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The Permanent Mission of Jamaica to the Organization of American States presents its compliments to the Inter-American Court of Human Rights and further to the latter's Note CDH-OC-25/527 dated 25th May 2017 has the honour to resubmit as requested, signed observations of the Government of Jamaica in reference to the Advisory Opinion presented by the Government of the Republic of Ecuador on 18th August 2016 concerning "The Scope and Purpose of the Right of Asylum in Light of International Human Rights Law, Inter-American Law and International Law."

The Permanent Mission of Jamaica to the Organization of American States avails itself of this opportunity to renew to the Inter-American Court of Human Rights the assurances of its highest consideration.

PERMANENT MISSION OF JAMAICA TO THE O.A.S.

Inter-American Court on Human Rights
Organization of American States
26th May 2017

In the Matter

PRESENTED BY

**THE GOVERNMENT OF THE REPUBLIC OF ECUADOR**

TO THE

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

CONCERNING

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

## I. Jurisdiction of the Inter-American Court to issue advisory opinions

1. The American Convention on Human Rights ('ACHR') establishes the jurisdiction of the Inter-American Court of Human Rights ('the Court') to give advisory opinions. In particular, Article 64 of the ACHR provides that *"[t]he member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states"*. Article 64(2) of the ACHR further outlines that *"[t]he 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. When presented with a request for an advisory opinion, the Court must first satisfy itself that it has jurisdiction *ratione materiae* and *ratione personae*. This requires the Court to analyse the body submitting the request and the nature of the request[1].

3. The Court has defined the scope of its *ratione materiae* jurisdiction. In an Advisory Opinion requested by Peru, the Court cautioned that the broad scope of the language of Article 64 should not be construed to mean that there are no limits to the advisory jurisdiction of the Court. Importantly, it noted that there are certain natural limitations to the Court's advisory jurisdiction which are implicit in the terms of Article 64 and the context and object and purpose of the ACHR[2].

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[1] International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), IACtHR, Advisory Opinion OC-14/94 of 9 December 1994, Ser. A, No. 16, para. 20.

[2] "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights) Requested by Peru, IACtHR, Advisory Opinion OC-1/82 of September 24, 1982, [18].

4. In this regard, the Court stated "*...that, if the principal purpose of a request for an advisory opinion relates to the implementation or scope of international obligations assumed by a Member State of the inter-American system, the Court has jurisdiction to render the opinion. By the same token, the Court lacks that jurisdiction if the principal purpose of the request relates to the scope or implementation of international obligations assumed by States not members of the inter-American system.*" The Court further explained that its advisory jurisdiction is to assist the American States in discharging their international human rights obligations.[3] As such, it is only for compelling reasons that indicate that the Court has exceeded the limits of its advisory jurisdiction that it will refrain from complying with a request for an opinion[4]. The questions presented in this request appear to fall within the jurisdiction *ratione materiae* of the Court. It is also self-evident that this request falls within the Court's jurisdiction *ratione personae.*

5. It is accepted that the Court is not confined to looking only at treaties that emanate from the inter-American Human Rights system. The Court opined that:

> *The text of Article 64 of the Convention does not compel the conclusion that it is to be restrictively interpreted.... The ordinary meaning of the text of Article 64 therefore does not permit the Court to rule that certain international treaties were meant to be excluded from its scope simply because non-American States are or may become Parties to them. In fact, the only restriction to the Court's jurisdiction to be found in Article 64 is that it speaks of international agreements concerning the protection of human rights in the American States. The provisions of Article 64 do not require that the agreements be treaties between American States, nor that they be regional in character, nor that they have been adopted within the framework of the inter-American system. Since a restrictive purpose was not expressly articulated, it cannot be presumed to exist.*[5]

6. The Court may therefore consider all the conventions referred to in this request that are not inter-American conventions including the International Covenant on Civil and Political Rights ('ICCPR'), the International Covenant on Economic, Social and Cultural Rights ('ICESCR') and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('the Convention against Torture'), the 1961 Convention on the Status of Refugees ('the Refugee Convention') and its 1976 New York Protocol.

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[3] *Ibid,* [25].
[4] *Ibid,* [30].
[5] *Ibid,* [37]. See also para. 57 of Ecuador's request which refers to this.

## II. Diplomatic Asylum and Territorial Asylum

7. It is not our intention to directly address the specific questions before the Court in the request for an Advisory Opinion. We find it useful first to distil the normative content of territorial asylum and thereafter make observations regarding the scope and content of diplomatic asylum. We submit that the concept of territorial asylum reflects generally accepted customary practices concerning the exercise of a State's sovereign rights while that of diplomatic asylum gives rise to questions about its normative character particularly outside of the Latin American context.

*Territorial Asylum*

8. The right of a State to grant asylum is well established in international law. It follows from the principle that every State is deemed to have exclusive control over its territory and hence over persons present in its territory[6]. Professor Hersch Lauterpacht has commented that such a right is one, "which every state...possesses under international law".[7] In the *Asylum Case,* the International Court of Justice ("ICJ") linked the right of a State not to extradite an alien within its territory with the right to grant territorial asylum which the ICJ also considered as a normal exercise of the State's sovereign powers. More instructively, the ICJ concluded that the exercise of a State's right in this way is not an affront to another State's sovereignty[8].

9. The Declaration on Territorial Asylum that was adopted by the UN General Assembly in 1967 also affirms that the grant of asylum is a peaceful and humanitarian act and a normal exercise of State sovereignty. The Declaration further outlines that the decision of a State to grant territorial asylum should be respected by all the other States. Territorial asylum has also been given normative recognition in other international conventions such as the 1951 Geneva Refugee Convention, the ICCPR, the ACHR and the Inter-American Convention on Territorial Asylum. As aptly articulated by Ecuador in its request "...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 American Convention on Human Rights, or by according him refugee status under the 1951 Geneva Convention"[9]. The grant of territorial asylum is therefore comparatively uncontroversial.

*Diplomatic Asylum*

10. Diplomatic asylum on the other hand is used to denote asylum granted by a State outside its territory, particularly in its diplomatic premises,

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[6] Felice Morgenstern, The Right of Asylum, 1949 Brit. Y.B. Int'L L. 327.
[7] Hersch Lauterpacht, The Universal Declaration of Human Rights, 1948 Brit. Y.B. Int'L L. 354, 373.
[8] *Asylum Case (Colombia v Peru)*, I.C.J. Reports 1950, p. 274.
[9] Para. 3, Ecuador's request.

consulates, on board its ships in the territorial waters of another State (naval asylum), and also on board its aircraft and of its military or para-military installations in foreign territory.[10] This is regarded as a form of extraterritorial asylum. We submit however, that diplomatic asylum is not generally recognized in public international law.

11. The decision of the ICJ in the *Asylum Case* is instructive in this regard. In the *Asylum Case*, the ICJ considered that the granting of diplomatic asylum may be regarded as a violation of the sovereignty of the territorial State. The ICJ stated that:

> *'In the case of diplomatic asylum, the refugee is within the territory of the State where the offence was committed. A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.'*[11]

12. The qualification expressed by the ICJ that a legal basis may be established in a particular case is linked to the general acknowledgement that there might be humanitarian considerations which could justify the grant of diplomatic asylum. The humanitarian considerations that may provide adequate justification were not addressed by the Court. The Court noted, however, that:

> *An exception to this rule (asylum should not be granted to those facing regular prosecutions) can occur only if, in the guise of justice, arbitrary action is substituted for the rule of law. Such would be the case if the administration of justice were corrupted by measures clearly prompted by political aims. Asylum protects the political offender against any measures of a manifestly extra-legal character which a Government might take or attempt to take against its political opponents... On the other hand, the safety which arises out of asylum cannot be construed as a protection against the regular application of the laws and against the jurisdiction of legally constituted tribunals. Protection thus understood would authorize the diplomatic agent to obstruct the application of the laws of the country whereas it is his duty to respect them... Such a conception, moreover, would come into conflict with one of the most firmly established traditions of Latin-America, namely, non-intervention.*

13. Oppenheim's International Law also affirms, in relation to the grant of diplomatic asylum, that "compelling reasons of humanity may justify the

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[10] UN General Assembly, *Question of Diplomatic Asylum: Report of the Secretary General*, 22 September 1975, A/10139 (Part II), available at: http://www.refworld.org/docid/3ae68bf10.html

[11] *Ibid*, n. 8.

grant of asylum"[12]. The acceptance of a humanitarian exception gains further support from the Report of the Secretary General on the Question of Diplomatic Asylum[13]. The Report of the Secretary General highlights that Jamaica and other States such as Canada, Australia, Belgium, Denmark, Liberia and Singapore acknowledged the propriety of this exception without accepting that there exists a customary right to provide diplomatic asylum[14]. It must therefore be asked whether customary international law has evolved over the past forty years as to recognize any broader right concerning diplomatic asylum.

14. A review of the authorities indicates that there is no customary rule of international law that establishes a general right to either grant or seek (and receive) diplomatic asylum. Proponents for this position cite the various instances internationally in which States have granted diplomatic asylum. Reference is often made to Canada's decision to grant diplomatic asylum to six United States of America ('US') diplomats on Canadian diplomatic premises in Iran during the Tehran hostages crisis. In that instance, Canada argued that its actions were actually consistent with international law since the attack on the US Embassy in Iran was an attack on the entire diplomatic corps and any other embassy was entitled to assist[15]. Further reference is made to the 'Durban Six' incident where six anti-apartheid activists who had been served detention orders sought refuge in the British consulate in Durban in 1984. The British authorities agreed to provide refuge to the activists though they indicated that these persons could not stay in the premises indefinitely and that they would not intervene on their behalf with the South African authorities. There are other notable isolated instances.[16] However, these cases have not provided compelling reasons for international jurists to consider that the humanitarian exception to diplomatic asylum is now part of international law. On the contrary, the greater weight of legal opinion is that the instances of States granting diplomatic asylum are not uniform and are too much of an inconsistent character to amount to a rule of customary international law[17].

15. Only Latin American countries have developed and codified a system for the recognition and grant of diplomatic asylum through the Inter-

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[12] Oppenheim's International Law (Vol. I) (1992), p. 1085.
[13] *Ibid,* n. 10.
[14] *Ibid.*
[15] For the Canadian position, see L.H. Legault, 'Canadian Practice in International Law during 1979 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs', 18 Canadian Yearbook of International Law (1980).
[16] *See* Andreopoulos, G. J. (2014). *Asylum.* Retrieved May 4, 2017, from Encyclopedia Britannica at http://www.britannica.com/EBchecked/topic/40220/asylum which indicates that "...after an unsuccessful uprising against the communist government of Hungary in 1956, the United States controversially granted diplomatic asylum to dissident Hungarian Roman Catholic József Cardinal Mindszenty, who was given refuge in the U.S. embassy and remained there for 15 years."
[17] F. Morgenstern, 'The Right of Asylum', 26 BYIL (1949); A.M. Rossitto, 'Diplomatic Asylum in the United States and Latin America: A Comparative Analysis', 13 Brooklyn Journal of International Law (1987), p. 114.

American Convention on Diplomatic Asylum ("the 1954 Caracas Convention"). The Havana Convention of 1928; Montevideo Convention on Political Asylum of 1933; Montevideo Treaty on Political Asylum and Refuge of 1939; and the Caracas Convention of 1954 all apply to diplomatic asylum within the region. However, it is notable that the ICJ in the *Asylum case* was unable to find a consistent and uniform State practice within Latin America that would lead to the conclusion that there is a customary regional norm that supports the right of States to grant diplomatic asylum outside of the treaty-based systems.

16. The grant of diplomatic asylum in Latin America is therefore given legal content through these various conventions which themselves reflect adherence to the *pro homine* principle which underpins the humanist conception of human rights protection within the region which this Court upholds. Even in those conventions, the right to grant diplomatic asylum is not absolute. Under the 1954 Caracas Convention while Article II secures the right of States to grant diplomatic asylum it also permits a State to refuse to grant such an asylum and to opt not to provide any reason for such a refusal. Less than half of all OAS Member States (and not even all Latin American countries) have ratified this Convention. This may be seen as further supporting the assertion that the practice to grant diplomatic asylum has not fully crystalized in the hemisphere and has evolved only in terms of sub-regional practices.

*Diplomatic asylum as a feature of diplomatic/consular law*

17. Neither the Vienna Convention on Diplomatic Relations ('VCDR') nor the Vienna Convention on Consular Relations ('VCCR') categorizes the extension of diplomatic asylum as a recognized diplomatic or consular function. In fact, at the time of negotiating these conventions, the notion of diplomatic asylum was expressly omitted from their scope of application given disagreements as to how the matter was to be treated in light of the opposing views as to the existence and substance of the right[18]. It may be contended however that diplomatic asylum is indirectly covered by Article 41(3) of the VCDR which suggests that diplomatic premises may be used as agreed by the sending and receiving State in any special agreement between them. The regional conventions on diplomatic asylum are regarded as this type of special agreement among States that are parties to those conventions. Indeed, Article 41(3) was specifically included in the VCDR to accommodate the Latin American conventions on diplomatic asylum.

18. Diplomatic asylum is possible because of the inviolability of diplomatic and consular premises which must be respected by the territorial State

[18] Heijer, M. d. (2011), Europe and Extraterritorial Asylum, Leiden: Universiteit Leiden, p.125.; Report of the Secretary-General, *ibid*, n. 10.

even when it is in opposition to the extension of diplomatic asylum[19]. Nevertheless, the extension of such refuge might be regarded as inconsistent with the duties of the State not to interfere with the domestic affairs of the host State or use diplomatic and consular premises in any manner incompatible with recognized diplomatic or consular functions[20]. General international law does not appear to create any normative right for the grant of diplomatic asylum. The assertion of a right to consular asylum would seem to be even more tenuous. The distinct treatment of diplomatic and territorial asylum in customary international law therefore merits further consideration in the ultimate disposition of the questions before the Court.

## III. The duty to protect and ensure international human rights without discrimination and the *pro homine* principle

19. The extension of diplomatic asylum might be said to have emanated from the obligation of all states to respect international human rights. Article 2(1) of the ICCPR provides that each State Party to the Convention shall protect and ensure the Covenant rights of all individuals within its territory and subject to its jurisdiction without any discrimination of any kind. Article 5(1) states that "[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant". Article 5(2) specifies that "[t]here shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent." Article 26 of the ICCPR guarantees the equality of all persons before the law and secures for them the right to the equal protection of the law without any form of discrimination.

20. Article 28 of the UDHR sets out the entitlement of everyone to a social and international order in which the rights and freedoms set forth in that Declaration can be fully realized whilst Article 30 provides that nothing in the Declaration is to be construed as giving the right of anyone to destroy any of the rights or freedoms in the Declaration. The Court has been asked to consider whether these provisions, given their overarching importance to the universal protection of human rights, support the legal validity of all forms and categories of asylum that exist now or could be established in the future[21].

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[19] Articles 22(1) VCDR and 31(2) VCCR; Report of the Secretary-General, *ibid*, note 10, paras. 190 Note that discussions in the Report of the Secretary-General support the view that diplomatic premises should remain inviolable even where they have been misused.

[20] Articles 41(1), (3) VCDR and Articles 55(1), (2) VCCR.

[21] Request of Ecuador, Para. 27.

21. The customary methods of treaty interpretation are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). Particular emphasis is placed on the object and purpose of human rights treaties in applying the *pro homine* principle. The result as has been suggested to this Court is the revelation of a broad scope and content to be attributed to Article 22(7) of the ACHR which establishes the right of everyone to seek and be granted asylum in accordance with the legislation of the State and international conventions[22].

22. Articles 2(1) and 5 of the ICCPR extend protection to the rights and freedoms recognized by that Convention. Likewise, the UDHR refers to those rights articulated in the Declaration. As discussed above, while international law affirms the rights of States to grant territorial asylum, it does not countenance an unqualified right to seek and be granted diplomatic asylum. Moreover, the instances in which diplomatic asylum have been granted have been considered to be too inconsistent to give rise to the crystallization of a rule of general international law as opposed to sub-regional practices regarding the existence of such a right. It may therefore be incongruous to contend as a general proposition that actions by any State, group or individual that signify a restrictive interpretation on the permissible forms of asylum equate to a disregard for the provisions established in the human rights instruments when said instruments are not universally accepted as encompassing the right to seek and be granted diplomatic asylum. The grant of diplomatic asylum therefore remains subject to the territorial sovereignty of the host State. However, the host State must at all times respect the inviolability of diplomatic premises even where there is no treaty or customary practice supporting the right of diplomatic asylum.

23. This Court when analyzing Article 29 of the American Convention in its advisory opinion on *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, asserted that "if in the same situation both the American Convention and another international treaty are applicable, the rule most favourable to the individual must prevail"[23]. The *pro homine* principle, in recognizing the preponderance of the human person, sets two interpretative rules in international law. First, human rights norms must be extensively interpreted. Second, in case of doubt or conflict between different human rights norms, the most protective norm to the human person – the victim of human rights violations must be adopted. In this sense, the Court is being invited to consider that reference to asylum under the various conventions include diplomatic asylum and any other foreseeable type of asylum that might be accorded by a State.

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[22] This is similar to Article XXVII of the American Declaration on the Rights and Duties of Man which provides that every person is entitled to seek and be granted asylum consistent with national legislation and international agreements.

[23] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, November 13, 1985, Inter-Am. Ct. H.R. (Ser. A) No. 5 (1985).

24. The normative character of rights, however, is such that they are not absolute; the individual's right must be measured against what is justifiable in a free and democratic society. Indeed, even within the customary and treaty-based regimes on territorial asylum it is recognized that there are persons deemed unworthy of international protection who have no right to asylum.[24] International peace and security are predicated on the fundamental principles of State sovereignty and non-intervention.[25] The progressive development of humanitarian law is a source for promoting universal respect for human rights while respecting differences in legal traditions and customary practices.

25. The universal respect for human rights underpins the *erga omnes* character of those rights. The Declaration on Territorial Asylum, provides a basis for the contention that asylum granted by a State in the exercise of its sovereign rights create international obligations not only for that State but also for the international community regardless of the treaty that forms the basis for the grant of asylum.[26] The provisions of the Declaration are bolstered by the almost universal acceptance of the principle of *non-refoulement,* as codified by Article 33 of the Refugee Convention, which prohibits the return of any refugee who establishes a well-founded fear of persecution in any State to which he or she might be returned.

26. The authorities therefore support the view that States could be regarded as acting contrary to the purposes of the relevant human rights conventions and customary international law if they take actions that impede the full deployment of the right of a State to grant asylum and the right of any person to seek and receive such protection. It could also be contrary to the purpose and spirit of the UN Charter which imposes an obligation on all States to cooperate with each other. Further, the Declaration on the Principles of International Law concerning Friendly Relations and Co-Operation among States provides that States shall cooperate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all.

27. To this extent Jamaica agrees that the international protection of human rights under any form of asylum is universal and give rise to obligations *erga omnes* for every State. It may be questioned, however, whether any assistance may be gained from the reference to the Martens Clause and the dictates of the public conscience as the basis for substantiating independent rights flowing from the grant of diplomatic asylum given the various interpretations assigned to the Clause by humanitarian lawyers and the particular expressions thereof in analyses on the law of armed conflict.[27]

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[24] Refugee Convention, Article 1F.
[25] UN Charter.
[26] Ecuador's Request, para 14.
[27] This clause is repeated in several instruments such as the Preamble to the 1977 Protocol II Additional to the 1949 Geneva Conventions relating to the Protection of Victims of Non-

## *IV. Non-Refoulement*

28. The Court will be required to consider the prohibition of *"refouler"* or return of a refugee or asylee in its analysis of this request. The principle of *non-refoulement* is a recognised rule of customary international law which binds all States. It has even been considered as a norm of *jus cogens* from which no derogation is permitted[28]. Article 33 of the Refugee Convention describes *non-refoulement* as imposing a clear duty on States Parties not to expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The Organization of African Union Refugee Convention[29] and the ACHR[30] explicitly affirm this obligation. The principle is also reflected in a number of non-binding international texts. An important example is the Declaration on Territorial Asylum. All States therefore have an obligation not to return a person to any territory in which he or she may face persecution. This applies whether the States are parties to a specific treaty or not.

29. In its Note on international protection of 13 September 2001, the UNHCR, whose task it is to oversee how the States Parties apply the Geneva Convention, stated the following in regard to the principle of "*non-refoulement*":

> The obligation of States not to expel, return of *refoule* refugees to territories where their life of freedom would be threatened is a cardinal protection principle enshrined in the [Geneva] Convention, to which no reservations are permitted. In many ways, the principle is the logical complement to the right to seek asylum recognised in the Universal Declaration of Human Rights. It has come to be considered a rule of customary international law binding on all States. In addition, international human rights law has established *non-refoulement* as a fundamental component of the absolute prohibition of torture and cruel, inhuman or degrading treatment or

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International Armed Conflicts; The ICJ in their advisory opinion on the Legality of the Threat or Use of Nuclear Weapons issued on 8 July 1996, had to consider the general laws of armed conflict before they could consider the specific laws relating to nuclear weapons. Several different interpretations of this clause were presented in oral and written submissions to the ICJ. Although the ICJ advisory opinion did not provide a clear understanding of the Clause, several of submissions to the court provided an insight into its meaning.

[28] Executive Committee of the High Commissioner's Programme, Conclusion No. 25 (XXXIII) 1982, at para. (b). In Conclusion No. 79 (XLVII) 1996, the Executive Committee emphasized that the principle of *non-refoulement* was not subject to derogation.

[29] Article II(3).

[30] Article 22(8).

> punishment. The duty not to *refoule* is also recognised as applying to refugees irrespective of their formal recognition, thus obviously including asylum-seekers whose status has not yet been determined. It encompasses any measure attributable to a State which could have the effect of returning an asylum-seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution. This includes rejection at the frontier, interception and indirect *refoulement*, whether of an individual seeking asylum or in situations of mass influx.

30. Article 3(1) of the UN Convention against Torture also specifically 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". To this end it is to be noted that the prohibition of torture is of *jus cogens* character.

31. Article 7 of the ICCPR provides that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. This obligation has been construed by the UN Human Rights Committee, in its General Comment No. 20 (1992), to include a *non-refoulement* component as follows:

> *States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.*[31]

32. The corresponding provision in Article 3 of the ECHR has similarly been interpreted by the European Court of Human Rights as imposing a prohibition on *refoulement*.[32]

33. Article 3(2) of the 1957 European Convention on Extradition precludes extradition 'if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons'. Similarly, Article 4(5) of the 1981 Inter-American Convention on Extradition precludes extradition when 'it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the position of the person sought may be prejudiced for any of these reasons'.

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[31] HRI/HEN/1/Rev.1, 28 July 1994, at para. 9.

[32] *See for example Cruz Varas v. Sweden* (1991), series A, no. 201; 108 ILR 283, [69]; *Vilvarajah v. United Kingdom* (1991), series A, no. 215; 108 ILR 321, [73–4], [79–81]

34. Under Article III of the Caracas Convention, a person facing such legal proceedings within the State of origin may not be granted diplomatic protection unless the charges that he would face are politically motivated. The obligation not to return any refugee or asylee to a country where he or she might face persecution or be subject to torture or other cruel or inhuman treatment is therefore well established in international law.

*Determination of Refugee Status*

35. A person who may claim protection under the Refugee Convention is one 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."[33]

36. The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees[34] provides guidance in relation to the category of refugee status based on political offences. It states as follows:

> *84. Where a person is subject to prosecution or punishment for a political offence, a distinction may have to be drawn according to whether the prosecution is for political opinion or for politically-motivated acts. If the prosecution pertains to a punishable act committed out of political motives, and if the anticipated punishment is in conformity with the general law of the country concerned, fear of such prosecution will not in itself make the applicant a refugee.*
>
> *85. Whether a political offender can also be considered a refugee will depend upon various other factors. Prosecution for an offence may, depending upon the circumstances, be a pretext for punishing the offender for his political opinions or the expression thereof. Again, there may be reason to believe that a political offender would be exposed to excessive or arbitrary punishment for the alleged offence. Such excessive or arbitrary punishment will amount to persecution.*
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> *86. In determining whether a political offender can be considered a refugee, regard should also be had to the following elements: personality of the applicant, his political opinion, the motive behind*

[33] See Article 1(2) of the 1967 Protocol which deletes the initial reference to the 1 January 1951 date in the Convention.
[34] HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979

*the act, the nature of the act committed, the nature of the prosecution and its motives; finally, also, the nature of the law on which the prosecution is based. These elements may go to show that the person concerned has a fear of persecution and not merely a fear of prosecution and punishment – within the law – for an act committed by him.*

37. The determination of refugee status is that of the State granting asylum. Article 1(3) of the Declaration on Territorial Asylum indicates that it shall rest with the State granting asylum to evaluate the grounds for the granting of asylum Under the Refugee Convention, States Parties are left to adopt their own procedures to determine whether any person is entitled to protection. The determinations made by States Parties may not result in a similar outcome in every case although the participation of the Office of the High Commissioner is designed to facilitate this.[35] The decisions made by States are less contentious under the UN conventional regime than in the context of the assertion of a right to provide diplomatic asylum. Under Article IV of the 1954 Caracas Convention, the States Parties have the right to determine the nature of the offences or the motives of persecution when it will refuse to grant asylum under Article III of that Convention.

*The exception to refugee/asylum protection*

38. Not every person is entitled to the right of asylum. Article 1F of the Refugee Convention provides that persons who have committed war crimes, crimes against humanity, crimes against peace, serious non-political crimes outside the country of refuge or have been found guilty of acts contrary to the purposes and principles of the United Nations do not qualify for protection. These exceptions are routinely found in treaties on asylum. However, they should be very restrictively applied. The Handbook of the United Nations High Commissioner for Refugees is instructive in this regard and states as follows:

*155. What constitutes a "serious" non-political crime for the purposes of this exclusion clause is difficult to define, especially since the term "crime" has different connotations in different legal systems. in some countries the word "crime" denotes only offences of a serious character. In other countries it may comprise anything*

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[35] In this regard paragraph 194 of the Refugee Convention Handbook states as follows: Determination of refugee status, which is closely related to questions of asylum and admission, is of concern to the High Commissioner in the exercise of his function to provide international protection for refugees. In a number of countries, the Office of the High Commissioner participates in various forms, in procedures for the determination of refugee status. Such participation is based on article 35 of the 1951 Convention and the corresponding article 11 of the 1967 Protocol, which provide for co-operation by the Contracting States with the High Commissioner's Office.

*from petty larceny to murder. In the present context, however, a "serious" crime must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1 F (b) even if technically referred to as "crimes" in the penal law of the country concerned.*

*156. In applying this exclusion clause, it is also necessary to strike a balance between the nature of the offence presumed to have been committed by the applicant and the degree of persecution feared. If a person has well-founded fear of very severe persecution, e.g. persecution endangering his life or freedom, a crime must be very grave in order to exclude him. If the persecution feared is less serious, it will be necessary to have regard to the nature of the crime or crimes presumed to have been committed in order to establish whether the applicant is not in reality a fugitive from justice or whether his criminal character does not outweigh his character as a bona fide refugee.*

39. Exclusion clauses address the limited scope of the right to asylum and are particularly relevant where a claim of diplomatic asylum is made. A person seeking refuge on mission premises may be viewed by the host State as a fugitive from justice and not a legitimate asylum-seeker or alternatively even if a *bona fide* refugee not one who is entitled to protection given the serious nature of the crimes that it is alleged he or she has committed.

40. Significantly, Article III of the 1954 Caracas Convention provides that it is not lawful to grant diplomatic asylum to a person who is under indictment or on trial for common offenses or has been convicted by competent regular courts and have not served their respective sentence. Where such a person is surrendered to the local authorities, Article III(2) provides that he or she may not be tried for a political offence committed at a time before his or her surrender. The conventional rule represents a possible solution but in the absence of the general recognition of a right to grant diplomatic asylum, it does not suggest a basis for the assertion of a general principle of customary law.

41. The obligations stated in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment establish the fundamental rule applicable to all persons, even excluded individuals deemed unworthy of protection under the asylum regime, that absolutely prohibits the return of an individual to a country where there is a risk that he or she will be subjected to torture. Other international and regional human rights instruments contain similar provisions.[36]

## V. Conclusion

[36] See also Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, para 9

42. In considering this request, the Court must first satisfy itself that it has the jurisdiction to consider the substance of the various questions presented to it. In our observation, no substantial issues are apparent in this regard. Of significance to the disposition of this request is consideration by this Court of the important distinction between territorial and diplomatic asylum. While territorial asylum is firmly grounded in international law and custom, the instances of diplomatic asylum have not been uniform or consistent enough to be properly regarded as giving rise to a rule of customary international law. While there has been extensive normatisation of diplomatic asylum in Latin America, the rest of the international community has not come to a uniform position regarding the existence and scope of such a right.

43. Though not accepting the grant of diplomatic as a customary right, several States have signalled their acceptance of the possibility that another State may grant diplomatic asylum if it is justifiable as a humanitarian need such as where an individual is attempting to escape political persecution from another country. This exception accords with the *erga omnes* nature of the system of human rights protection that requires every state to protect fundamental rights and freedoms. Nevertheless, the grant of diplomatic asylum is still viewed as a breach of the territorial State's sovereignty and the principles of non-intervention enshrined in the Charter of the United Nations. Neither the Martens clause nor the *pro homine* principle as embraced by this Court will of themselves give normative content to the right to grant diplomatic asylum in respect of conventions that do not expressly provide for this given the manifestly extraterritorial exercise of State power that diplomatic asylum entails. Moreover, diplomatic asylum was considered and expressly rejected as a diplomatic function during the negotiations of the text of the VCDR.

44. The *non-refoulement* obligation is an overarching principle of the law relating to refugees and asylum. The prohibition on *refoulement* is regarded both as customary international law and *jus cogens*. It ensures that persons are not returned to a country where he or she might face persecution on the basis of matters such as their race, nationality or political opinions. An individual should also not be returned when he or she is likely to be prosecuted for political offences. Moreover, individuals should not be returned to a country where they are likely to be subjected to torture or any other form of cruel, inhuman and degrading punishment or treatment. In any of these cases, the State determines whether any of those conditions applies. These protection mechanisms are affirmed in international and regional instruments on refugee protection and asylum and thus merit further assessment by this Court in its analysis of the specific questions presented in the request for an Advisory Opinion made by Ecuador.

PERMANENT MISSION OF JAMAICA TO THE O.A.S.

**Submitted on behalf of Jamaica**
**May 4, 2017**