refugee status as a universal protection regime

94. In 1951, the Convention on the Status of Refugees was adopted by the United Nations to deal with refugee situations arising from the atrocities and massive crimes committed during the Second World War in Europe. This instrument therefore places great emphasis on the prohibition of *refoulement* and the right of assimilation. Its 1967 Protocol extended the applicability of the 1951 Convention by removing the geographical and temporal restrictions which had limited their application to persons displaced in that context.[97]

95. This Court has already stated that the central importance of both treaties is that they are the first global instruments to specifically regulate the treatment of those forced to leave their homes because of a break with their country of origin. Although the 1951 Convention does not explicitly establish the right of asylum as an explicit right, it is considered to be implicitly incorporated in its text,[98] which contains the definition of a refugee, protection under the principle of *non-refoulement* and a catalogue of rights to which refugees have access. In other words, these treaties establish the basic principles on which the international protection of refugees is based, what their legal status is and their rights and duties in the country of asylum, as well as issues relating to the implementation of the respective instruments.[99] With the protection of the 1951 Convention and its 1967 Protocol, the institution of asylum assumed a specific form and modality at the universal level: that of refugee status.[100] Thus, "the institution of asylum, which derives directly from the right to seek and enjoy asylum set out in Article 14 (1) of the 1948 Universal Declaration of Human Rights (*infra* para. 113), is among the most basic mechanisms for the international protection of refugees".[101]

96. Subsequently, at the regional level, the Cartagena Declaration on Refugees was adopted at a colloquium held by UNHCR and other institutions in November 1984 in Cartagena=, Colombia. The Declaration broadened the definition of refugees to cover, in addition to the elements of the 1951 Convention and the 1967 Protocol, persons who have fled their countries because their life, security or freedom has been threatened by widespread violence, foreign aggression, internal conflicts, massive human rights violations or other circumstances that have seriously disturbed public order.[102] The Court has considered that the broadening of the definition of refugees is not only a response to the dynamics of forced displacement that gave rise to it, but also satisfies the

97 *Cfr. Case of Pacheco Tineo Family v. Bolivia, supra*, para. 138, and Advisory Opinion OC-21/14, *supra*, footnote 417.

98 *Cfr. Case of Pacheco Tineo Family v. Bolivia, supra*, para. 138, and Advisory Opinion OC-21/14, *supra*, footnote 413.

99 *Cfr. Case of Pacheco Tineo Family v. Bolivia, supra*, para. 139.

100 This is evidenced in the preamble to the 1951 Convention itself, as the importance of international cooperation to ensure the granting of asylum through the treaty itself, and has been reiterated by the UNHCR Executive Committee. *Cfr. Case of Pacheco Tineo Family v. Bolivia, supra*, para. 139, and Advisory Opinion OC-21/14, *supra*, para. 74.

101 United Nations High Commissioner for Refugees (UNHCR), Executive Committee, *Conclusion on the Safeguarding of the Institution of Asylum*, UN Doc. 82 (XLVIII)-1997, issued 17 October 1997, para. b. The Executive Committee, in its Conclusion No. 5 of 1977, had already called on State Parties to the 1951 Convention and the 1967 Protocol to apply liberal practices and to grant permanent or at least temporary asylum to refugees who had arrived directly on their territory. United Nations High Commissioner for Refugees (UNHCR), Executive Committee, Asylum, UN Doc. 5 (XXVIII)-1977, published in 1977, para. a. *Cfr. also, Case of Pacheco Tineo Family v. Bolivia, supra*, para. 139, and Advisory Opinion OC-21/14, *supra*, footnote 414.

102 *Cfr. Case of Pacheco Tineo Family v. Bolivia, supra*, para. 141, and Advisory Opinion OC-21/14, *supra*, para. 76.

protection challenges arising from other patterns of displacement that are occurring today.[103] The Declaration, in turn, reaffirmed the peaceful, apolitical and exclusively humanitarian nature of the granting of asylum or recognition of refugee status.[104] The expanded definition of Cartagena has been adopted in different national legislations in the Latin American region (*infra* para. 129).

97. The Court recalls that it has previously had the opportunity to develop various criteria relating to State obligations with respect to asylum-seekers and refugees from a human rights perspective, in light of Articles 22(7), 1(1) and 2 of the American Convention, which in turn took into account, in the terms of Article 29.b) of the Convention and the text of Article 22.7 itself, the specialty of the protection regime developed at the universal level under the 1951 Convention and its 1967 Protocol; the guidelines, criteria and other authorized pronouncements of bodies such as the UNHCR, and the domestic legislation of States implementing a scheme of international protection for such persons.[105] This development was established in the precedent cases of *Pacheco Tineo Family v. Bolivia* and *Advisory Opinion OC-21/14*.

98. The legal value of the criteria developed by this Court regarding the right to asylum under refugee status has been reaffirmed by the States of the continent in the Declaration and Plan of Action of Brazil in 2014,[106] as an expression of their *opinio juris*, in which they maintained that:

> Recognize developments in the jurisprudence and doctrine of the Inter-American Court of Human Rights, in those countries in which they apply, regarding the content and scope of the right to seek and grant asylum enshrined in the regional human rights instruments, their relationship to international refugee instruments, the *jus cogens* character of the principle of *non-refoulement*, including non-rejection at borders and indirect *refoulement*, and the integration of due process guarantees in refugee status determination procedures, so they are fair and efficient.[107]

99. In particular, the Court recalls that the right to seek and receive asylum in connection with refugee status under the 1951 Convention, recognized in Articles 22.7 of the American Convention and XXVII of the American Declaration, read in conjunction with other provisions of the Convention and in light of the special treaties, imposes certain specific duties on the State: (I) the obligation not to return (*non-refoulement*) and its extraterritorial application; (ii) the obligation to allow asylum applications and not to reject them at the border; (iii) the obligation not to penalize or sanction irregular entry or presence, and non-detention; (iv) the obligation to provide effective access to a fair and efficient refugee status determination procedure; (v) the obligation to ensure

103 See Advisory Opinion OC-21/14, *supra*, para. 79.

104 Cartagena Declaration on Refugees of 1984, *supra*, Conclusion Four. *Cfr.* also, *Case of the Pacheco Tineo Family v Bolivia*, *supra*, para. 141, and Advisory Opinion OC-21/14, *supra*, para. 77.

105 *Cfr. Case of the Pacheco Tineo Family v. Bolivia*, *supra*, para. 143, and Advisory Opinion OC-21/14, *supra*, paras. 58 to 60. This integrative interpretation has also been used by the Inter-American Commission on Human Rights (CIDH), Report on the human rights situation of asylum-seekers in the framework of the Canadian system of refugee status determination, OEA/Ser.L/V/II.106. Doc. 40. Rev. 1, 28 February 2000, paras. 26 and 28.

106 On 2 and 3 December 2014, the Governments of Latin America and the Caribbean met in Brasilia on the occasion of the 30th anniversary of the Cartagena Declaration on Refugees of 1984. At the close of the Ministerial Meeting, organized by the Government of Brazil, 28 countries and three territories from Latin America and the Caribbean (Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Cayman Islands, Chile, Colombia, Costa Rica, Cuba, Curaçao, El Salvador, Ecuador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Suriname, Trinidad and Tobago, the Turks and Caicos Islands, Uruguay and Venezuela) adopted by acclamation the Brazilian Declaration and Plan of Action, agreeing to work together to maintain the highest standards of protection at the international and regional levels.

107 Twelfth paragraph of the preamble to the Brazilian Declaration and Plan of Action.

minimum due process guarantees in fair and efficient procedures for determining refugee status; (vi) the obligation to adapt procedures to the specific needs of children and adolescents; (vii) the obligation to grant international protection if the definition of refugee is met and to ensure the maintenance and continuity of refugee status; (viii) the obligation to interpret the exclusion clauses restrictively; and (ix) the obligation to provide equal access to rights as set out in the 1951 Convention.

100. Thus, while the refugee protection regime was temporarily and geographically extended by the 1967 Protocol and consolidated at the universal level, with numbers of forcibly displaced persons rising higher than ever before in contemporary history, there has been no global consensus to make progress on a binding treaty on territorial and diplomatic asylum.

B. The nucleus of asylum as a legal concept and its particularities according to modality

101. The term asylum has been defined as "protection granted by a State on its territory or elsewhere under the control of one of its organs to a person who has come to seek asylum".[108] Based on the above, the Court considers that the concept of asylum in broad terms rests on a hard nucleus that is related, on the one hand, to the protection offered by a State to a person who is not a national of that State or who does not habitually reside in its territory and, on the other, to not surrendering that person to a State where his or her life, security, freedom and/or integrity is or could be in danger. This is because the primary purpose of the institution is to preserve the life, security, liberty or integrity of the person.

102. At the global level, it has been emphasised that the situation of asylum-seekers is of concern to the international community.[109] Asylum is considered to serve the purpose of protecting the human person and is a peaceful and humanitarian act.

103. Several international instruments have made statements in this regard. The 1967 Declaration on Territorial Asylum states that "the grant of asylum by a State [...] is a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State".[110] This Declaration further emphasizes that asylum exists within the framework of the purposes proclaimed in the Charter of the United Nations, including achieving international cooperation in solving international problems of various kinds, including humanitarian problems.[111] In turn, Article 3 of the 1933 Montevideo Convention on Political Asylum (*supra* para. 84) states that "[p]olitical asylum, as an institution of humanitarian character, is not subject to reciprocity". For its part, the 1951 Convention on the Status of Refugees recognizes in its preamble "the social and humanitarian nature of the problem of refugees", calling on States to "do everything within their power to prevent this problem from becoming a cause of tension between States". The "peaceful, non-political and exclusively humanitarian nature of grant of asylum or recognition of the status of refugee", as well as "the importance of the internationally accepted principle that nothing in either shall be interpreted as an unfriendly act towards the country of origin of refugees" were ratified by the fourth provision of the Cartagena Declaration. The Organization of African Unity (OAU) has also recognized asylum as a

108 *Cfr.Cfr. Institute of International Law, Bath Session, 11 September 1950, Yearbook, Vol 43 (II), 1950, Vol. 1* "the protection that a State grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it".

109 *Cfr.* Article 2 of the 1967 Declaration on Territorial Asylum.

110 Preamble to the 1967 Declaration on Territorial Asylum.

111 *Cfr.* Preamble of the 1967 Declaration on Territorial Asylum.

peaceful and humanitarian institution, as Article II(2) of the Convention governing the specific aspects of refugee problems in Africa states that "[t]he granting of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State."[112]

104. Without prejudice to the foregoing, the Court considers it appropriate to emphasize that there is a contrast between territorial asylum and refugee status on the one hand and diplomatic asylum on the other, since the latter necessarily occurs within the context of inter-State relations. While a State granting asylum on its own territory makes use of one of its sovereign powers, in the case of diplomatic asylum, a person seeking protection is in the territory of the State requesting it, or of a third State requesting it at the request of another, and must therefore be compatible with other areas of international law, such as diplomatic relations and the principle of non-intervention in the internal affairs of the receiving State.[113] In this regard, if there are no special agreements between States on the grounds of diplomatic asylum, and this is granted by the accrediting State, with the opposition of the receiving State, a dispute could arise.

105. The place where asylum is granted consequently does make a difference. Indeed, the fact that asylum is granted in a legation means that additional aspects are taken into account. On the one hand, at the universal level, diplomatic and consular relations are governed by the Vienna Conventions of 1961 and 1963 which, in principle, do not include the granting of asylum as a diplomatic or consular function.[114] On the other hand, from the Latin American tradition of diplomatic asylum it can be seen that the place where asylum can be granted in these frameworks has expanded over the course of the various conventions, to include other places that would not normally be inviolable (*supra* para. 87).

106. That is why, beyond the question of functionality, the protection of persons on humanitarian grounds in exceptional circumstances where their life, security, liberty and/or integrity are in imminent danger is achieved by addressing the inviolability of mission premises, which is guaranteed by the Vienna Convention on Diplomatic Relations in two ways. On the one hand, by prohibiting the receiving State from entering them without the consent of the head of mission (Article 22(1)) and, on the other hand, by imposing a special obligation to “take all appropriate steps" to protect the premises from intrusion or damage (Article 22(2)). In this regard, the Court notes that, in accordance with the universal instruments, forced entry to a diplomatic representation or other mission premises, such as the residence of the head of mission or their means of transport, which also enjoy inviolability, is prohibited. Furthermore, the Court considers that the suspicion of misuse of the inviolability of these premises, whether due to violations of local laws or the

112 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government at its sixth ordinary session (Addis Ababa, 10 September 1969) and entered into force on 20 June 1974.

113 *Cfr.* United Nations General Assembly Resolution No. 2625 (XXV), *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970; Resolution No. 36/103 of the United Nations General Assembly, *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, 9 December 1981, UN Doc. A/RES/36/103, and International Court of Justice (ICJ), *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Judgment of 27 June 1986, para. 202 ff.

114 This is clear from the preparatory work, in the course of which the proposal to include diplomatic asylum was expressly rejected. Indeed, "[a] Colombian amendment to the Yugoslav draft resolution expressly proposed that the International Law Commission should deal not only with diplomatic privileges and immunities but also with the right of asylum. This amendment was rejected by votes to, with abstentions, the majority of the Committee holding that the two questions were distinctand had always been regarded as such by the International Law Commission." Yearbook of the International Law Commission, 1956, vol II, p. 131, para. 10.

continued shelter of an asylee, clearly does not constitute a justification for the receiving State to forcefully enter the premises of the diplomatic mission, in violation of the principle of inviolability. This is because Article 22 of the Vienna Convention on Diplomatic Relations itself does not provide for any exception to the principle of inviolability.

107. Without prejudice to the foregoing, the provision of protection to a person suffering persecution or imminent danger to life, security, liberty and/or integrity in a legation does not per se mean use of the facilities in a manner incompatible with the functions of the mission. This is because Article 41.3[115] of the Vienna Convention on Diplomatic Relations itself incorporates other rules derived from general international law or from particular agreements in force between the accrediting State and the receiving State in the consideration of the particular situation. In the first case, as will be specified later, the principle of *non-refoulement*, as progressively developed in the framework of international and regional human rights protection systems, may impose extraterritorial obligations on host States in cases where they exercise jurisdiction, which may be enforceable against third States, given the *erga omnes* nature of this rule in international law (*infra* paras. 188 and 192). In the second case, it is clear that this provision was inserted to amalgamate the general regulation of the diplomatic function with the provisions of the inter-American conventions on asylum in this region, or any other bilateral agreement.

108. In addition, the Court notes that the question of whether diplomatic asylum gives rise to an obligation on the accrediting State to grant it remains a controversial issue, especially since, in accordance with the Latin American Conventions, adopted in the context of an inter-State logic, States continue to consider the power to grant asylum to persons persecuted for political crimes or political reasons a State prerogative. The States themselves, which participated by sending comments to the Court in the context of this advisory opinion, agreed that diplomatic asylum was not an individual right of the person, but a State prerogative, which could be granted by States by virtue of their obligations under the conventions on diplomatic asylum or by virtue of decisions to protect humanitarian considerations and/or policies adopted on a case-by-case basis.[116] The decision

115 Article 41, paragraph 3, states that: "The premises of the mission 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 or by any special agreements in force between the sending and the receiving State."

116 For Argentina, Belize and Bolivia it is neither a right or an obligation of a State to grant diplomatic asylum, since it is an act of State sovereignty. However, these States do recognize that the individual human right includes the right to seek asylum. For Ecuador, asylum is a human right, however, it stated that "seeking asylum is a right, receiving it is a prerogative of the asylum State; and not returning the refugee or asylum-seeker is an *erga omnes* international legal obligation". Ecuador also stated that "the archaic vision of asylum as a prerogative of the State has been definitively overcome in the light of the evolution and development of international human rights law which recognizes asylum and refuge as legal institutions and, as a human right, seeking, receiving and enjoying asylum in any country". Jamaica argued, on diplomatic asylum, that it can only be justified on humanitarian grounds and that this does not imply accepting that there is a customary right to grant diplomatic asylum. For Jamaica, there is no rule of international law that establishes a right to either seek or receive diplomatic asylum. The fact that there are isolated cases where it has been necessary to grant diplomatic asylum does not constitute compelling reasons for considering the humanitarian exception of diplomatic asylum to be part of international law. For Mexico, in the case of asylum, especially political asylum, its granting is a discretionary power that does not have an established procedure, while the recognition of refugee status is a universal declaratory act in which a person who meets certain requirements is recognized as having legal status. The grant or refusal to grant asylum is a discretionary power of the State, within the exercise of its sovereignty, to admit or not to admit a person to its territory and to act as its protector. The State is not obliged to grant it or to declare reasons for granting or denying it whenever it is an act of foreign policy. Panama indicated that asylum is the exclusive and discretionary power of the Executive Branch, a decision or not to grant the status of Political, Territorial and/or Diplomatic Asylum, is made with the unilateral will of the receiving State prevailing as an expression of the exercise of its sovereignty. Guatemala stated, in a generic way, that asylum is a human right without making any distinction as to the obligations that this would entail for the

to grant political asylum, in these cases, generally depends on the Executive Branch in a unilateral decision without further participation of the applicant or specification of the minimum guarantees required in a fair and efficient procedure, in accordance with Articles 8 and 25 of the Convention.[117] Moreover, in the case of diplomatic asylum, States are not obliged to grant it or to declare reasons for granting or denying it, in accordance with the respective conventions.

109. The Court therefore notes that the nature of its diplomatic functions and the fact that the legation is located in the territory of the receiving State makes a significant difference to territorial asylum, since diplomatic asylum cannot be conceived exclusively in terms of its legal dimension, but has other implications, since there is an interaction between the principle of State sovereignty, diplomatic and international relations and the protection of human rights.

110. Similarly, while refugee status, territorial asylum and diplomatic asylum are all forms of protection for individuals who are persecuted, each operates in different circumstances and with different legal connotations in international and national law and are therefore not interchangeable. This means that the respective conventions and/or domestic legislation govern each legal situation and establish a catalogue of rights and duties of persons living in asylum under its various modalities.

State.

117 According to the information available to the Court, eight OAS member states differentiate between the concept of diplomatic asylum and that of territorial asylum in their legislation, namely: Brazil, Costa Rica, Dominican Republic, Ecuador, Paraguay, Peru, Mexico and Venezuela. These States specifically regulate diplomatic asylum, either by express rule in this regard or by reference to the 1954 Convention on Diplomatic Asylum. The Dominican Republic refers specifically to the 1933 Political Asylum Convention, although it does not have clear rules on the procedure to be followed for requests for diplomatic asylum, there is a reference to the 1933 Convention and it should be noted that the State is also a party to the 1954 Diplomatic Asylum Convention. As for the entity that decides on the granting of diplomatic asylum, the majority places such a resolution at the head of the President of the Republic - such as Ecuador - although some with intervention or consultation with the Ministry of Foreign Affairs - as is the case of Brazil and Costa Rica - while Venezuela, Peru and Mexico have granted such attribution to the Ministry of Foreign Affairs. In the case of Mexico, this power has been delegated to the Ministry of Foreign Affairs, with the prior opinion of the Ministry of Interior. In the case of Paraguay, the procedure for requesting diplomatic asylum is not expressly defined in domestic legislation; however, it is one of the countries that expressly refers to agreements and treaties on the matter. With regard to the procedure, the only country with a specific procedure in the area of diplomatic asylum is Mexico, insofar as its domestic legislation provides that the application must be submitted orally or in writing to embassies, permanent missions and consular posts, identifying personal data and reasons for the asylum request. In turn, it provides for the possibility for the above-mentioned representatives to hold interviews with the applicants, as well as for the decision on the merits of the application to be notified to both the applicant and the territorial State. The rest of the countries do not have rules governing the processing of applications for diplomatic asylum, contrary to what happens with regard to refugee status, for which all states have specifically stipulated a specific and detailed procedure for the recognition of such status. With regard to the qualification of the act for which the request is made, Costa Rica, Mexico and Peru determine domestically that it is the asylum State that has such power, while the other States concerned will be governed by Article IX of the 1954 Convention on Diplomatic Asylum. In turn, with regard to the request for information from the territorial State to determine the framework of the act, Mexico, in adopting the Guidelines on Asylum and Refuge, expressly contemplated this possibility in the section on the asylum application procedure. For its part, Costa Rica has established that it will be through the Ministry of Foreign Affairs that the conditions established in the international instruments for asylum will be verified. Finally, with regard to the issuance of a *laissez-passer*, the States of Brazil and Ecuador have specifically provided for it in their domestic legislation in cases where diplomatic asylum has been granted, while for the other States this matter is regulated by the 1954 Convention on Diplomatic Asylum. In the particular case of Mexico, both in the Law on Refugees, Complementary Protection and Political Asylum and in the Guidelines on Asylum and Refuge, the asylum State shall ensure the mechanisms for the beneficiary to enter Mexican territory after being granted asylum, although the legislation does not specify how this circumstance will be implemented.

111. The Inter-American Juridical Committee has also issued a similar opinion, stating that, although "Asylum and refuge are institutions that coincide in the essential goal of protecting human beings when [they are] victims of persecution under the conditions established by international law" this does not detract from the specificities of both systems, particularly the special procedures for their application.[118]

C. Crystallization of international asylum as a human right in international instruments

112. With the emergence of the international human rights regime, the traditional concept of asylum evolved towards its positivization as a fundamental right. Thus, the 1948 American Declaration of the Rights and Duties of Man was the first international instrument to include the right to asylum in its Article XXVII (*supra* para. 63), which led to the recognition of an individual right to seek and receive asylum in the Americas. This represented a substantial shift in the so-called "Latin American asylum tradition" from previous concepts of sovereignty and State prerogative.

113. This development was followed at the universal level with the adoption that same year, although a few months later, of the Universal Declaration of Human Rights, in which the "right to seek and to enjoy in other countries asylum from persecution" was explicitly recognized in Article 14[119] at the initiative of the Latin American bloc. Indeed, the strong tradition of asylum in the region and the fact that the American Declaration, which already recognized the right to asylum, was adopted earlier, exerted a dominant influence.

114. With regard to the wording of the provision, it should be noted that, unlike the American Declaration and the American Convention which contain the right to "seek and receive asylum", the Universal Declaration opted for the right to "seek and enjoy asylum". The preparatory work, both of the Declaration and of the American Convention, is succinct with regard to this variation and reveals a lack of exchange on the meaning of the terms, in marked contradiction with the debate that arose during the discussions held for the adoption of Article 14.1 of the Universal Declaration. The inclusion of the word "receive" in the initial draft was resisted by some countries because it was understood to express an obligation on the part of the State to grant asylum under the conditions laid down in the provision. The wording was therefore amended and the Universal Declaration adopted the terms "seeking and enjoying asylum" at the proposal of the United Kingdom, which was supported by most States. In any case, the recognition of this right represented a step forward from the situation in which asylum was regarded as a mere State prerogative. According to this understanding, if a person received asylum from the State, he or she had the right to enjoy it. The final text of Article 14 was unanimously adopted by the General Assembly, which generated criticism from authors of the doctrine for the limited form of its recognition, which could result in the content and scope of the right being hollowed out.

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118 *Cfr.* Inter-American Juridical Committee (CJI), *Opinion of the Inter-American Juridical Committee on the relations between asylum and refuge*, CJI/RES. 175 (LXXVIII-O/11), 28 March 2011. In: Annual Report of the Inter-American Juridical Committee to General Assembly, OEA/Ser.Q/IV.42, CJI/doc.399/11, 5 August 2011, p. 97, paragraphs 2 and 3, available at: http://www.oas.org/es/sla/cji/docs/INFOANUAL.CJI.2011.ESP.pdf

119 Article 14 of the Universal Declaration states that: "1. Everyone has the right to seek and to enjoy in other countries asylum from persecution. 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

115. It should also be noted that during the drafting process of the Universal Declaration, there was a proposal by Uruguay and Bolivia to incorporate diplomatic asylum under the scope of the right to asylum, which was not accepted. That is why the reference to "any country" or "other countries" in the framework of Article 14, incorporated at the proposal of the United States of America, clearly indicates that the right to asylum under that instrument refers only to territorial asylum and refugee status, and not to diplomatic asylum.

116. In addition, despite numerous attempts by the International Law Commission to place the issue of diplomatic asylum on its agenda, such efforts proved fruitless, as States have been reluctant to adopt a positivist approach to the right to asylum. Therefore, the only relevant development that operated later in the universal system on the institution of asylum concerns territorial asylum[120] and was embodied in a declaration adopted in 1967 by the General Assembly of the United Nations in its Resolution No. A/6716 1967. The Declaration on Territorial Asylum, in a sense, reproduces and extends the provisions already contained in Articles 13 and 14 of the 1948 Universal Declaration of Human Rights. However, this right did not crystallize into a universally binding human rights treaty,[121] although it did in the regional framework of the inter-American system.

117. The Court also notes that, in accordance with General Assembly Resolution No. 3321 (XXIX) of December 1974, States were invited to submit their views on diplomatic asylum for inclusion in a report of the Secretary-General on the subject, with a view to initiating preliminary studies into different aspects of the concept of diplomatic asylum. Although this report was submitted to the General Assembly, no international instruments regulating this concept were adopted.[122]

118. By contrast, in the inter-American system of human rights protection, the right to asylum was codified through the incorporation of Article 22, paragraph 7, into the American Convention. Although the right to asylum was not proposed in the initial draft of the treaty, it was included at the request of Colombia and approved by the States of the region. After its inclusion was approved, the President of the Inter-American Specialized Conference on Human Rights, during which the

120 *Cfr.* United Nations Audiovisual Library of International Law, Historical Archives, 1967 Declaration on Territorial Asylum, p. 3, available at: http://legal.un.org/avl/pdf/ha/dta/dta_ph_e.pdf. That document stressed that "[at[the twenty-first session of the General Assembly, in 1966, the Sixth Committee held a general debate on the item “Draft Declaration on the Right of Asylum” (Report of the Sixth Committee to the General Assembly, A/6570). During this debate, although a few representatives stated that the Sixth Committee should feel perfectly free to study both diplomatic and territorial asylum, the general view was that the Committee should limit itself at that stage to territorial asylum and should ensure that this limitation was adequately reflected in the text of the draft declaration. On 7 November 1966, the Sixth Committee decided to establish a new Working Group with the task of preparing a preliminary draft declaration on the right of territorial asylum. The new Working Group was composed of twenty members, and met fourteen times between 14 Novembe and 6 December 1966. Noting that its terms of reference required it to prepare a draft declaration on “territorial asylum,” and that amendments had been proposed to insert the word “territorial” before the word “asylum,” the Working Group agreed to entitle the draft as the“Declaration on Territorial Asylum” (Report of the Sixth Committee to the General Assembly, Annex, Report of the Working Group, A/6570). On 7 December 1966, the Working Group submitted a report to the Sixth Committee that included the text of the draft declaration (A/C.6/L.614), which the Sixth Committee adopted unanimously, on 9 December 1966[...]".

121 *Cfr.* United Nations Audiovisual Library of International Law, Historical Archives, 1967 Declaration on Territorial Asylum, *supra*, p. 1. It was noted there that "[i]n 1952, the Commission on Human Rights rejected proposals to include a provision on the right of asylum in the draft International Covenant on Civil and Political Rights (Memorandum of the Secretary-General on the right of asylum, E/CN.4/738)".

122 *Cfr.* Report of the Secretary-General of the United Nations to the General Assembly on the Question of Diplomatic Asylum, 2 September 1975, Introduction, para. 2.

Convention was adopted, "referred to the tragedy of the exiles and expressed the view that this project would strengthen an institution that already existed in the inter-American conventions".[123]

119. At the level of regional systems, the Court notes that, although the right to asylum was not expressly granted under the European Convention on the Protection of Human Rights and Fundamental Freedoms, it is recognised in Article 18 of the Charter of Fundamental Rights of the European Union. According to its wording, "[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention [...] and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union".[124] In the African system, it is regulated by Article 12.3 of the African Charter on Human and Peoples' Rights,[125] which states: "[e]very individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions". In addition, an expanded regional definition of refugee is welcomed.[126]

120. The Court considers it pertinent to specify that the human right of any person suffering persecution[127] under the inter-American system is to "seek" and "receive" asylum. These words cannot be separated, i.e. the configuration of the law incorporates both components and it is therefore not permissible to adopt positions that seek to disintegrate their normative strength. As for the scope of these precepts, the preparatory work of the Declaration and of the American Convention in this regard is extremely brief and reflects a lack of debate on the meaning of the terms, in marked opposition to the debate that arose during the discussions for the adoption of Article 14.1 of the Universal Declaration (*supra* para. 114).

121. In this regard, the Court notes that State actions as they relate to the right to asylum must be assessed through the general obligations of respect, guarantee and non-discrimination. However, as already noted, the Convention and the American Declaration do not contain a detailed and/or regulatory development of what this entails, but refer to both the domestic and international norms that specifically govern the matter (*infra* paras. 139-141). In short, both conventions refer to domestic legislation and to international conventions in order to make tangible the way in which the right of asylum becomes operational. In other words, State obligations and the rights of persons subject to international protection have been developed in more detail, and in accordance with the will of the States themselves, in special international instruments, specifically through international refugee law and the regional asylum normative framework. This shall not, in any event, affect the

123 OAS Secretariat, Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 7-22 November 1969, Acts and Documents, OEA/Ser.K/XVI/1.2, Washington, D.C., 1978, p. 248.

124 Article 18 of the Charter of Fundamental Rights of the European Union, published in the Official Journal of the European Union on 7 June 2016, (2016/C 202/02).

125 Article 12.3 of the African Charter on Human and Peoples' Rights (Banjul Charter), adopted on 27 July 1981, during the XVIII Assembly of Heads of State and Government of the Organization of African Unity meeting in Nairobi, Kenya, entered into force 21 October 1986.

126 *Cfr*. Article I of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *supra*.

127 The UNHCR has pointed out that: "There is no universally accepted definition of "persecution", and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution.." UN High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV. 3, para. 51.

essential core of the law and of the obligations acquired in the context of international human rights treaties.[128]

122. Thus, the Court considers that the right to seek asylum includes the right to apply for or request asylum, either within the territory of the State or when in any way under its jurisdiction, without discrimination of any kind. In addition, for the right to seek asylum to take effect in practice, host States are required to allow persons to apply for asylum or refugee status, which is why such persons cannot be rejected at the border or returned without an adequate and individualised analysis of their claims with due guarantees.[129] This requires, as the Court has stressed, the corresponding right of asylum-seekers to have a proper assessment by the national authorities of their applications and of the risk they may face in the event of *refoulement*.[130] This implies, in its positive obligations aspect, that the State must allow entry to the territory and give access to the procedure for determining the status of asylum-seeker or refugee.[131] Similarly, the Court considers that third States may not take action to prevent persons in need of international protection from seeking protection in other territories nor may they hide behind legal fictions to do so[132] in order not to give access to the corresponding protection procedures. Thus, the Court has stated that the practice of intercepting asylum-seekers in international waters in order not to allow their requests to be assessed in potential host States "is contrary to the principle of *non-refoulement*, as it does not allow for the assessment of individual risk factors".[133] The same applies to the outsourcing of borders and to migration control carried out outside the territory.[134]

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128 This is reinforced by the provisions, for example, of Article 5 of the 1951 Refugee Convention, which provides that "[n[othing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention".

129 *Case of Pacheco Tineo Family v. Bolivia*, *supra*, para. 153, and Advisory Opinion OC-21/14, *supra*, para. 210. *Cfr.* also, United Nations High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, published on 26 January 2007, para. 8.

130 *Cfr. Case of Pacheco Tineo Family v. Bolivia*, *supra*, para. 139, citing ECtHR, *Case of Jabari v. Turkey*, No. 40035/98. Judgment of 11 July 2000, paras. 48-50, and Advisory Opinion OC-21/14, *supra*, para. 81. The Commission also held that "the fact that the US authorities intercepted the Haitian refugees and summarily repatriated them to Haiti, without making a proper examination of their condition and without granting them an interview to determine whether they qualify as 'refugees', contravenes the right to seek and receive asylum under Article XXVII of the Declaration, as such actions prevented the victims from even having the opportunity to exercise that right". Inter-American Commission on Human Rights (CIDH), Merits Report No. 51/96, Case 10.675, *Interdiction of Haitians v. United States*, 13 March 1997, para. 163.

131 *Cfr. Case of Pacheco Tineo Family v. Bolivia*, *supra*, para. 153, and Advisory Opinion OC-21/14, *supra*, para. 210. See also, *United Nations High Commissioner for Refugees (UNHCR), Advisory Opinion on the Extraterritorial Application of the Obligations of Non-refoulement under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, *supra*, para. 8.

132 *Cfr.* Advisory Opinion OC-21/14, *supra*, para. 220, citing the Committee on the Rights of the Child, General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/6, 1 September 2005, para. 12, which states that "State obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from a State's territory or by defining particular zones or areas as not, or only partly, under the jurisdiction of the State.". See also, ECHR, *Amuur v. France*, No. 19776/92. Judgment of 25 June 1996, para. 52.

133 Advisory Opinion OC-21/14, *supra*, para. 220, citing the Inter-American Commission on Human Rights (CIDH), Substantive Report No. 51/96, Case 10.675, *Interdiction of Haitians v. United States*, 13 March 1997, paras. 156, 157 and 163, and ECtHR, *Case Hirsi Jamaa et al. v. Italy[GS]*, No. 27765/09. Judgment of 23 February 2012, paras. 133 and 134.

134 On this growing trend, see Inter-American Commission on Human Rights (CIDH), Human Rights of Migrants, Refugees, Stateless Persons, Victims of Trafficking in Persons, and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System (Human Mobility Report), OEA/Ser.L/V/II. Doc. 46/15, 31 December 2015, para. 142.

123. For its part, the right to receive asylum means that the State must grant protection provided that the requirements and conditions for it to be provided are met. In this regard, and within the framework of the right to receive asylum in conjunction with the 1951 Convention, the Court has determined that it is the obligation of the host State to grant international protection when the person qualifies for it, either under the criteria of the traditional or the extended Cartagena definition, as the case may be, and benefit other family members with that recognition, in accordance with the principle of family unity.[135] The Court has also concluded[136] that, once a person's refugee status is determined, he or she shall remain such unless he or she falls within the scope of one of the cessation clauses.[137] Under this understanding, it is necessary to consider the obligation of States to maintain and give continuity to the refugee status determination, which also is in effect extraterritorially, unless any of the cessation clauses are incurred, as already expressed.

135 *Cfr.* Case of Pacheco Tineo Family v. Bolivia, *supra*, para. 225, and Advisory Opinion OC-21/14, *supra*, para. 81. *Cfr.* also, United Nations High Commissioner for Refugees (UNHCR), Procedural standards for refugee status determination under the mandate of UNHCR, Chapter 5, Processing of claims based on the right to family unity, 2016, paragraph 5.1, available in English at: http://www.refworld.org/docid/577e17944.html. Paragraph 5.1 states that ""refugees have a right to family unity. Maintaining and facilitating family unity helps ensure the physical care, protection, emotional well-being and economic support of individual refugees. This may be achieved through various means. Granting derivative refugee status to the family members/dependants of a recognized refugee is one way of doing so in certain cases where the family members/dependants do not qualify for refugee status in their own right."

136 *Cfr. Case of the Pacheco Tineo Family v. Bolivia*, *supra*, paras. 148-150.

137 The cessation clauses are established in Article 1.C of the Convention relating to the Status of Refugees and are based on the transitional nature of the international protection of the right to asylum, as well as on respect for the wishes of the refugee. United Nations High Commissioner for Refugees (UNHCR), Manual and Guidelines on Procedures and Criteria for Determining Refugee Status, *supra*, para. 111, which states that "[t]he so-called "cessation clauses" (article 1 C (1) to (6) of the 1951 Convention) spell out the conditions under which a refugee ceases to be a refugee. They are based on the consideration that international protection should not be granted where it is no longer necessary or justified.."

D. Regulatory incorporation of the various forms of asylum into domestic law

124. Of the 35 member states of the OAS, 16 recognize the right to asylum in their constitutional texts.[138] Almost all of them - with the exception of Cuba and Haiti,[139] according to information available to the Court - also have complementary domestic legislation on political asylum and/or refugee status.

125. Eight countries that do not have a constitutional provision nevertheless include the issue in national legislation[140] - Argentina, Belize, Canada, Chile, Panama, Suriname, United States of America and Uruguay.

126. Eleven other States, according to information available to the Court - Antigua and Barbuda, Bahamas, Barbados, Dominica, Grenada, Guyana, Jamaica, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, and Trinidad and Tobago - have no specific regulations at the domestic level. However, seven of the countries mentioned above have ratified the 1951 Convention, and six have ratified its 1967 Protocol.[141]

127. Among the countries that regulate asylum domestically, Brazil, Costa Rica, the Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru and Venezuela have chosen to distinguish between political asylum and refugee status.[142] Within this group, eight States

138 (i) Bolivia, Political Constitution of the State of 2009, Article 29.I; (ii) Brazil, Political Constitution of the Federative Republic of Brazil of 1988, Article 4; (iii) Colombia, Political Constitution of Colombia of 1991, Article 36; (iv) Costa Rica, Political Constitution of the Republic of Costa Rica of 1949, Article 31; (v) Cuba, Constitution of the Republic of 1976, updated with the constitutional reform of 2002, Article 13; (vi) Ecuador, Constitution of the Republic of Ecuador of 2008, Article 41; (vii) El Salvador, Constitution of the Republic of El Salvador of 1983, Article 28; (viii) Guatemala, Political Constitution of the Republic of Guatemala of 1985, as amended by Popular Consultation, Legislative Agreement 18-93 of November 1993, Article 27; (ix) Haiti, Constitution of the Republic of Haiti of 1987, updated with the constitutional reform of 2012, Article 57; (x) Honduras, Political Constitution of 1982, Article 101; (xi) Mexico, Political Constitution of the United Mexican States of 1917 and its amendments, Article 11, second paragraph; (xii) Nicaragua, Political Constitution of the Republic of Nicaragua of 1987 and its amendments, Article 5, fifth paragraph, and Article 42; (xiii) Paraguay, Constitution of the Republic of Paraguay of 1992, Article 43; (xiv) Peru, Political Constitution of Peru of 1993, Articles 36 and 37; (xv) Dominican Republic, Constitution of the Dominican Republic of 2010, Article 46.2, and (xvi) Venezuela, Constitution of the Bolivarian Republic of Venezuela of 1999, Article 69.

139 Cuba has not ratified the 1951 Convention relating to the Status of Refugees or its 1967 Protocol, nor is it a State party to the American Convention on Human Rights. In this regard, the only regulation on asylum matters is that provided for in its Constitution, which establishes in Article 13 the granting of asylum to subjects "persecuted for their ideals or struggles for democratic rights, against imperialism, fascism, colonialism and neo-colonialism; against discrimination and racism; for national liberation; for the rights and claims of workers, peasants and students; for their progressive politics, scientific, artistic and literary activities, for socialism and peace". As for Haiti, despite the lack of domestic legislation, it recognizes the right to asylum in its constitutional text for "political refugees" and acceded to the 1951 Convention relating to the Status of Refugees and to its 1967 Protocol in 1984.

140 Jamaica and Trinidad and Tobago have not adopted domestic legislation, but they regulate the matter through Refugee Policies. See Jamaica, Refugee Policy, 2009, available at: http://www.refworld.org/pdfid/500000def.pdf, and Trinidad and Tobago, 2009. Refugee Policy Draft, 2014, available at: http://www.refworld.org/docid/571109654.html.

141 The countries of Antigua and Barbuda, Bahamas, Dominica, Jamaica, Saint Kitts and Nevis, Saint Vincent and the Grenadines, and Trinidad and Tobago have ratified the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, with the exception of Saint Kitts and Nevis, which has only ratified the Convention, but not the Protocol. Suriname has also ratified both international treaties.

142 (i) Brazil, Migration Law, Law No. 13.445 of 24 May 2017, Art. 27, and Regulatory Decree of Law No. 13.445, Decree No. 9199/2017 of 20 November 2017, Art. 108, which define the concept of political asylum; as well as

distinguish in their legislation the concept of political asylum as it relates to territorial and diplomatic asylum, grouping persecution on the basis of opinion, belief or crimes of a political nature, the distinction deriving from their corresponding modality.[143] For their part, both Nicaragua and Guatemala, although they have differentiated political asylum from refugee status, do not mention in their legislation any distinction with regard to the modalities of political asylum, whether territorial or diplomatic.[144] On the other hand, Honduras only regulates territorial political asylum.[145]

128. Among the OAS member states that make no distinction between political asylum and refugee status are Argentina, Belize, Bolivia, Canada, Chile, Colombia, El Salvador, Jamaica,

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Law No. 9.474, which defines mechanisms for implementing the 1951 Refugee Statute and determines other provisions of 22 July 1997, Art. 1, and Regulatory Decree No. 9199/2017, Article 119 (referring to Law No. 2,474), which establishes the definition of refugee status; ii) Costa Rica, General Migration and Immigration Law, Law No. 8764 of August 2009, Articles 106 and 109 and Regulation of Refugees (Regulation of Law No. 8764), Decree No. 36831-G of September 2011, Article 4; iii) Ecuador, Organic Law of Human Mobility, published on 6 February 2017, Articles 95 to 98, and Regulation to the Organic Law of Human Mobility, Executive Decree No. 111, published on 10 August 2017, Article 75 and sig; iv) Guatemala, Migration Code, Decree No. 44-2016, published on 18 October 2016, Articles 43 and 44; v) Honduras, Immigration and Foreigners Act, Decree No. 208-2003, published on 3 March 2004, Articles 42 and 52, and Regulation of the Migration and Aliens Act, published on 3 May 2004, Articles 45 to 58 and 61 to 65; vi) Mexico, Law on Refugees, Complementary Protection and Political Asylum, published on 27 January 2011 and amended on 30 October 2014, Articles 2.I) and 2.VIII), and 13; vii) Nicaragua, Law on the Protection of Refugees, Law No. 665, published on 9 July 2008, Article 1, and General Law on Migration and Immigration, Law No. 761, published on 6-7 July, 2011, Article 27; viii) Paraguay, General Law on Refugees, Law No. 1.938, published on 9 July 2002, Article 1; Law No. 978/96 on Migration, promulgated on 8 November 1996, Article 27, and Decree No. 4483, approving the National Migration Policy of the Republic of Paraguay of 27 November 2015, paras. 80 and 81; ix) Peru, Asylum Law, Law No. 27840 of 12 October 2002, Article 4, and Refugee Law, Law No. 27891 of 22 December 2002, Article 3; x) Dominican Republic, Regulation of the National Commission for Refugees, Decree No. 2330 of 10 September 1984, Article 6; Regulation of application of the General Law of Migration No. 285-04 of 15 August 2004, Decree No. 631-11 of 19 October 2011, Articles 3, 46 and 47, and xi) Venezuela, Organic Law on Refugees, Asylees or Asylum-seekers, of 13 September 2001, Articles 2.2, 5, 38 to 41, and Regulation of the Organic Law on Refugees, Asylees or Asylum-seekers, Decree No. 2.491 of 2003, of 4 July 2003, Article 1. The United States of America makes a distinction between refugee status and asylum, based on the place where the person seeking protection is located. Refugee status will be processed outside the United States of America, while the procedure for obtaining asylum will imply that the applicant is present in that country, see: https://www.uscis.gov/humanitarian/refugees-asylum.

143 i) Brazil, Migration Law, Law No. 13.445 of 24 May 2017, Article 27 and Regulatory Decree of Law No. 13.445, Decree No. 9199/2017 of 20 November 2017, Articles 108 to 118; ii) Costa Rica, General Migration and Immigration Act, Law No. 8764 August 2009, Articles 109 and 111; iii) Ecuador, Organic Law of Human Mobility, published on 6 February 2017, Articles 95 to 97; iv) Mexico, Law on Refugees, Complementary Protection and Political Asylum, published on 27 January 2011 and amended on 30 October 2014, Articles 2.I and 59 to 74. See also, Written Observations Submitted by Mexico, paras. 124 to 128; v) Paraguay, Constitution of the Republic of Paraguay of 1992, Article 43; Law No. 978/96 on Migration, promulgated on 8 November 1996, Article 27, and Decree No. 4483, approving the National Migration Policy of the Republic of Paraguay of 27 November 2015, paras. 80 and 81; vi) Peru, Asylum Law, Law No. 27840 of 12 October 2002, Article 4; vii) Dominican Republic, Constitution of the Dominican Republic of 2010, Article 46.2, and Regulation of application of the General Migration Law No. 285-04 of 15 August 2004, Decree No. 631-11 of 19 October 2011, Article 46, insofar as it refers to the Convention on Political Asylum, approved by Law No. 775, and viii) Venezuela, Organic Law on Refugees, Asylees or Asylum-seekers, of 13 September 2001, Articles 2.2, and 38 to 41. Most of these States specifically regulate diplomatic asylum, either by express rule or by referral to a Convention on diplomatic asylum. In the case of the Dominican Republic, although Article 46.2 of its Constitution refers to "asylum in the national territory" its domestic legislation refers only to political asylum, referring to the effects of its definition to the Convention on Political Asylum of Montevideo of 1933 (Article 46 of Decree No. 631-11).

144 Article 5, fifth paragraph, of the Political Constitution of the Republic, as well as Article 27 of the General Law on Migration and Aliens make general reference to "political asylum", without distinguishing between territorial and diplomatic asylum. Article 44 of the Guatemalan Migration Code provides that the granting of asylum constitutes a

Panama, and Uruguay. Although several of them do expressly recognize the right to asylum in their constitutional texts, when legislating at the domestic level, they have not distinguished cases of political persecution from those involving refugee status.

129. After a review of the domestic regulations of each State, it can be concluded that 15 of them adopted internally the definition of a refugee based not only on the 1951 Convention and/or its 1967 Protocol, but also on the 1984 Cartagena Declaration. In this regard, Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru and Uruguay[146] have extended protection to persons forced to flee their country of habitual residence or that of which they are nationals because their lives, personal integrity or freedom are threatened by situations of widespread violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances that have disturbed internal public order. The regulations of other States - Costa Rica, Canada, Dominican Republic, Jamaica, Panama, Suriname, Trinidad and Tobago, United States of America and Venezuela - use the refugee definition based on the 1951 Convention and/or its 1967 Protocol.[147]

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discretionary act of the State, in accordance with its Constitution. However, no distinction is made between diplomatic and territorial asylum.

145 Honduras, Immigration and Foreigners Act, Decree No. 208-2003, published on 3 March 2004, Article 52 and Regulations of the Migration and Aliens Act, published on 3 May 2004, Articles 61 to 65.

146 Countries that incorporate the refugee definition according to the 1951 Convention and its 1967 Protocol, as well as the expanded definition established in the Cartagena Declaration in its national legislation: i) Argentina, General Law for the Recognition and Protection of Refugees, Law No 26,165 of 28 November 2006, Article 4, paragraphs a) and b); ii) Belize, Refugees Amendment Act, 2016 (originally adopted in 1991, with its latest amendments of 2016, Refugee Law of 1991), Chapter 165, Article 4.1; iii) Bolivia, Refugee Protection Law, Law No. 251 of 30 June 2012, Article 15; iv) Brazil Law No. 9,474, which defines mechanisms for the implementation of the Refugee Statute of 1951 and determines other measures of 22 July 1997, Article 1. This article includes some of the assumptions of the extended refugee definition; v) Chile, Law that establishes provisions on the protection of refugees, Law No. 20,430, promulgated on 8 April 2010 and published on 15 April 2010, Article 2, and Regulatory Decree No. 837, enacted on 14 October 2010 and published on 17 February 2011, Article 2; vi) Colombia, Decree No. 2840, which establishes the Procedure for the Recognition of Refugee Status, establishes rules on the Advisory Commission for the Determination of Refugee Status and other provisions of 6 December 2013, Article 1; vii) Ecuador, Organic Law of Human Mobility, published on 6 February 2017, Article 98, and Regulation to the Organic Law of Human Mobility, Executive Decree No. 111, published on 10 August 2017, Article 75 and sig.; viii) El Salvador, Law for the Determination of the Condition of Refugees, Decree No. 918, published on 14 August 2002, Article 4; ix) Guatemala, Regulation for the Protection and Determination of the Refugee Statute in the Territory of the State of Guatemala, Governmental Agreement No. 383-2001 of 14 September 2001, Article 11, which continues to be applied in accordance with Government Agreement No 83-2017; x) Honduras, Migration and Foreigners Law, Decree No. 208-2003, published on 3 March 2004, Article 42; xi) Mexico, Law on Refugees, Complementary Protection and Political Asylum, published on 27 January 2011 and amended on 30 October 2014, Article 13; xii) Nicaragua, Refugee Protection Law, Law No. 665, published on 9 July 2008, Article 1; xiii) Paraguay, General Law on Refugees, Law No. 1.938, published on 9 July 2002, Article 1; xiv) Peru, Refugee Law, Law No. 27891 of 22 December 2002, Article 3, and Regulation of Legislative Decree No. 1350 (Legislative Decree on Migration), Supreme Decree No. 007-2017-IN, published on 29 March 2017, Article 4.d, and xv) Uruguay, Law on the Right to Refugees and Refugees, Law No. 18,076, published on 5 January 2007, Article 2.

147 (i) Costa Rica, General Migration and Aliens Act, Act No. 8764 of August 2009, Article 106 and Refugee Regulations (Regulations to Act No. 8764), Decree No. 36831-G of September 2011, Articles 4 and 12; (ii) Canada, Immigration and Refugee Protection Act (S.C. 2001, c. 27) of 2001 and amendments thereto, Article 96; (iii) United States of America, Immigration and Nationality Act (INA) of 1952, Article 101(a)(42); (iv) Jamaica, Refugee Policy of 2009, Article 2; (v) Panama, Decree No. 23 implementing Law No. 5 of 26 October 1977 approving the 1951 Convention and 1967 Protocol relating to the Status of Refugees, promulgated on 12 February 1998, Article 5; (vi) Dominican Republic, Regulations of the National Commission for Refugees, Decree No. 2330 of 10 September 1984, Article 6, and Implementing Regulations of the General Migration No. 285-04 of 15 August 2004, Decree No. 631-11 of 19 October 2011, Article 3; (vii) Suriname, Aliens Act 1991 of 16 January 1992, Article 16; (viii) Trinidad and Tobago, Refugee Policy Draft, 2014, Section 2: General Definitions and Principles; and (ix)

130. Based on the foregoing, the Court notes that of the 35 member States of the OAS, 31 recognize the right to asylum in a broad sense, either through their Constitutions, by having ratified an international convention (including the 1951 Convention and/or its 1967 Protocol), or through national legislation. On the other hand, only four[148] of these States have no legislation in place and have not ratified any international convention on asylum or the status of refugees.

E. The human right to seek and receive asylum in the framework of the inter-American system

131. This Court has already established that both the American Convention in its Article 22.7 and the American Declaration of the Rights and Duties of Man in its Article XXVII, have crystallized the subjective right of all persons to seek and receive asylum, and have transcended the historical understanding of this institution as a "mere state prerogative" under the various inter-American conventions on asylum.[149]

132. In this regard, the Court has considered that the right to "seek and receive asylum", within the framework of the inter-American system, is configured as an individual human right to seek and receive international protection in a foreign territory, including refugee status according to the relevant United Nations instruments or corresponding national laws, and asylum in accordance with the various inter-American conventions on the matter.[150] Furthermore, in light of the progressive development of international law, the Court has considered that the obligations deriving from the right to seek and receive asylum are operative with respect to those persons who meet the requirements of the expanded definition of the Cartagena Declaration.[151]

133. However, since the concept of asylum is an encompassing concept (*supra* para. 65), it is for the Court to determine whether asylum, in accordance with the various inter-American conventions on the subject, as specifically with Article 22(7) of the American Convention and Article XXVII of the American Declaration, covers both territorial and diplomatic asylum. This, since the very wording of the rule in Article 22(7) of the Convention refers to the "case of prosecution for political offences or related common crimes", so that, in principle, it could cover both types of political asylum, i.e. that requested in the territory of the host State or that requested in a diplomatic mission. It is therefore necessary to interpret the meaning of the factor "foreign territory" and of the conditioning factor "in accordance with the legislation of each State and international conventions" in the text of Article 22.7 of the American Convention and Article XXVII of the American Declaration. To this end, the Court, in accordance with its consistent practice, will use the interpretative guidelines set out below.

E.1 Rules of Interpretation

134. In order to give its opinion on the interpretation of the legal provisions brought before it for consultation, the Court will have recourse to the Vienna Convention on the Law of Treaties, which

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Venezuela, Organic Law on Refugees, Asylees or Asylum-seekers of 13 September 2001, Articles 2.2 and 5.

148 These are: Barbados, Grenada, Guyana and Saint Lucia.

149 *Cfr. Case of the Pacheco Tineo Family v. Bolivia*, *supra*, para. 137, and Advisory Opinion OC-21/14, *supra*, para. 73.

150 See Advisory Opinion OC-21/14, *supra*, para. 78.

151 See Advisory Opinion OC-21/14, *supra*, para. 79.

incorporates the general rule of interpretation of international treaties of a customary nature,[152] which involves the simultaneous application of good faith, the natural meaning of the terms used in the treaty in question, their context and the object and purpose of the treaty. Where relevant, this Convention states:

> Article 31. General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.
> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> Article 32. Supplementary means of interpretation
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

135. Furthermore, as it is a human right, the Court must resort to the system's own interpretative guidelines. In the case of the American Convention, the object and purpose of the treaty is "the protection of the fundamental rights of human beings",[153] and it was designed to protect the human rights of persons regardless of nationality, from their own State or from any other State.[154] In this regard, it is essential to bear in mind the specificity of human rights treaties, which create a legal order in which States assume obligations towards individuals under their jurisdiction[155] and whose violations can be claimed by them and by the community of State Parties to the Convention through the action of the Commission[156] and even before the Court,[157] all of which has the effect that the interpretation of the norms must also be developed on the basis of those values that the inter-American system seeks to safeguard, from the "best angle" for the protection of the individual.[158]

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152 *Cfr.* Advisory Opinion OC-21/14, *supra*, para. 52, and Advisory Opinion OC-24/17, *supra*, para. 55. *Cfr.* also, *inter alia*, International Court of Justice (ICJ), *Case concerning sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia v. Malaysia). Judgment of 17 December 2002, para. 37, and International Court of Justice, *Avena and other Mexican nationals* (Mexico v. United States of America). Judgment of 31 March 2004, para. 83.

153 *Cfr.* Advisory Opinion OC-2/82, *supra*, para. 29, and Advisory Opinion OC-24/17, *supra*, para. 56.

154 *Cfr.* Advisory Opinion OC-2/82, *supra*, para. 33, and Advisory Opinion OC-24/17, *supra*, para. 56.

155 *Cfr.* Advisory Opinion OC-2/82, *supra*, para. 29, and Advisory Opinion OC-24/17, *supra*, para. 56.

156 *Cfr.* Articles 43 and 44 of the American Convention.

157 *Cfr.* Article 61 of the American Convention.

158 *Cfr. Case of González and others ("Campo Algodonero") v. Mexico. Preliminary Objection, Merits, Reparations and Costs.* Judgment of 16 November 2009. Series C No. 205, para. 33, and Advisory Opinion OC-24/17, *supra*, para. 56.

136. It is in this sense that the American Convention expressly foresees certain guidelines of interpretation in its Article 29,[159] among which the *pro homine* principle is included, which imply that no provision of said treaty may be interpreted in the sense of limiting the enjoyment and exercise of any right or freedom that may be recognized in accordance with the laws of any of the State Parties or in accordance with another convention to which one of said States is a party, or of excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature.[160]

137. Furthermore, the Court has repeatedly pointed out that human rights treaties are living instruments, the interpretation of which has to accompany the evolution of the times and current living conditions. Such an evolutionary interpretation is consistent with the general rules of interpretation set forth in Article 29 of the American Convention, as well as those established by the Vienna Convention on the Law of Treaties.[161]

E.2 Interpretation of the Convention concerning the phrase "in accordance with the law of each State and international conventions"

138. The Court has already established, in its Advisory Opinion OC-21/14, that the text of Articles 22(7) of the Convention and XXVII of the Declaration itself prescribes two criteria for the determination of the persons entitled to the right, namely "the law of each country", i.e. the country in which asylum is sought, and "international conventions".[162] That is to say, it is through international conventions or domestic legislation that the cases in which the person can exercise the right to seek and receive asylum and access international protection are regulated. This Court has interpreted that both criteria need not be met at the same time, since there are cases in which, although a State has not ratified a particular international treaty, such as the 1951 Convention, its 1967 Protocol or one of the Latin American conventions, it has adopted domestic legislation to guarantee the right to asylum, or on the contrary, having ratified such conventions, it has not adopted domestic legislation (*supra* paras. 124-126). An interpretation to the contrary would severely limit Article 22(7).

139. The reference to domestic legislation and international conventions was introduced in Article XXVII of the American Declaration and is literally reflected in the American Convention. In accordance with the preparatory work of the Declaration (*infra* para. 152), the Court notes that the purpose of States, in including such references, was to ensure the regulation of the asylum that persons might seek and receive was derived from domestic legislation or international conventions. At the time of the adoption of the Declaration, one of the concerns, beyond the inclusion of the concept of asylum in its strict sense, or political asylum, was the exponential increase in the number of persons seeking refuge, resulting from the horrors of the Second World War, and the intention to

159 Article 29 of the American Convention states: "Restrictions Regarding Interpretation: No provision of this Convention shall be interpreted as: 1.permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; 2.restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; 3.precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or 4.excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have."

160 *Cfr.* Advisory Opinion OC-21/14, *supra*, para. 54, and Advisory Opinion OC-24/17, *supra*, para. 57.

161 *Cfr.* Advisory Opinion OC-16/99, *supra*, para. 114, and Advisory Opinion OC-24/17, *supra*, para. 58.

162 *Cfr. Case of Pacheco Tineo Family v. Bolivia, supra,* paras. 137 and 140, and Advisory Opinion No. 21/14, *supra*, para. 74.

provide them with protection. This concern, and the need to regulate it, contributed to the adoption of said normative reference, which was aimed at converging and complementing domestic or international regulations in order to give substance to Article 22.7 of the Convention.[163]

140. To the extent that Article 22(7) refers to domestic legislation or international conventions in order to integrate their content more specifically, the right to seek and receive asylum is not an absolute right. However, in accordance with Article 29 of the American Convention, domestic legislation may extend the scope of protection, but may never restrict it beyond the minimums established by the American Convention and international law. Furthermore, the reference to international conventions may not be interpreted as limiting the right beyond what is established in the Convention itself.

141. Furthermore, the expression "in accordance with the law of each State" does not imply that States do not have an immediate obligation to respect and guarantee the right of asylum. The Court has already established that "[t]he fact that State Parties may establish the conditions for the exercise of [a] right [...] does not preclude the enforceability under international law of the obligations they have undertaken under Article 1(1) [...]".[164] The fact that Article 22.7 derives from domestic legislation and international conventions does not impose, as a precondition for the respect and guarantee of the right to asylum, the adoption of standards or the ratification of treaties. This Court has pointed out that "the system of the Convention is aimed at recognizing rights and freedoms for individuals, not at empowering States to do so".[165] Thus, while Article 22(7), read in conjunction with the obligations set out in Articles 1(1) and 2 of the Convention, requires States to adopt legislative and other measures to guarantee the right to seek and receive asylum, in accordance with the Convention itself and other relevant international conventions, this does not mean that if the State does not have domestic legislation or is not party to other treaties involving international obligations on asylum, it is not obliged to respect and guarantee the right to seek and receive asylum. Consequently, those States that do not yet have domestic legislation should adopt the necessary measures to regulate adequately and in accordance with the convention’s parameters the procedure and other aspects necessary to give useful effect to the right to seek and receive asylum.

142. Similarly, the Court notes that it is Article 22(7) itself that makes a reference to "international conventions", without restricting it to specific conventions on human rights, or to treaties at the regional level. Therefore, the reference to "international conventions" implies that this Court's interpretation of Article 22(7) should focus not only on the Latin American conventions on asylum, but also on the most universally relevant instrument for the protection of persons fleeing persecution, the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. This is of

163 *Cfr.* Advisory Opinion OC-21/14, *supra*, para. 78.

164 Enforceability of the right of rectification or reply (Arts. 14.1, 1.1 and 2, American Convention on Human Rights). Advisory Opinion OC-7/86 of 29 August 1986. Series A No. 7, paras. 13, 24 and 28.

165 Advisory Opinion OC-7/86, *supra*, para. 24. The Court was consulted in this advisory opinion on the meaning of the expression "under conditions established by law" in Article 14.1 (the right of rectification), asking whether it only empowered States to create the right by law without an immediate obligation to respect and ensure it, or whether the term referred rather to the obligation to take measures to guarantee the right. In this regard, the Court established that "the purpose of the Convention is to recognize individual rights and freedoms and not simply to empower the States to do so". Thus, the Court noted, "[t]he fact that the States Parties may fix the manner in which the right of reply or correction is to be exercised does not impair the enforceability, on the international plane, of the obligations they have assumed under Article 1(1) [...] If for any reason, therefore, the right of reply or correction could not be exercised by “anyone" who is subject to the jurisdiction of a State Party, a violation of the Convention would result which could be denounced to the organs of protection provided by the Convention."

utmost importance, as it allows the Court, based on an evolving interpretation, to interpret the grounds for persecution of Article 22(7) in light of current conditions regarding the need for international protection, with a gender, diversity and age focus. As an example, in relation to age, Advisory Opinion OC-21/14 stressed that "it is necessary to recognize that the elements of the refugee definition have traditionally been interpreted on the basis of the experiences of adults or persons over 18 years of age...".[166] Therefore, since children have the right to seek and receive asylum[167] and can therefore apply for refugee status as refugees in their own right, whether or not they are accompanied, the elements of the definition should be interpreted in a way that takes into account the particular ways in which persecution of children may manifest itself, as well as the way in which children may experience such situations.[168]

143. Having made clear the existence of international standards governing both forms of political asylum, i.e. territorial and diplomatic asylum, and the adoption of domestic legislation in several countries of the region regulating such forms of asylum (*supra* paras. 81-87 and 127), the terminology "in accordance with the legislation of each State and the international conventions" provides an initial parameter for assuming that all forms of asylum could be covered by the protection of Article 22.7 of the Convention. However, this statement must be appreciated in conjunction with the interpretation of the term "in foreign territory", which was included in both Article 22(7) of the American Convention and Article XXVII of the American Declaration, which the Court will discuss below.

E.3 Interpretation of the Convention concerning the phrase "in foreign territory"

144. It is now up to the Court to determine whether the fact that both Article 22(7) of the American Convention and Article XXVII of the American Declaration have incorporated the wording "in a foreign territory" leads to the interpretation that only territorial asylum is covered by this rule, excluding the diplomatic asylum modality. To this end, the Court will analyse the ordinary meaning of the terms (literal interpretation), the context (systematic interpretation), as well as the object and purpose of the treaty (teleological interpretation), and the origin of the evolving interpretation in relation to the scope of those provisions. In addition, in accordance with Article 32 of the Vienna Convention, additional means of interpretation will be used, in particular the preparatory work for the treaty.

145. Article 22(7) of the American Convention establishes the right to seek and receive asylum "in a foreign territory". The same wording was adopted by States in Article XXVII of the American Declaration. From the interpretation of the ordinary meaning of the terms it is possible to understand that "in territory" refers to the protection afforded by a State within its own geographical area.[169] The Royal Academy of the Spanish Language defines territory as "a portion of the Earth's

166 *Cfr.* Advisory Opinion OC-21/14, *supra*, para. 80, citing the United Nations High Commissioner for Refugees (UNHCR), Guidelines on International Protection. Asylum applications by children under Articles 1(A)2 and 1(F) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, published on 22 December 2009, UN Doc. HCR/GIP/09/08, para. 1.

167 According to UNHCR, even at a young age the child can be considered the main asylum-seeker. See United Nations High Commissioner for Refugees (UNHCR), Guidelines on International Protection. Requests for asylum of children under Articles 1(A)2 and 1(F) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees. See also Advisory Opinion OC-21/14, *supra*, para. 80.

168 *Cfr.* Advisory Opinion OC-21/14, *supra*, para. 80.

169 This is without prejudice to the fact that, at present, certain States regulate cases in which applications for refugee status may be submitted and/or approved outside their territory, after which individuals who have been granted such protection enter the territory of the asylum State to enjoy it.

surface belonging to a nation, region, province, etc.". For its part, the term "foreign" must be interpreted in relation to the individual to be protected; that is to say, that persons seeking asylum will receive protection precisely in the territory of a State other than that of his nationality or habitual residence.

146. However, although the text may seem literally clear, it is necessary to analyse it by applying all the elements that make up the rule of interpretation of Article 31 of the Vienna Convention (*supra* para. 134). The Court has also said this, pointing out that the "ordinary meaning" of the terms cannot be a rule in itself but must be involved within the context and, in particular, within the object and purpose of the treaty, so that the interpretation does not lead in any way to a weakening of the system of protection enshrined in the Convention.[170]

147. In this sense, if a systematic interpretation is made of the entirety of the articles of the Convention, it can be seen that Article 22 as a whole, unlike others, incorporates the term territory in the formulation of the right, so that it is linked to its enjoyment and exercise. In addition, in accordance with Article 22.7 itself, as well as Article XXVII of the Declaration, which integrates regional conventions on asylum, it is necessary to interpret the context of the norm in order to identify the role of the term “territory” in the formulation of the right. To this end, the Court will analyse the terminology used in those conventions. The Court notes that the formula "in territory" or "in foreign territory" is also included in the treaties of the Latin American tradition of asylum to which the Convention and Declaration themselves refer. In particular, the words "in territory" or "in foreign territory" are referred to in Articles 15 to 17 of the 1889 Treaty on International Criminal Law,[171] in Article 1 of the 1928 Havana Convention on Asylum,[172] in Article 11 of the 1939 Treaty on Asylum and Political Refuge in Montevideo,[173] in Articles I and II of the 1954 Convention on

170 *Cfr.* Advisory Opinion OC-1/82, *supra*, paras. 43-48, and Case of González et al ("Campo Algodonero") v. Mexico, *supra*, para. 42.

171 Article 15 states that: "No offender who has taken refuge in the territory of a State shall be surrendered to the authorities of any other State except in compliance with the rules governing extradition.”. Article 16 states that: "Political refugees shall be afforded an inviolable asylum; but it is the duty of the nation of refuge to prevent asylees of this kind from committing within its territory any acts which may endanger the public peace of the nation against which the offense was committed.”. Article 17 states that: "Such persons as may be charged with non-political offenses and seek refuge in a legation, shall be surrendered to the local authorities by the head of the said legation, at the request of the Ministry of Foreign Relations, or of his own motion. Said asylum shall be respected with regard to political offenders, but the head of the legation shall be bound to give immediate notice to the government of the State to which he is accredited; and the said government shall have the power to demand that the offender be sent away from the national territory in the shortest possible time. The head of the legation shall, in his turn, have the right to require proper guarantees for the exit of the refugee without any injury to the inviolability of his person. The same rule shall be applicable to the refugees on board a man-of-war anchored in the territorial waters of the State."

172 Article 1 provides that: "It is not permissible for States to grant asylum in legations, warships, military camps or military aircraft, to persons accused or condemned for common crimes, or to deserters from the army or navy. Persons accused of or condemned for common crimes taking refuge in any of the places mentioned in the preceding paragraph, shall be surrendered upon request of the local government. Should said persons take refuge in foreign territory, surrender shall be brought about through extradition, but only in such cases and in the form established by the respective treaties and conventions or by the constitution and laws of the country of refuge."

173 Chapter 11: Refuge in foreign territory, Article 11 provides that: "Asylum granted within the territory of the high contracting parties, in conformity with the present treaty, is an inviolable asylum for persons pursued under the conditions described in Article 2; but it is the duty of the State to prevent the refugees from committing within its territory, acts which may endanger the public peace of the State from which they come. The determination of the causes that induce the asylum appertains to the State which grants it. The grant of asylum does not entail for the State which makes that grant, any obligation to admit the refugees indefinitely into its territory."

Territorial Asylum,[174] and in Articles XII and XVII of the 1954 Convention on Diplomatic Asylum.[175] According to that Article, it is clear that the terms in question are used to denote the protection afforded in the territory of a State, in the context of territorial asylum, as opposed to asylum in legations, warships, camps or military aircraft. Therefore, the very context of Article 22.7 of the Convention and of Article XXVII of the Declaration, when referring to the international conventions on the subject, allows us to strengthen the conclusion that the terminology "in foreign territory" clearly refers to the protection derived from territorial asylum, unlike diplomatic asylum, whose scope of protection is legations, among other places.

148. However, with regard to interpretation in accordance with the object and purpose of the American Convention, and the *pro homine* principle, it is important to stress that the Court, when carrying out its interpretative work, should not consider them in isolation, but in conjunction with the other methods of interpretation. In this sense, although the object and purpose of the American Convention is "the protection of the fundamental rights of human beings", that object is to be understood as within the limits set by the treaty itself and in accordance with the guarantees it recognizes. In the case of asylum, the object is the protection of persons who have been forced to flee because of certain reasons.

149. In turn, the *pro homine* principle implies that, in interpreting a treaty provision, the application of the rule that gives the greatest protection to the rights of the individual should be privileged and/or the rights should be interpreted in a broad manner in favour of the individual. However, the application of this principle cannot displace the use of the other methods of interpretation, nor can it ignore the results achieved as a result of them, since all of them must be understood as a whole. Otherwise, the unrestricted application of the *pro homine* principle would lead to the delegitimization of the interpreter's actions. Therefore, based on the analysis of the preceding paragraphs, for this Court, both from the literal interpretation of Article 22.7 of the Convention and from the interpretation of its context, in particular the conditions established in the Latin American conventions that clearly define the meaning of the terms "in foreign territory", it is clear that the purpose of the configuration of the right to seek and receive asylum is the protection in foreign territory of persons who have been forced to flee for certain reasons, which translates into the protection of territorial asylum. This is because it is not possible to assimilate legations to

174 Article I states that: "Every State has the right, in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable, without, through the exercise of this right, giving rise to complaint by any other State." Article II states that: "The respect which, according to international law, is due the Jurisdictional right of each State over the inhabitants in its territory, is equally due, without any restriction whatsoever, to that which it has over persons who enter it proceeding from a State in which they are persecuted for their beliefs, opinions, or political affiliations, or for acts which may be considered as political offenses. Any violation of sovereignty that consists of acts committed by a government or its agents in another State against the life or security of an individual, carried out on the territory of another State, may not be considered attenuated because the persecution began outside its boundaries or is due to political considerations or reasons of state."

175 Article XII stipulates that: "Once asylum has been granted, the State granting asylum may request that the asylee be allowed to depart for foreign territory, and the territorial State is under obligation to grant immediately, except in case of force majeure, the necessary guarantees, referred to in Article V, as well as the corresponding safe conduct." Article XVII states that: "Once the departure of the asylee has been carried out, the State granting asylum is not bound to settle him in its territory; but it may not return him to his country of origin, unless this is the express wish of the asylee. If the territorial State informs the official granting asylum of its intention to request the subsequent extradition of the asylee, this shall not prejudice the application of any provision of the present Convention. In that event, the asylee shall remain in the territory of the State granting asylum until such time as the formal request for extradition Is received, in accordance with the Juridical principles governing that Institution In the State granting asylum. Preventive surveillance over the asylee may not exceed thirty days.".

foreign territory. This interpretation is confirmed by the preparatory work of the American Declaration, as will be developed below.

150. On the other hand, with regard to the evolutionary principle (*supra* para. 137), the Court notes that, despite the fact that in practice some States continue to grant diplomatic asylum in specific cases, such protection responds to the same situations as those in which the Latin American conventions on asylum were adopted in the past and no developments have occurred in international law since 1954. In other words, neither the concept of diplomatic asylum nor the reasons for its codification have changed. Therefore, this method does not provide any basis to support a conclusion other than that stated in the previous paragraph.

151. Finally, the Court considers it necessary to have recourse to the preparatory work of the American Declaration in order to confirm the interpretation given in the preceding paragraphs, since those of the Convention do not expressly refer to the reasons why the terminology "in foreign territory" would have been adopted.

152. Indeed, the preparatory work provides for the following:

> The representative of the United States "asked whether this [asylum] right was considered to be subject to the domestic law of each country; and whether it referred to diplomatic asylum or had a much broader meaning, which could cover, for example, European refugees, in which case the immigration rules of each country would have to be taken into account". The representative of Bolivia, in line with the suggestion made by the United States, clarified that the Working Group had added the phrase "in accordance with international conventions" at the end of the Article. The representative of the Dominican Republic, supported by Nicaragua, Peru and Bolivia, stated that he "considered it appropriate to include in the Article a reservation that States could make to avoid receiving undesirable refugees, and therefore proposed that the final part of the Article be added as follows: ...in accordance with the legislation of each country and international conventions". The representative of Guatemala "objected to the proposed addition, in its concept, the Article referred not only to refuge in foreign territory but also to asylum in the legations, in which case national legislation could not be applied". To this, the representative of the Dominican Republic replied that "the Article exclusively covered the case of refuge in foreign territory, and that the case of asylum in legations would continue to be governed exclusively by the provisions of international treaties". The President put Article XXVII to the vote, "with the addition proposed by the Delegate of the Dominican Republic, and so it was adopted".[176]

153. From the foregoing, it is clear that the will of the States when drafting the American Declaration - and it may even be said that they maintained this position when drafting the American Convention since the wording of Article XXVII of the Declaration was maintained - was to exclude the concept of diplomatic asylum as a protected modality under these international norms, maintaining the regulation of this concept in accordance with the Latin American conventions on asylum, that is, on the understanding that it constitutes a State prerogative.

154. The Court considers that the express intention not to include diplomatic asylum within the scope of the inter-American human rights system may have been due to the will, expressed even

176 Ninth International Conference of American States, Bogotá, Colombia, 30 March-2 May 1948, Proceedings and Documents, Volume V, p. 595.

within the framework of this procedure (*supra* para. 108), to conceive of diplomatic asylum as a right of the State, or in other words as a State prerogative, and thus retain the discretionary power to grant or deny it in specific situations.

155. As mentioned above, there is no universal agreement under public international law on the existence of an individual right to receive diplomatic asylum, although this could be an effective mechanism to protect individuals from circumstances that make democratic life difficult in a given country. This lack of international consensus does not imply that recourse to diplomatic asylum should be ruled out, since States retain the sovereign power to grant it (*infra* para. 163). Indeed, individuals have sought asylum in diplomatic missions for centuries, and States, in turn, have granted some form of protection to individuals persecuted for political reasons or facing an imminent threat to their life, liberty, security and/or integrity, not always recognizing diplomatic asylum, but often resorting to diplomatic negotiations.[177] To this extent, in accordance with international law, diplomatic asylum consists of a humanitarian practice for the purpose of protecting fundamental human rights (*supra* para. 103), which has been granted for the purpose of saving lives or preventing damage to rights in the face of an imminent threat.

156. In conclusion, the Court interprets that diplomatic asylum is not protected under Article 22(7) of the American Convention or Article XXVII of the American Declaration. In short, the right to seek and receive asylum within the framework of the inter-American system is configured as a human right to seek and receive international protection in a foreign territory, including with this expression refugee status according to the pertinent United Nations instruments or relevant national legislation, and territorial asylum in accordance with the various inter-American conventions on the subject.

157. Finally, the Court considers it pertinent to rule on the argument that diplomatic asylum would be a regional custom. The Court notes that, in order to determine the existence of a rule of customary international law, it is necessary to verify: (i) a general practice of States, and (ii) their acceptance as law (*opinio juris sive necessitatis*), that is, that they must be followed with the conviction of the existence of a legal obligation or right.[178]

158. In this case, a customary rule of a regional nature is alleged, which is particular and not universal in scope. The International Court of Justice, in the aforementioned Asylum Case (*Colombia v. Peru*), determined that a regional customary rule could be established as long as the existence of uniform and consistent use as an expression of a right of the State granting asylum is proved.[179] However, in view of the broad nature of its advisory jurisdiction, the Inter-American

177 By way of illustration, the following are some examples of factual situations or cases of fact similar to those giving rise to asylum, irrespective of the qualification of the protection granted by the State concerned: from 1956 to 1971, the U.S. embassy in Budapest hosted Hungarian Cardinal József Mindszenty for 15 years; in 1988, the U.K. embassy in Luanda, Angola, provided asylum for six months for Olivia Forsyth, a former spy for the apartheid regime in South Africa; in 1990, the French embassy in Beirut provided asylum for former Lebanese Prime Minister Michel Aoun; in 2002, a group of 28 North Korean dissidents obtained protection at the diplomatic offices of Germany, the United States of America and Japan and were subsequently granted a safe passage to South Korea; since 2012, the Embassy of the Republic of Ecuador in London, United Kingdom, has provided asylum to the founder of WikiLeaks, Julian Assange; in 2016, for 10 months, the Swiss Embassy in Baku granted protection to Emin Huseynov, a journalist and human rights activist, until the Azerbaijani authorities granted him safe passage.

178 Article 38 (1) (b) of the Statute of the International Court of Justice refers to international custom as "evidence of a general practice accepted as law". See also, Advisory Opinion OC-20/09, *supra*, para. 48.

179 *Cfr.* International Court of Justice (ICJ), *Asylum Case* (Colombia v. Peru). Judgment of 20 November 1950, pp. 277-278.

Court considers that it is appropriate to assess that character within the framework of the 35 Member States of the OAS, in the general interest and without limiting the scope of its advisory opinions to only a few States (*supra* para. 31).

159. However, the Court notes that not all OAS Member States are parties to the various conventions on diplomatic asylum and, furthermore, as already stated, these conventions are not uniform in their terminology or provisions, since they respond to a progressive development of the regulation of diplomatic asylum in response to certain situations arising (*supra*, paras. 80 and 88).

160. On the other hand, the Court reiterates that some participating States in the framework of this procedure expressly stated their approach that there is no uniform position in the Latin American sub-region to conclude that diplomatic asylum is part of regional custom, and that it is only a treaty-based system. Furthermore, most participating States argued that there is no legal obligation to grant diplomatic asylum, as it constitutes an act of foreign policy (*supra*, para. 108).

161. In addition, despite the fact that the United States of America has in practice granted protection in its embassies in specific cases, it has persistently opposed it[180] since 1933 when, at the Seventh International American Conference in Montevideo, it stated that, "by virtue of the fact that the United States of America does not recognize or subscribe to the doctrine of political asylum as part of international law, the Delegation of the United States of America abstains from signing this Convention" (footnote 72 above).

162. Thus, the Court finds that the element of *opinio juris* necessary for the determination of a customary rule is not present, notwithstanding the State practice of granting diplomatic asylum in certain situations or granting some form of protection in their legations (*supra* para. 155).

163. The granting of diplomatic asylum and its scope must therefore be governed by the inter-State conventions governing it and by domestic legislation. That is, those States that have signed multilateral or bilateral agreements on diplomatic asylum, or that have it recognized as a fundamental right in their domestic legislation, are bound by the terms established in those regulations. In this regard, the Court considers it appropriate to stress that States have the power to grant diplomatic asylum as an expression of their sovereignty, which is in line with the logic of the so-called "Latin American tradition of asylum".

V.
THE CONTENT AND SCOPE OF STATE OBLIGATIONS IN ACCORDANCE WITH ARTICLES 1.1, 5 AND 22.8 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS

164. The Court has been consulted on the international obligations deriving from the American Convention and the American Declaration in a situation of diplomatic asylum for the asylum State.

165. Having made it clear that the right to asylum, within the framework of the Convention and the American Declaration, includes only the modalities of territorial asylum provided for in international conventions or in domestic legislation, the Court now turns to the second question.

180 *Cfr.* Report of the Secretary-General of the United Nations to the General Assembly on the *Question of Diplomatic Asylum*, 22 September 1975, Part II, para. 220.

166. In principle, it is pertinent to stress that the above statement does not leave the person seeking protection in diplomatic premises helpless, but rather that his or her status and the obligations of the host State are governed by the specific framework of the respective inter-American conventions of an inter-State nature, which are binding on the States Parties, or by domestic legislation itself (*supra* para. 163).

167. Without prejudice to the foregoing, the Court will then determine whether, despite the fact that diplomatic asylum is not protected under the inter-American system (*supra* para. 156), other human rights obligations remain for the host State and, where appropriate, for third States, by virtue of the risk that persons who seek protection from a legation may suffer. This is because, although granting asylum is not considered to constitute a diplomatic or consular function under general international law (*supra* para. 105), States are obliged to respect, through all their public officials and state authorities, the rights and freedoms recognized in the American Convention of all persons under their jurisdiction, whether or not they are nationals, without discrimination of any kind. Therefore, certain obligations remain in the event that it is established that the person who goes to or enters the diplomatic mission in search of protection is under the jurisdiction of that State.

168. To this end, the Court will analyse, firstly, the scope of general human rights obligations around the concept of jurisdiction and its application in legations, and then address specifically the obligations arising from the principle of non-return [*principio de no devolución*], also known as *non-refoulement*.

A. The general obligations derived from Article 1.1 of the American Convention, in relation to the rights established in that instrument, and their application in legations

169. Within the framework of the Convention, Article 1(1), which is a general rule, the content of which extends to all the provisions of the treaty, places on State Parties the fundamental duties, *erga omnes* in nature, to respect and ensure respect for – and guarantee – protection standards and to ensure the effective exercise of the rights recognized therein in all circumstances and for everyone, "without discrimination of any kind".[181] These obligations are imposed on States, for the benefit of persons under their respective jurisdictions, and regardless of the nationality or immigration status of protected persons,[182] and must be carried out in light of the principle of equality before the law and non-discrimination.[183] Thus, the protection of human rights necessarily implies the restricting of the exercise of State power.[184]

170. Furthermore, the Court has stressed that there is an indissoluble link between the obligation to respect and ensure human rights and the principle of equality and non-discrimination.[185] The Court has pointed out that the notion of equality stems directly from the unity of the nature of the

181 *Cfr.* Case of Velásquez Rodríguez v. Honduras. Background. Judgment of 29 July 1988. Series C No. 4, para. 164; Advisory Opinion OC-23/17, supra, para. 115, and Advisory Opinion OC-24/17, *supra*, para. 63.

182 *Cfr.* Advisory Opinion OC-18/03, supra, para. 109; Advisory Opinion OC-21/14, *supra*, para. 113; and Advisory Opinion OC-23/17, *supra*, para. 41.

183 *Cfr. Case of the Yean and Bosico Girls v. Dominican Republic. Preliminary Objections, Merits, Reparations and Costs*. Judgment of 8 September 2005. Series C No. 130, para. 155, and *Case V.R.P., V.P.C. et al. v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs.* Judgment of 8 March 2018. Series C No. 350, para. 289.

184 *Cfr.* the expression "Laws" in Article 30 of the American Convention on Human Rights. Advisory Opinion OC-6/86 of 9 May 1986. Series A No. 6, para. 21, and *Case I.V. v. Bolivia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of 30 November 2016. Series C No. 329, para. 222.

185 *Cfr.* Advisory Opinion OC-18/03, *supra*, para. 85, and Advisory Opinion OC-24/17, *supra*, para. 63.

human race and is inseparable from the essential dignity of the person, against whom any situation is incompatible which, because it considers a group to be superior to a particular group, leads to its being treated with privilege; or which, conversely, because it considers it to be inferior, treats it with hostility or in any way discriminates against it denying it the enjoyment of rights which are recognized to those who are not considered to be in such a situation.[186] At the present stage of evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*. It permeates the entire legal system and provides the legal scaffolding for national and international law. States should refrain from any action that in any way directly or indirectly creates situations of *de jure* or *de facto* discrimination.[187]

171. The Inter-American Court has indicated that the use of the term jurisdiction in Article 1(1) of the American Convention implies that the State's duty to respect and guarantee human rights is owed to any person within the territory of the State or otherwise subject to its authority, responsibility or control.[188] In this regard, the Court has previously established in precedent cases that the fact that a person is subject to the jurisdiction of the State does not mean that he or she is in its territory.[189]

172. Thus, the Court has affirmed that, in accordance with the rules of treaty interpretation, as well as those specific to the American Convention, the ordinary meaning of the term jurisdiction, interpreted in good faith and taking into account the context, purpose and intent of the American Convention, indicates that the scope of the general obligations is not limited to the concept of national territory, but has effect with respect to certain forms of exercise of jurisdiction outside the territory of the State in question.[190]

173. Therefore, the margin of protection for the rights recognized in the American Convention is wide, in that the obligations of the State Parties are not restricted to the geographic space corresponding to their territory, but rather include those situations where, even outside the territory of a State, a person is under its jurisdiction.[191] Therefore, for the Court, the "jurisdiction" referred to in Article 1(1) of the American Convention provides for circumstances in which extraterritorial conduct by States constitutes an exercise of jurisdiction by that State.[192]

174. Similarly, the Human Rights Committee has recognized the existence of extraterritorial conduct by States involving the exercise of their jurisdiction over another territory or over persons outside their territory.[193] It is therefore the duty of State Parties to respect and ensure the rights set forth in the International Covenant on Civil and Political Rights "to everyone who is under the authority or effective control of the State Party even if not within the territory of the State Party".[194] In particular, the Committee has recognized that the acts of consular officials may fall within the

186 *Cfr.* Advisory Opinion OC-4/84, *supra*, para. 55, and *Case of Ramírez Escobar et al. v. Guatemala. Background, Reparations and Costs.* Judgment of 9 March 2018. Series C No. 351, para. 270.

187 *Cfr.* Advisory Opinion OC-18/03, *supra*, paras. 101, 103 and 104, and *Case of Ramírez Escobar et al. v. Guatemala*, *supra*, para. 270.

188 *Cfr.* Advisory Opinion OC-21/14, *supra*, para. 61, and Advisory Opinion OC-23/17, *supra*, para. 73.

189 *Cfr.* Advisory Opinion OC-21/14, *supra*, para. 219, and Advisory Opinion OC-23/17, *supra*, para. 74.

190 *Cfr.* Advisory Opinion OC-23/17, *supra*, para. 74.

191 *Cfr.* Advisory Opinion OC-23/17, *supra*, para. 77.

192 *Cfr.* Advisory Opinion OC-23/17, supra, para. 78.

193 *Cfr.* Advisory Opinion OC-23/17, supra, para. 79, citing the Human Rights Committee, *Case of Lilian Celiberti of Casariego v. Uruguay* (Communication No. 56/1979), UN Doc. CCPR/C/13/D/56/1979, Views adopted on 29 July 1981, para. 10.3, and *Mabel Pereira Montero v. Uruguay (Communication No. 106/1981)*, UN Doc. CCPR/C/18/D/106/1981, Views adopted on 31 March 1983, para. 5.

scope of the International Covenant on Civil and Political Rights.[195] The International Court of Justice has reaffirmed this assertion, stating that "the Covenant on Civil and Political Rights is applicable with respect to acts of a State in the exercise of its jurisdiction outside its own territory".[196]

175. The European Court of Human Rights has also noted that the exercise of jurisdiction outside the territory of a State under the European Convention on Human Rights requires a State Party to the Convention to exercise effective control over an area outside its territory, or over persons in the territory of another State, whether lawfully or unlawfully,[197] or, by consent, invitation or acquiescence of the Government of that territory, to exercise all or some of the public powers that it would normally exercise.[198] For the European Court, the decisive factor will then be to establish *de jure* jurisdiction, in cases where the State is entitled to act under the rules of public international law, or *de facto*, by establishing "control" over persons or territory on the basis of the facts and circumstances of each particular case. Specifically, it has stated that "it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others".[199]

176. In the same vein, the Court understands that the jurisdiction of a State extends to extraterritorial conduct involving the exercise of its jurisdiction over another territory or over persons outside its territory. However, in order to establish jurisdiction over individuals, the jurisprudence of various bodies has dealt with very different circumstances in view of the relationship established between the State and the individual, including the acts of diplomatic or consular agents present on foreign territory or "the exercise of physical power and control over the person in question".[200]

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194 *Cfr.* Human Rights Committee, General Comment No. 31: The nature of the general legal obligation imposed, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 10.

195 *Cfr.* Human Rights Committee, *Case of Sophie Vidal Martins v. Uruguay* (Communication No. R.13/57), UN Doc. CCPR/C/15/D/57/1979, Views adopted on 23 March 1982, para. 7; *Samuel Lichtensztejn v. Uruguay, (Communication No. 77/1980)*, UN Doc. CCPR/C/OP/2, Views adopted on 31 March 1983, para. 8.3; *Case of Mabel Pereira Montero v. Uruguay*, (Communication No. 106/1981), UN Doc. CCPR/C/OP/2, Views adopted on 31 March 1983, para. 5, and *Case of Carlos Varela Núñez v. Uruguay* (Communication No. 108/1981), UN Doc. CCPR/C/OP/2, Views adopted on 22 July 1983, para. 9.3.

196 International Court of Justice (ICJ), Advisory Opinion on the Legal Consequences of the Construction of a wall in the Occupied Palestinian Territory, 9 July 2004, para. 111.

197 Advisory Opinion OC-23/17, *supra*, para. 79, citing ECtHR, Case of Loizidou v. Turkey (Preliminary Objections), No. 15318/89. Judgment of 23 March 1995, para. 62; Case of Al-Skeini et al. v. United Kingdom [GS], No. 55721/07. Judgment of 7 July 2011, para. 138, and Case of Catan et al. v. Moldova and Russia[GS], No. 43370/04, 8252/05 and 18454/06. Judgment of 19 October 2012, para. 311.

198 Advisory Opinion OC-23/17, *supra*, para. 79, citing the ECtHR, Case of Chiragov et al. v. Armenia [GS], No. 13216/05. Judgment of 16 June 2015, para. 168, and Case of Banković and others v. Belgium and others [GS], No. 52207/99. Decision on Admissibility of 12 December 2001, para. 71.

199 ECtHR, Case of Al-Skeini et al. v. United Kingdom [GS], No. 55721/07. Judgment of July 7, 2011, para. 134. See also ECtHR, Case of Banković and others v. Belgium and others [GS], No. 52207/99. Decision of Admissibility of 12 December 2001, para. 73, and European Commission on Human Rights, X. v. Federal Republic of Germany, No. 1611/62, Decision on Admissibility of 25 September 1965, p. 168; X v. United Kingdom, No. 7547/76, Decision on Admissibility of 15 December 1977, para. 1, and W.M. v. Denmark, No. 17392/90. Decision on Admissibility of 14 October 1992, para. 1.

200 ECtHR, *Case of Al-Skeini et al. v. United Kingdom* [GS], No. 55721/07. Judgment of 7 July, 2011, para. 136. In the same vein, Human Rights Committee, Case of Delia Saldias de Lopez v. Uruguay (Communication No. 52/1979), U.N. Doc. CCPR/C/OP/1, Views adopted on 29 July 1981, para. 12.1.

177. In view of the foregoing, the Court concludes that host States are bound by the provisions of Article 1(1) of the Convention, insofar as they are exercising control, authority or responsibility over any person, whether that person is on the land, water, sea or air territory of that State.[201] Therefore, the Court considers that the general obligations established by the American Convention are applicable to the actions of diplomatic agents deployed in the territory of third States, provided that the personal link of jurisdiction with the person concerned can be established.

B. Obligations arising from the principle of *non-refoulement* in the context of a legation

178. With regard to the matter under consideration, the Court notes that it is of paramount importance to analyse the validity of the principle of *non-refoulement* in the case of an asylum application before a legation.

179. The Court has defined as an integral component of the right to seek and receive asylum the obligation of the State not to return a person in any way to a territory where he or she is at risk of persecution.[202] The principle of *non-refoulement* is the cornerstone of the international protection of refugees and asylum-seekers[203] and has been codified in Article 33(1) of the 1951 Convention.[204] The principle of *non-refoulement* in this area has been recognized as a customary rule of international law[205] binding on all States, whether or not they are parties to the 1951 Convention or the 1967 Protocol.[206]

180. However, the principle of *non-refoulement* is not an exclusive component of international refugee protection, since, with the evolution of international human rights law, it has found a solid

201 *Cfr.* Advisory Opinion OC-21/14, *supra*, para. 219.

202 *Cfr. Case of Pacheco Tineo Family v. Bolivia*, *supra*, paras. 151 and 152, and Advisory Opinion OC-21/14, *supra*, paras. 81 and 212.

203 *Case of the Pacheco Tineo Family v. Bolivia*, *supra*, para. 151, citing the United Nations High Commissioner for Refugees (UNHCR), Executive Committee, General Conclusions on International Refugee Protection, UN Doc. 65 (XLII)-1991, issued 11 October 1991, para. c, and Advisory Opinion OC-21/14, *supra*, para. 209.

204 Article 33(1) of the 1951 Convention states that "No Contracting State shall expel or return ('*refouler*') 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.".

205 *Cfr. Case of Pacheco Tineo Family v. Bolivia*, *supra*, para. 151, and Advisory Opinion OC-21/14, *supra*, para. 211, citing the United Nations High Commissioner for Refugees (UNHCR), Global Consultations on International Protection: Ministerial Meeting of the State Parties to the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (12-13 December 2001) - Declaration by the States Parties to the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/MMSP/2001/9, adopted on 13 December 2001, which in its paragraph 4 states: "Acknowledging the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law". See also, United Nations High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, *supra*, paras. 14-16; Executive Committee, General Conclusions on the International Protection of Refugees, Conclusion No. 25 (XXXIII)-1982, para. b; Executive Committee, General Conclusions on the International Protection of Refugees, Conclusion No. 79 (XLVII)-1996, para. (i); Cartagena Declaration on Refugees, *supra*, Conclusion 5, and Brazilian Declaration, "A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean", adopted in Brasilia, 3 December 2014, preamble, p. 2. Also, see United Nations General Assembly Resolution, UN Doc. A/RES/51/75, 12 February 1997, para. 3, and UN Doc. A/RES/52/132, 12 December 1997, preambular paragraph 12.

206 *Cfr.* United Nations High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, *supra*, para. 15.

basis in the various human rights instruments and the interpretations made of them by the monitoring bodies. Indeed, the principle of *non-refoulement* is not only fundamental to the right to asylum, but also as a guarantee of various non-derogable human rights, since it is precisely a measure aimed at preserving the life, liberty or integrity of the protected person.[207]

181. Thus, under the American Convention, other human rights provisions such as the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, recognized in Article 5 of the American Convention, provide a solid basis for protection against *refoulement*. In this regard, this Court has already indicated that, based on Article 5 of the American Convention, read in conjunction with the *erga omnes* obligations to respect and ensure respect for human rights protection norms, it follows the State's duty not to deport, return, expel, extradite or otherwise remove a person subject to its jurisdiction to another State, or to a third State that is not safe, when there is a well-founded presumption that he or she would be in danger of being subjected to torture, cruel, inhuman or degrading treatment.[208] This principle seeks, first and foremost, to ensure the effectiveness of the prohibition of torture in all circumstances and in respect of all persons, without discrimination of any kind. As an obligation arising from the prohibition of torture, the principle of *non-refoulement* in this area is absolute and also takes on the character of a peremptory norm of customary international law, i.e. *jus cogens.*[209]

182. In addition, the inter-American system has a specific treaty, the Inter-American Convention to Prevent and Punish Torture, which incorporates the principle of *non-refoulement* in its Article 13, as follows: "The requested person shall not be extradited or returned where there is a well-founded presumption that his life is in danger, that he will be subjected to torture, cruel, inhuman or degrading treatment or that he will be tried by courts of emergency or ad hoc tribunals in the requesting State." Moreover, the Court has already indicated that the principle, as regulated, is also associated with the protection of the right to life and of certain judicial guarantees, so that it is not limited solely to protection against torture.[210]

183. For its part, the United Nations Human Rights Committee has interpreted Article 7 of the International Covenant on Civil and Political Rights[211] to include a duty on State Parties to "not [...] expose persons to the risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment upon their return to another country following extradition, expulsion or *refoulement*".[212] This duty arises from the general obligations of Article 2 of the Covenant, which requires State Parties to respect and ensure the rights recognized therein to all individuals within their territory and to all persons subject to their jurisdiction, which entails the obligation not to "extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for

207 *Cfr.* Advisory Opinion OC-21/14, *supra*, paras. 211 and 224-227.

208 *Cfr.* Advisory Opinion OC-21/14, *supra*, para. 226, and Case of Wong Ho Wing v. Peru, supra, para. 127.

209 *Cfr.* Advisory Opinion OC-21/14, *supra*, para. 225. See also, Report submitted by the Special Rapporteur on Torture, Mr. Theo van Boven, Civil and Political Rights in Particular Issues Related to Torture and Detention, UN Doc. E/CN.4/2002/137, 26 February 2002, para. 14, and Committee against Torture (CAT), General Comment No. 4: *On the implementation of Article 3 of the Convention in the context of Article 20*, advanced unedited version, 9 February 2018, para. 9. This paragraph states that "The principle of “non-refoulement” of persons to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture is similarly absolute".

210 See Advisory Opinion OC-21/14, *supra*, para. 229, and *Case of Wong Ho Wing v. Peru*, *supra*, para. 128.

211 That Article states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

212 Human Rights Committee, *General Comment No. 20: Replaces General Comment No. 7: Prohibition of torture and cruel treatment or punishment (Article 7)*, UN Doc. HRI/GEN/1/Rev.7, 10 March 1992, para. 9.

believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 [right to life] and 7 [prohibition of torture and other cruel, inhuman or degrading treatment] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed."[213]

184. Article 3 of the Convention against Torture provides that "[n]o State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".

185. The Court has also found that, in addition to including the right to seek and receive asylum and the prohibition of torture, the American Convention has an express provision dealing with *non-refoulement*. In fact, Article 22(8) of the American Convention prohibits the expulsion or return of any "foreigner" to "another country, whether or not of origin" - that is, to his country of nationality or, in the case of statelessness, to that of his habitual residence or to a third State - where "his right to life or liberty" are "at risk of being violated on account of race, nationality, religion, social status or political opinions".[214]

186. The Court has interpreted that the principle of *non-refoulement* as expressed in Article 22(8) of the American Convention has a specific scope given that this provision was included after the enshrinement of the individual right to seek and receive asylum, a broader right in its sense and scope than the one that operates in the application of international refugee law. Thus, the Convention prohibits returning the person and provides additional protection for foreigners who are not asylum-seekers or refugees in cases where their right to life or liberty is threatened for the reasons listed.[215] The protection of the principle of *non-refoulement* laid down in that provision therefore extends to any foreign person and not only to a specific category of foreigners, such as asylum-seekers and refugees.[216]

213 Human Rights Committee, *General Comment No. 31: Nature of the general legal obligation imposed on State Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 12. Furthermore, in several decisions concerning individual cases, the Committee has stated that it is not possible to extradite, deport, expel or remove a person from the territory of a State if there are sufficient grounds to believe that there is a risk of irreparable harm to his or her rights, and without first taking into account the individual's allegations of risk. Human Rights Committee, *Case of Joseph Kindler v. Canada* (Communication No. 470/1991), UN Doc. CCPR/C/48/D/470/1991, Views adopted on 11 November 1993, para. 6.2; *Case of Charles Chitat Ng v. Canada* (Communication No. 469/991), UN Doc. CCPR/C/49/D/469/1991, Views adopted on 7 January 1994, para. 6.2; *Case of Jonny Rubin Byahuranga v. Denmark* (Communication No. 1222/2003), UN Doc. CCPR/C/82/D/1222/2003, Views adopted on 9 December 2004, para. 11.3, and *Case of Jama Warsame v. Canada*, (Communication No. 1959/2010), UN Doc. CCPR/C/102/D/1959/2010, Views adopted on 1 September 2011, para. 8.3.

214 *Cfr. Case of Pacheco Tineo Family v. Bolivia*, *supra*, para. 134, and Advisory Opinion OC-21/14, *supra*, para. 214.

215 *Cfr.* Advisory Opinion OC-21/14, supra, para. 217.

216 *Cfr. Case of Pacheco Tineo Family v. Bolivia*, *supra*, para. 135, and Advisory Opinion OC-21/14, *supra*, para. 215.

187. It is widely accepted that the principle of *non-refoulement* applies not only in the territory of a State, but also at the border,[217] in international transit areas and at sea,[218] due to their key role in ensuring access to territorial asylum. In line with *non-refoulement* obligations under international human rights law, UNHCR has argued that the decisive criterion is not whether the person is in the national territory of the State or in a territory that is *de jure* under the sovereign control of the State, but whether or not that person is subject to the effective authority and control of the State.[219] Similarly, the Committee against Torture clarified that the principle of *non-refoulement* "includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the *de jure* or *de facto* control of the State party".[220] It also stressed that "[e]ach State party must apply the principle of *non-refoulement* in any territory under its jurisdiction or any area under its control or authority, or on board a ship or aircraft registered in the State party, to any person, including persons requesting or in need of international protection, without any form of discrimination and regardless of the nationality or statelessness or the legal, administrative or judicial status of the person concerned under ordinary or emergency law".[221]

188. Furthermore, the Court notes that Article 22(8) of the Convention does not establish any geographical limitations, which makes the general criterion of jurisdiction appropriate, i.e. it has a broad scope of application. Therefore, for the purposes of applying the principle of *non-refoulement* under the Convention and the Declaration, it is relevant to establish the link of territorial or personal jurisdiction, *de jure* or *de facto*. In short, the Court considers that the scope of protection against *refoulement* is not limited to the person being in the territory of the State, but also obliges States extraterritorially, provided that the authorities exercise their authority or effective control over such persons, as may be the case in legations, which by their very nature are in the territory of another State with its consent.

217 The Court has interpreted the principle of *non-refoulement* as protecting those who wish to assert their right to seek and receive asylum and are either at the border or crossing the border without being formally or legally admitted to the territory of the country, otherwise this right would become illusory and void of content, i.e. without any value or effect. This necessarily implies that such persons cannot be rejected at the border or expelled without an adequate and individualized analysis of their requests. In addition, *non-refoulement* at the border has been expressly recognized in the legislation of several OAS Member States as one of the cardinal principles of refugee protection. See the legislation of several countries of the continent, including Argentina, Bolivia, Chile, Ecuador, Honduras, Mexico, Panama and Uruguay, which expressly adopt the prohibition of border rejection. L*aw No. 26.165 - General Law on Refugee Recognition and Protection*, promulgated on 28 November 2006, Article 2 (Argentina); *Law No. 251 on the Protection of Refugees*, of 20 June 2012, Article 4.II (Bolivia); *Law No. 20.430 - Establishes provisions on refugee protection*, promulgated on 8 April 2010, Article 3 (Chile); *Decree No. 1.182 - Regulation on the Application of the Right of Refuge of 30 May 2012*, Article 9 (Ecuador); *Law on Migration and Aliens*, 3 May 2004, Article 44 (Honduras); *Law on Refugees and Complementary Protection* of 27 January 2011, Article 6 and *Regulation on the Law on Refugees and Complementary Protection* of 21 February 2012, Article 9 (Mexico); *Executive Decree No. 23* of 10 February 1998, Articles 53 and 82 (Panama); and *Law No. 18. 076 - Right to Refuge and Refugees*, published on 5 January 2007, Article 12 (Uruguay). See Advisory Opinion OC-21/14, *supra*, para. 210.

218 *Cfr.* ECtHR, *M.S.S. v. Belgium and Greece* [GS]. No. 30696/09. Judgment of 21 January 2011, para. 223; *Hírsi Jamaa et al. v. Italy [GS]*, No. 27765/09. Judgment of 23 February 2012, paras. 129 and 135, and *Kebe et al. v. Ukraine*, No. 12552/12. Judgment of 12 January 2017, para. 74.

219 See United Nations High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Implementation of the Extraterritorial Obligations of Non-refoulement under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, *supra*, para. 35.

220 Committee against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by State Parties*, CAT/C/GC/2, 24 January 2008, paras. 7 and 16, and *J.H.A. v Spain* (Communication No. 323/2007), UN Doc. CAT/C/41/D/323/2007, Views adopted on 21 November 2008, para. 8.2.

221 Committee against Torture (CAT), General Comment No. 4: On the implementation of Article 3 of the Convention in the context of Article 20, supra, para. 10.

189. In this regard, the Court notes that both the former European Commission on Human Rights and the United Nations Human Rights Committee have recognized that the principle of *non-refoulement* may be engaged in the event that persons who have entered an embassy are handed over to the authorities of the territorial State.[222]

190. That is why *refoulement*, as an autonomous and encompassing concept, may include a variety of State conduct involving placing the person in the hands of a State where his or her life, security and/or freedom are at risk of violation because of persecution or threat thereof, widespread violence or massive violations of human rights, among others, as well as where he or she risks being subjected to torture or other cruel, inhuman or degrading treatment, or to a third State from which he or she may be sent to a State where he or she may run such risks (indirect *refoulement*). Such conduct includes, *inter alia*, deportation, expulsion or extradition, but also refusal at the border, non-admission, interception in international waters and informal transfer or "surrender".[223] This statement is based on the very wording of Article 22(8) of the American Convention, which states that "under no circumstances" may a foreigner be expelled or returned to another country, that is to say, the article is not conditioned by territory and includes the transfer or removal of a person between jurisdictions.

191. Indeed, in the case of *Wong Ho Wing v. Peru*, the Court stated that:

> [...] the obligation to guarantee the rights to life and personal integrity, as well as the principle of *non-refoulement* in the face of the risk of torture and other forms of cruel, inhuman or degrading treatment or risk to the right to life "applies to all forms of return of a person to another State, including by extradition".[224]

192. Consequently, the principle of *non-refoulement* is enforceable by any foreign person, including those seeking international protection, over whom the State in question is exercising authority or who is under its effective control,[225] whether on the State's land, river, sea or air

222 *Cfr.* European Commission on Human Rights, *W.M. v. Denmark*, No. 17392/90. Decision on Admissibility of 14 October 1992, para. 1, and Human Rights Committee, *Case of Mohammad Munaf v. Romania* (Communication No. 1539/2006), UN Doc. CCPR/C/96/D/1539/2006, Views adopted on 21 August 2009, paras. 14.2 and 14.5.

223 Committee against Torture (CAT), General Comment No. 4: On the implementation of Article 3 of the Convention in the context of Article 20, supra, para. 4. The paragraph states that "[f]or the purpose of this General Comment, the term "deportation" includes, but is not limited to, expulsion, extradition, forcible return, forcible transfer, rendition, rejection at the frontier, pushback operations (including at sea)of a person or group of individuals from a State party to another State".

224 *Case of Wong Ho Wing v. Peru, supra*, para. 130, citing the Committee against Torture (CAT), *Case of Chipana v. Venezuela (*Communication No. 110/1998), UN. Doc. CAT/C/21/D/110/1998, opinion adopted on 10 November 1998, para. 6.2, and *Case of G.K. v. Switzerland* (Communication, No. 219/2002), UN. Doc. CAT/C/30/D/219/2002, opinion adopted on 7 May 2003, paras. 6.4 and 6.5. The European Court has ruled along the same lines. *Cfr. Case of Babar Ahmad and others v. United Kingdom*, Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09. Judgment of 10 April 2012, paras. 168 and 176.

225 In the same vein, the Inter-American Commission decided: "[t]he Commission does not believe, however, that the term "jurisdiction" in the sense of Article 1(1) is limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's own territory [...]" and that "[t]his understanding of jurisdiction--and therefore responsibility for compliance with international obligations--as a notion linked to authority and effective control, and not merely to territorial boundaries, has been confirmed and elaborated on in other cases decided by the European Commission and Court". Inter-American Commission on Human Rights (CIDH), Inadmissibility Report No. 38/99, *Víctor Saldaño v. Argentina*, 11 March 1999, paras. 17 and 19.

territory.[226] This provision includes acts performed by immigration and border authorities, as well as acts performed by diplomatic officials.

193. When Article 22(8) of the American Convention refers to expulsion or return to "another country, whether or not of origin", it concerns not only the State to which the person is expelled, returned or extradited, but also any State to which the person may subsequently be expelled, returned or extradited.[227] That is to say, it encompasses so-called indirect return.

194. It follows from the foregoing that, within the framework of the principle of *non-refoulement*, certain specific obligations, in terms of individualized risk assessment and appropriate protective measures, including measures against arbitrary detention, are required of the host State, under whose jurisdiction the person who has applied for protection in a diplomatic mission is situated. In this regard, the Court recalls that "it is not enough for States to refrain from violating this principle, it is imperative that positive measures be taken".[228]

195. Thus, the Court considers that, within the framework of the American Convention, an interview with the person and a preliminary assessment of the risk of return is required. Indeed, this Court has already stated that:

> [...] where an alien alleges before a State a risk of *refoulement*, the competent authorities of that State shall at least interview the person, giving him or her due opportunity to state the reasons for the refusal of *refoulement*, and carry out a prior or preliminary assessment to determine whether or not such a risk exists and, if it is established, he or she should not be returned to his or her country of origin or where the risk exists.[229]

196. Similarly, the Human Rights Committee has considered that a person may not be extradited, deported, expelled or removed in any way from the territory of a State if there are sufficient grounds for believing that there is a risk of irreparable harm to his or her rights, and without first taking into account the person's allegations about the risk involved.[230] That is to say, when a foreigner alleges a risk to a State in the event of *refoulement*, the competent authorities must at least interview the person and carry out a prior or preliminary assessment in order to determine whether or not there is such a risk in the event of expulsion. With regard to the risk to the rights of the foreign person, it is pertinent to specify that it must be real, that is, it must be a foreseeable consequence. In this regard, the State must carry out an individualized examination in order to verify and assess the circumstances invoked by the person that reveal that he or she may suffer an impairment of his or her life, liberty, security or integrity in the country to which he or she is to be returned or that, if he or she is returned to a third country, he or she is at risk of being sent to the place where he or she is at risk of such a harm. If their account is credible, convincing or consistent with the possibility of a probable situation of risk, the principle of *non-refoulement* should apply.[231]

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226 *Cfr.* Advisory Opinion OC-21/14, *supra,* para. 219.

227 *Cfr. Pacheco Tineo Family v. Bolivia Case*, *supra*, para. 153, and Advisory Opinion OC-21/14, *supra*, para. 212. Similarly, Committee against Torture (CAT), *General Comment No. 4: On the implementation of Article 3 of the Convention in the context of Article 20*, *supra*, para. 2.

228 Advisory Opinion OC-21/14, *supra*, para. 235, and *Case of Wong Ho Wing v. Peru*, *supra*, para. 128.

229 Advisory Opinion OC-21/14, supra, para. 232. See also, *Case of Pacheco Tineo Family v. Bolivia*, *supra*, para. 136.

230 See Human Rights Committee, *Case of Jonny Rubin Byahuranga v. Denmark* (Communication No. 1222/2003), UN Doc. CCPR/C/82/D/1222/2003, Views adopted on 9 December 2004, para. 11.3, and *Case of Jama Warsame v. Canada* (Communication No. 1959/2010), UN Doc. CCPR/C/102/D/1959/2010, Views adopted on 1 September 2011, para. 8.3.

231 See Advisory Opinion OC-21/14, supra, para. 221.

197. The Court considers that the protecting State must therefore take all necessary steps to protect the person in the event of a real risk to life, integrity, liberty or security[232] if he or she is surrendered or removed to the territorial State or if there is a risk that the person may subsequently be expelled, returned or extradited by that State to another State where such a real risk exists.

198. The Court also considers that the legal situation of the person cannot be left in limbo or prolonged indefinitely.[233] Thus, the Court has specified, in other cases than the one examined here, that the person not only has the right not to be returned, but that this principle also requires State action,[234] taking into account the object and purpose of the rule. However, the fact that the person cannot be returned does not per se imply that the State must necessarily grant asylum at its diplomatic mission,[235] but that there remain other obligations on the State to take diplomatic measures, including the request to the territorial State to issue a *laissez-passer*, or other measures under its authority and, in accordance with international law, to ensure that applicants' convention rights are guaranteed.[236]

199. Finally, the Court recalls that the duty of cooperation among States in the promotion and observance of human rights is a rule of an *erga omnes* nature, since it must be observed by all States, and of a binding nature in international law. Indeed, the duty of cooperation is a customary rule of international law, crystallised in Article 4.2 of Resolution 2625 of 24 October 1970 of the United Nations General Assembly concerning the "Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations", which was unanimously adopted by the Member States.[237] To this extent, the Court considers that, in accordance with the collective guarantee mechanism underlying the American Convention,[238] it is incumbent upon all States of the inter-American system to cooperate with each other in order to comply with their international obligations, both regional and universal.[239]

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232 See ECtHR, *Case of Saadi v. Italy [GS]*, No. 37201/06. Judgment of 28 February 2008, para. 125.

233 Under this principle, the Inter-American Commission has considered that the prolonged confinement of persons in a facility subject to diplomatic immunity constitutes a violation of the personal freedom of the asylee by the State and could be considered an excessive penalty. Inter-American Commission on Human Rights (CIDH), Report on the situation of human rights in Argentina, OEA/Ser.L V/II.49, doc. 19, 11 April 1980, Chapter IV, The right to liberty, para. 4.

234 *Cfr.* Advisory Opinion OC-21/14, *supra*, para. 236.

235 *Cfr.* Committee against Torture (CAT), *Case of Seid Mortesa Aemei v. Switzerland* (Communication No. 34/1995), UN Doc. CAT/C/18/D/34/1995, Views adopted on 29 May 1997, para. 11.

236 *Cfr*. *Mutatis mutandi*, ECtHR, *Case Ilaşcu and others v. Moldova and Russia*, No. 48787/99. Judgment of 8 July 2004, para. 331.

237 The International Court of Justice considered that the attitude of States towards Resolution 2625 should not be understood as a "reiteration or elucidation" of the obligations set out in the Charter of the United Nations itself, but acceptance of the rules contained therein, the rule being deemed to be a *opinio juris* necessary for it to be classified as customary law. See International Court of Justice (ICJ), *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). Judgment of 27 June 1986, para. 188.

238 *Cfr. Case of the Constitutional Court v. Peru. Competence.* Judgment of 24 September 1999. Series C No.55, para. 41, and Case of González et al ("Campo Algodonero") v. Mexico, supra, para. 62.

239 *Case of Goiburú et al. v. Paraguay, supra*, para. 132, and *Case of La Cantuta v. Peru. Merits, Reparations and Costs*. Judgment of 29 November 2006. Series C No. 162, para. 160.

VI.
OPINION

200. For the reasons set out above, in interpretation of Articles 1(1), 5, 22(7) and 22(8) of the American Convention on Human Rights and Article XXVII of the American Declaration of the Rights and Duties of Man,

THE COURT,

HAS DECIDED

unanimously, that:

1. It is competent to issue this Advisory Opinion, under the terms set forth in paragraphs 13 to 60.

AND IS OF THE OPINION

unanimously, that:

2. Within the framework of the inter-American system the right to seek and receive asylum is configured as a human right to seek and receive international protection in a foreign territory, including refugee status according to the relevant United Nations instruments or the corresponding national laws, and territorial asylum according to the various inter-American conventions on the subject, under the terms set forth in paragraphs 61 to 163.

3. Diplomatic asylum is not protected under Article 22.7 of the American Convention on Human Rights or Article XXVII of the American Declaration of the Rights and Duties of Man, and must therefore be governed by the inter-State conventions that regulate it and domestic legislation provisions, in the terms of paragraphs 61 to 163.

4. The principle of *non-refoulement* is enforceable for any foreign person, including those seeking international protection, over whom the State concerned is exercising authority or which is under its effective control, regardless of whether he or she is on the State's land, river, sea or air territory, under the terms set forth in paragraphs 164 to 199.

5. The principle of *non-refoulement* not only requires that the person not be returned, but also imposes positive obligations on States, under the terms set forth in paragraphs 194 to 199.

Eduardo Ferrer Mac-Gregor Poisot
President

Eduardo Vio Grossi

Humberto A. Sierra Porto

Elizabeth Odio Benito

Patricio Pazmiño Freire

Pablo Saavedra Alessandri
Secretary

Communicate and execute,

Eduardo Ferrer Mac-Gregor Poisot
President

Pablo Saavedra Alessandri
Secretary