



International Migrants Bill of Rights (IMBR) Initiative
Georgetown University Law Center, Human Rights Institute

AMICUS CURIAE BRIEF

PREPARED BY THE INTERNATIONAL MIGRANTS BILL OF RIGHTS (IMBR) INITIATIVE

SUBMITTED TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS
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REGARDING OBSERVATIONS ON THE REQUEST FOR ADVISORY OPINION

AS PRESENTED BY THE GOVERNMENT OF THE REPUBLIC OF ECUADOR
TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS

ON THE SCOPE AND PURPOSE OF THE RIGHT OF ASYLUM
IN LIGHT OF INTERNATIONAL HUMAN RIGHTS LAW,
INTER-AMERICAN LAW AND INTERNATIONAL LAW

I. INTRODUCTION

The issues presented before the Inter-American Court of Human Rights in the request for an advisory opinion from the Government of the Republic of Ecuador are regarding the scope and purpose of the right to asylum in light of international human rights law, Inter-American law, and international law. The specific questions on which an advisory opinion is requested are as follows in Section II.¹

Amicus curiae respectfully submits this brief to provide observations on several questions presented in the request for advisory opinion and focuses largely, though not exclusively, on relevant rights and laws specifically contemplated in the International Migrants Bill of Rights, namely the right of asylum and State obligations to uphold this right, and the right to protection from *refoulement* and the international legal principle of *non-refoulement*.

II. QUESTIONS PRESENTED IN THE REQUEST FOR ADVISORY OPINION

- A. Considering the principles of equality and non-discrimination 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 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, and specifically in light of Article 5 of the UN Convention relating to the Status of Refugees, Article 22(7) of the American Convention on Human Rights, and Article XXVII of the American Declaration of the Rights and Duties of Man, whether it is 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. Whether it is admissible for a State which is not party to a specific convention on asylum to obstruct, prevent, or restrict the action of another State that is party to that convention, such that the latter State is unable to fulfill its obligations and

¹ These questions are quoted in whole or in part from the Request for Advisory Opinion submitted to the Secretariat of the Inter-American Court of Human Rights by the Government of the Republic of Ecuador on August 8, 2016, para. 58.

- commitments under that convention, and what should be the legal consequences of this conduct for the person who has been granted asylum?
- C. Whether it is admissible that a State which is not party to a specific convention on asylum, or which belongs to a different regional legal system from that in 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 they are in a country outside the said legal system due to exercising their 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. Whether it is 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. Whether it is 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 the arguments on the human rights and fundamental freedoms of the person concerned, taking into account that the person could be a victim of political persecution or acts of discrimination?
- F. Whether 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, where there are clear indications that that would result in the said person suffering serious harm, namely, capital punishment, life imprisonment, torture or cruel, inhuman or degrading treatment?
- G. Whether it is 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 on Human Rights, 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 refugee 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?

III. **AMICUS CURIAE'S INTEREST IN THE REQUEST FOR ADVISORY OPINION**

The International Migrants Bill of Rights (IMBR) Initiative is based at Georgetown University Law Center's Human Rights Institute. The IMBR Initiative seeks to promote and uphold the universal recognition and fulfillment of the human rights of all international migrants, regardless of their status or reason for their migration, through the restatement and promotion of established international and regional laws and norms relevant to migrants' rights and as compiled in the International Migrants Bill of Rights.

Drawing upon existing international and regional human rights laws and norms, the fundamental principles and rights reflected in the IMBR include the inherent right to life; the right to recognition as a person before the law; the right to equal protection under the law; the right to liberty and security of person; the right to dignity and physical, mental, and moral integrity; the right to protection and assistance as required by vulnerable persons; the right to due process of law; the right to effective remedy; the right to protection and assistance as needed by victims of crime; the right to a nationality; the right to seek and enjoy asylum; the right to protection from *refoulement*; the right to protection from discriminatory or arbitrary expulsion or deportation; the right to work and freedom from slavery; the right to education; the right to an adequate standard of living; the right to the highest attainable standard of physical and mental health; the right to protection and unification of family; the right to use and enjoy one's own languages and cultures; the right to freedom of thought, conscience, religion or belief; the right to freedom of opinion and expression; the right to freedom of peaceful assembly and association; and the right to participate in civil and political life.

The IMBR presents a comprehensive, coherent articulation of the legal framework that protects the rights of all international migrants. The IMBR Initiative works to contribute to important, ongoing debates about the way the world views and treats people who cross borders, and utilizes the IMBR to promote the normative foundation for human rights protections at multiple levels of migration governance. The IMBR Initiative envisions a world in which the human rights of all international migrants are protected, and advocates for the protection of migrants' human rights by promoting the understanding and use of the International Migrants Bill of Rights.

IV. **AMICUS CURIAE'S OBSERVATIONS ON THE QUESTIONS PRESENTED IN THE REQUEST FOR ADVISORY OPINION**

As a human right, asylum is enshrined in the Universal Declaration of Human Rights and a myriad of international and regional legal instruments which also articulate the binding obligations of States to provide refuge to those fleeing persecution, to uphold the institution of asylum, and to prevent *refoulement* of persons who may face torture, ill-treatment, or threat to

life.² Under international human rights law, Inter-American law, and international law, not only do persons have the human right to seek and enjoy asylum and refuge from political or other types of persecution, but States are invested with the obligation and power to ensure that persons are able to exercise their rights. States Party to international and regional legal instruments providing for the right of asylum must implement their treaty obligations within their respective jurisdictions. Other States that are not party to a specific treaty may not be obligated to implement its particular provisions, but also must not frustrate the implementation of those provisions by States which are party. Additionally, while the principle of *non-refoulement* is set forth in numerous international and regional treaties, it is also understood to be a preemptory norm of international law and thus, regardless of the status of a State's ratification or implementation of any particular international or regional treaty, *non-refoulement* is an obligation from which no State may derogate under any circumstances.

A. Pursuant to its international and regional legal obligations, and as a sovereign State, Ecuador must provide for and ensure the right to asylum within its sovereign jurisdiction.

As a State Party to international and regional treaties providing for the right of asylum, Ecuador must ensure the ability of persons subject to its jurisdiction to exercise that right. Accordingly, Ecuador is vested with the obligation and power to determine the form and method of asylum, so long as the form and method implement, and are in accord with, the State's international and regional legal obligations to provide for and ensure the right to asylum, as well as all other relevant human rights obligations.³

As a corollary to Ecuador's obligation to provide for and ensure the right of asylum, pursuant to its international and regional treaty obligations, and as an implicit requirement of State

² Universal Declaration of Human Rights, art. 14(1), U.N.G.A. Res. 217 (1948) (hereinafter "UDHR") ("Everyone has the right to seek and to enjoy in other countries asylum from persecution."); *see also* International Migrants Bill of Rights, art 12(1) (hereinafter "IMBR") ("Every migrant has the right to seek and to enjoy in other countries asylum.")

³ E.g., the right to asylum co-exists alongside other human rights, such as the right to equal protection under the law, due process, liberty and security of person, and freedom from expulsion and *refoulement*; States are obligated to ensure that all persons, including asylum seekers and those granted asylum, also retain these other human rights pursuant to international and regional legal treaties, as well as each State's domestic law. *See* UDHR, art. 7 ("All are equal before the law and are entitled without any discrimination to equal protection of the law."); International Covenant on Civil and Political Rights, art. 26, 999 U.N.T.S. 171 (1966) ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."); *see also* IMBR, art. 3(1) restating the right to equal protection ("All persons, including migrants, are equal before the law.").

sovereignty, States that are not party to the same treaties, or are not otherwise obligated to implement the same treaties, may not prevent, restrict, obstruct, or otherwise frustrate Ecuador's good faith implementation and observance of its human rights obligations under those legal instruments.

The additional consequence of this corollary is that regardless of whether other States are party to a specific convention on asylum, or whether other States belong to the same or a different regional legal system, Ecuador retains, and indeed must still fulfill, its own treaty obligations regarding asylum, pursuant to the provisions of the specific conventions to which it is State Party and the legal norms of the regional legal system to which it belongs.

Thus, Ecuador's or another State's observance and upholding of the human right of asylum must continue regardless of whether other States also observes the right; Ecuador's or another State's grant of asylum to a particular person must be respected by other States within the international community of States on the basis of the granting State's sovereignty and its legal obligations to make such determinations.⁴ Consequently, the grant of asylum is also closely related to the principle of *non-refoulement* and State obligations to not violate the principle.

Similarly, under the international law on treaties, and pursuant to their international and regional treaty obligations, Ecuador and other States Party must implement and apply the provisions on asylum in good faith, and may not restrict, reduce, or impair the right to asylum in any manner that is contrary to the relevant treaty provisions, or that would otherwise defeat the object and purpose of the treaty and its provisions.⁵ Furthermore, States must uphold and fulfill their obligations under customary international law, including their obligation to prevent *refoulement*.

Finally, pursuant to their status as sovereign States equal to other sovereign States within the international community, Ecuador and other States are obligated to consider asylum claims, to make impartial and independent findings as to whether individual asylum seekers have a well-founded fear of persecution, and to make grants of asylum in cases where such claims are determined to be well-founded. Yet, a grant of asylum does not necessarily convey or imply a grant of further unrelated rights or privileges; e.g., a grant of asylum within the jurisdiction of a diplomatic mission does not necessarily convey or imply a further grant of diplomatic immunity

⁴ See, e.g., *Elif Pelit v. Azerbaijan*, United Nations Committee against Torture (2007). "On the extraterritorial effect of the determination of refugee status... the very purpose of the 1951 Convention and the 1967 Protocol implies that refugee status determined by one Contracting State will be recognized also by the other Contracting States."

⁵ Vienna Convention on the Law of Treaties, art. 26, U.N. Doc. A/CONF. 39/27 (1969) (hereinafter "VCLT") ("Pacta Sunt Servanda: Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); see also, *id.*, art. 18 ("Obligation Not to Defeat the Object and Purpose of a Treaty Prior to Its Entry into Force").

to a person who does not have diplomatic status. Moreover, a refusal to consider a claim by an asylum seeker, or a refusal to grant asylum to an asylum seeker who is determined to have a well-founded fear of persecution, or a revocation of a grant of asylum, under circumstances where the potential granting State may be reasonably considered to have jurisdiction, could be considered a violation of the *jus cogens* principle of *non-refoulement*.

B. The principle of *non-refoulement* is an international norm from which no derogation is permitted and which obligates all States to prevent *refoulement* of any person, including any person subject to potential extradition, who faces substantial risk of torture, ill-treatment, or threats to life, including through further *refoulement*.

Non-refoulement is a *jus cogens* (preemptory norm) of international law which is understood and accepted as customary international law.⁶ As such, and although the principle of *non-refoulement* is articulated in numerous international and regional treaties, no specific international or regional treaty ratification is prerequisite to this obligation upon States to prevent *refoulement* of persons subject to their jurisdiction, and no State may derogate from this principle under any circumstances. In other words, all States are obligated to observe and uphold the principle of *non-refoulement* at all times and under all circumstances.

The principle of *non-refoulement* protects persons from expulsion or return (*refouler*) where there are “substantial grounds for believing that he would be in danger of being subject to torture,” ill-treatment, or threats to life.⁷ “However, the risk does not have to meet the test of being highly probable.”⁸

⁶ United Nations High Commissioner for Refugees, para. 21, “Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol,” available at <http://www.unhcr.org/4d9486929.pdf> (“The prohibition of torture is also part of customary international law, which has attained the rank of a peremptory norm of international law, or *jus cogens*. It includes, as a fundamental and inherent component, the prohibition of *refoulement* to a risk of torture, and thus imposes an absolute ban on any form of forcible return to a danger of torture which is binding on all States, including those which have not become party to the relevant instruments. The prohibition of arbitrary deprivation of life, which also includes an inherent obligation not to send any person to a country where there is a real risk that he or she may be exposed to such treatment, also forms part of customary international law. The prohibition of *refoulement* to a risk of cruel, inhuman or degrading treatment or punishment, as codified in universal as well as regional human rights treaties is in the process of becoming customary international law, at the very least at regional level.”)

⁷ Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 3, 23 I.L.M. 1027 (1984) (hereinafter “CAT”).

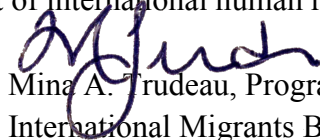
Because the principle of *non-refoulement* serves to prevent persons from suffering grievous and irreparable harm, a person does not lose the right to protection from *refoulement* simply by virtue of being outside the State or regional legal system in which they sought or were granted asylum. Similarly, no State may claim an exception to the mandatory prevention of *refoulement*.

Consequently, States must protect all persons from *refoulement* at all times and under all circumstances. Equally, the protection from *refoulement* applies to all persons subject to potential extradition.⁹ Additionally, an asylum grant, at a minimum, creates a presumption against *refoulement*, including possible extradition.

Where States have reason to believe that an extradition request may lead to further *refoulement*, States must reject the extradition request, prevent the extradition, and uphold the mandatory protection afforded under the principle of *non-refoulement* in order to prevent the risk of grievous harm through torture, ill-treatment, or threats to life. Even in the context of national security concerns, the non-derogable protections to persons at risk and the non-derogable obligations of the principle of *non-refoulement* are absolute.¹⁰

V. CONCLUSION

Amicus curiae respectfully request that the Inter-American Court of Human Rights consider the above observations when preparing its advisory opinion on the questions presented in the request by the Government of the Republic of Ecuador on the scope and purpose of the right of asylum in light of international human rights law, Inter-American law and international law.


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⁸ See CAT, General Comment No. 1 (implementing art 3 in light of art 22) (emphasis added).

⁹ United Nations High Commissioner for Refugees, “The Interface between Extradition and Asylum,” at x, available at <http://www.unhcr.org/3fe84fad4.pdf> (“The prohibition of *refoulement* applies to any form of removal, including extradition, as has been recognised, inter alia, in the national legislation of many countries. The principle of *non-refoulement* establishes a mandatory bar to extradition, regardless of whether or not it is explicitly provided for in an extradition treaty or legislation.”).

¹⁰ See, e.g., *Agiza v. Sweden*, United Nations Committee against Torture (2005): “[T]he Convention’s protections are absolute, even in the context of national security concerns, and that such considerations emphasise the importance of appropriate review mechanisms. While national security concerns might justify some adjustments to be made to the particular process of review, the mechanism chosen must continue to satisfy article 3’s requirements of effective, independent and impartial review.”