



UNHCR's Expert Witness Testimony before the Inter-American Court of Human Rights

Hearing in the case of *Pacheco Tineo vs. Bolivia*, Case 12.474, 18-21 March 2013

Mr. President, distinguished members of the Court,

1. Introduction

UNHCR is thankful to the Inter-American Commission on Human Rights (“the Commission”) for requesting the Inter-American Court of Human Rights (“the Court”) to allow the United Nations High Commissioner for Refugees (UNHCR) to make representations in these proceedings and to the Court for allowing UNHCR to do so.

The views UNHCR would like to present to this Court in these proceedings are informed by more than 60 years of experience supervising international refugee law instruments. UNHCR is mandated to supervise the application of international refugee law conventions, including the 1951 Convention and its 1967 Protocol, and as such has a responsibility and unique expertise to present its views to this Court. UNHCR has appeared as an intervener before several regional and national judicial proceedings, advising tribunals and courts on international refugee protection standards. UNHCR's interest in this case is based on the organization's duty to fulfil its mandate of ensuring the consistent and coherent interpretation of international refugee law.

UNHCR will take a neutral stance as between the positions of the Inter-American Commission on Human Rights, the alleged victims, and the State of Bolivia. UNHCR does not make submissions on the facts of the underlying individual case or on evidentiary matters, but is concerned with the interpretation and application of international refugee law instruments as a matter of law.

As such, the Court will receive information on two fundamental issues regarding refugee status determination relevant in the adjudication of the underlying case:

First, on how the underlying principles of international refugee protection, in particular that of the institution of asylum and of *non-refoulement*, are incorporated in the normative framework of international protection in the Americas. Second, on how the basic guarantees of due process and judicial protection as mentioned in Article 8 and 25 of the American Convention on Human Rights are to be respected in refugee status determination procedures.

1. The institution of asylum in the Americas and internationally

1. In Latin America the right to grant asylum was specifically codified in treaties of a regional scope, beginning with the *Tratado de derecho penal internacional* in 1889 (which

prohibited extradition for political crimes and established the right of states to grant asylum in their diplomatic premises abroad), to the *Convention on Territorial Asylum* and the *Convention on Diplomatic Asylum* both in 1954. The adoption of a set of treaties on diplomatic and territorial asylum and non-extradition for political reasons led to what has been commonly defined as the *Latin-American tradition of granting asylum*.

2. The traditional concept of asylum as an individual right evolved in the region with the development of an *Inter-American normative system of human rights*, following the universal trend of human rights protection of the post war era. In May 1948, the American Declaration of the Rights and Duties of Man (hereinafter “the American Declaration”) included the right of asylum in its Article XXVII:

“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.”

3. The American Declaration represented a major innovation and a radical change in the *Latin-American asylum tradition*. It represented a move away from the concept of asylum as a State prerogative to the recognition of an individual right to seek and receive asylum in the Americas. This development was matched at the global level with the passage in 1948 of the Universal Declaration of Human Rights, in which the “right to seek and enjoy in other countries asylum from persecution” was explicitly recognised in Article 14. During the period when the Universal Declaration was adopted, Latin-American States constituted the most extensive regional block in the United Nations, with 21 States.¹ Thereafter, the right of asylum started to be codified in human rights instruments rather than in inter-state treaties.

4. It is important to recall at this point in history the agreement of the 1951 Convention Relating to the Status of Refugees (the 1951 Refugee Convention), which is the universal and basic document governing refugee status and rights worldwide. While the 1951 Convention does not provide an explicit right to asylum, it is considered to be implicit in its terms, which outline not only the definition of a refugee, but also protection from *non-refoulement* and a range of rights to which such refugees are entitled. With the exception of Cuba, all Latin American countries are parties to the 1951 Refugee Convention and/or its 1967 Protocol. I’ll come back to the principle of *non-refoulement* in just a minute.

5. In relation to the nature of the State’s determination of the refugee status of an individual, it should be noted that this process is considered to be as a mere declarative action, and never constitutive. As it has been stated by the UNHCR:

“A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He

¹ MANLY, Mark. *La consagración del asilo como un derecho humano: Análisis comparativo de la Declaración Universal, la Declaración Americana y la Convención Americana sobre Derechos Humanos*. En *El Asilo y la Protección Internacional de los Refugiados en América Latina.: Análisis crítico del dualismo “asilo-refugio” a la luz del derecho internacional de los derechos humanos*”, ACNUR. 1ª. Edición. San José, Costa Rica. Editorama, 2004, p. 130.

does not become a refugee because of recognition, but is recognized because he is a refugee”.²

6. Even with the important role played by the UNHCR in the context of international protection, and taking into account the declaratory nature of the determination of refugee status, it should also be established that the duty to determine the refugee status of a person lays upon States Parties to the 1951 Convention, which should follow fair and efficient procedures for that effect.

7. In some cases, as an exception, the UNHCR is call upon to determine the refugee status of a person, but this is a practice that is only present in those States that have not signed any international refugee law instrument, and where the national authorities have expressly asked the UNHCR to play this role.³

8. As it is expressed by the UNHCR in its *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* “[o]nce a person’s status as a refugee has been determined, it is maintained unless he comes within the terms of one of the cessation clauses”.⁴ These clauses are contained in paragraphs 1) to 5) of Section C of Article 1 of the 1951 Convention.

9. That section of the Convention establishes the following:

“Article 1 C of the 1951 Convention provides that:

This Convention shall cease to apply to any person falling under the terms of section A, if:

- (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
- (2) Having lost his nationality, he has voluntarily re-acquired it; or
- (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
- (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
- (5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under Section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

² See UN High Commissioner for Refugees, *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/IP/4/ENG/REV. 3, available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html> [accessed 14 March 2013], para. 28.

³ **In the case of Latin America**, for example, the UNHCR has substituted the role played generally by the State in the determination of refugee status just in the case of Cuba, as this country is the only one in the region that is not Party, neither to the 1951 Convention nor to its 1967 Protocol.

⁴ See UN High Commissioner for Refugees, *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*, Op.cit, para. 112.

(...)

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence”.

10. In the analysis on whether, for example, the person has voluntarily re-availed himself of the protection of the country of his nationality (first clause of paragraph 1), three requisites are needed to apply the clause⁵: (a) voluntariness: the refugee must act voluntarily; (b) intention: the refugee must intend by his action to re-avail himself of the protection of the country of his nationality; (c) re-availment: the refugee must actually obtain such protection.

11. The UNHCR has been clear in the fact that a person “will not cease to be a refugee merely by applying for repatriation”.⁶ This cessation clause does not take place when the refugee at the end decides not to return to his/her country; this means that even if the refugee requested his/her voluntary repatriation but opts to go to a third country, and not to return to his/her country of origin. Indeed, a “refugee requesting protection from the authorities of the country of his nationality has only “re-availed” himself of that protection when his request has actually been granted”.⁷

12. Moreover, “[i]f the refugee does not act voluntarily, he will not cease to be a refugee. If he is instructed by an authority, e.g. of his country of residence, to perform against his will an act that could be interpreted as a re-availment of the protection of the country of his nationality, such as applying to his Consulate for a national passport, he will not cease to be a refugee merely because he obeys such an instruction”.⁸

13. In the analysis related to the possible disappearance of the circumstances that justified the refugee status (fifth clause of paragraph 1) ““circumstances” refer to fundamental changes in the country, which can be assumed to remove the basis of the fear of persecution”.⁹

14. States must ensure therefore that:

“(…)[s]uch protection must therefore be effective and available. It requires more than mere physical security or safety. It needs to include the existence of a functioning government and basic administrative structures, as evidenced for instance through a functioning system of law and justice, as well as the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood.”.¹⁰

⁵ *Idem*, para. 119.

⁶ *Idem*, para. 122.

⁷ *Idem*.

⁸ *Idem*, para. 120.

⁹ *Idem*, para. 135.

¹⁰ UN High Commissioner for Refugees, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)*, 10 February 2003, HCR/GIP/03/03, available at: <http://www.unhcr.org/refworld/docid/3e50de6b4.html> [accessed 28 March 2013], para. 15.

15. As a general rule, the cessation of the refugee status of a person due to a change in the circumstances in the country where the persecution was originated needs to be preceded by the adoption of a formal declaration of the general cessation of the status for a particular group of refugees, declaration that can be adopted by the UNHCR or by the State itself¹¹. **This declaration does not preclude individuals leaving this country from applying for refugee status again.**¹²

16. The cessation of the refugee status due to a change in the circumstances in the country where the persecution was originated could be also applicable in an individual basis, after there has been a proper analysis of the specific situation of the person justifying the cessation.

17. At the Inter-American level, the 1969 American Convention on Human Rights (hereinafter “the American Convention”) includes a provision in its Article 22.7 on the institution of asylum as an individual human right, similar to the one of the American Declaration adopted years before. This provision establishes that:

“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”.

18. The Cartagena Declaration on Refugees of 1984, adopted by a group of government representatives, academics and lawyers from the six Central American States (Guatemala, Belize, Honduras, El Salvador, Nicaragua y Costa Rica), and from those States of Contadora group (México, Panamá, Colombia y Venezuela) reinforced “the peaceful, non-political and exclusively humanitarian nature of grant of asylum or recognition of the status of refugee”. Even with the non-binding character of the Declaration, the extended definition of refugees contained therein¹³ has been adopted in 14 different national laws along the Latin American region.¹⁴

19. In summary, the main features of the *Latin American asylum tradition* as it stands today:
- a. Multiple treaties applicable in the region, including the global 1951 Refugee Convention, are regulating and giving content to the institution of asylum, albeit with divergent state practice;
 - b. Up until the *1954 Convention on Territorial Asylum* and the *1954 Convention on Diplomatic Asylum*, the term “asylum” was solely used to refer to the specific form of “political” or “diplomatic” asylum (in diplomatic and other premises abroad)

¹¹ *Ídem*, See para. 3.

¹² *Ídem*. See para 25.ix

¹³ The definition or concept of a refugee recommended by the Declaration “is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”. See Americas - Miscellaneous, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, available at: <http://www.unhcr.org/refworld/docid/3ae6b36ec.html> [accessed 13 March 2013].

¹⁴ This is the case of Argentina, Belice, Bolivia, Brasil, Chile, Colombia, El Salvador, Guatemala, Honduras, México, Nicaragua, Paraguay, Peru and Uruguay.

meanwhile the term “refugio político” referred to the protection granted in the territory of the State; this partially explains the “asilo-refugio” dichotomy and its implications for refugee protection;

- c. Since 1948, there has been recognition that there is an individual right to seek and receive asylum in line with international law, drawing upon international human rights law as well as the global refugee instruments; and that although the granting of asylum is largely a state prerogative, these instruments indicate that asylum must be granted to those who qualify for it.

2. The principle of *non-refoulement*

20. At the heart of the 1951 Convention is the institution of international protection for people who are at risk of being persecuted. Central principles of the 1951 Convention include those of non-discrimination, *non-refoulement*, non-penalization for illegal entry or stay, and the enjoyment of basic human rights. Admission to safe territory is the start of the process that concludes with the attainment of a durable solution.¹⁵

21. The principle of *non-refoulement* is a fundamental right and the cornerstone of international refugee protection. This principle is codified, *inter alia*, in Article 33.1 of the 1951 Convention, providing that:

“(n)o 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.”¹⁶

22. The Executive Committee of the UNHCR has reaffirmed “the fundamental importance of the observance of the principle of *non-refoulement* -both at the border and within the territory of a State - of persons who may be subjected to persecution if returned to their country of origin irrespective of whether or not they have been formally recognized as refugees.”¹⁷

3. Interrelation between the right to asylum, the international protection of refugees and the principle of *non refoulement*

23. The interrelation between the scope and content of the right to asylum contained in the Inter-American human rights instruments and the international protection of refugees rests in the text of Article XXVII of the American Declaration and Article 22.7 of the American Convention. Further, this right is to be implemented in accordance with the national legislation and international conventions.

¹⁵ UN High Commissioner for Refugees, *Note on international protection : report of the High Commissioner : addendum*, 28 June 2011, A/AC.96/1098/Add.1, available at: <http://www.unhcr.org/refworld/docid/4ed86eb52.html> [accessed 14 March 2013], paras. 2 and 3.

¹⁶ The 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 137, entered into force 22 April 1954 [hereinafter “1951 Convention”]. Art.33.1

¹⁷ See UNHCR Executive Committee. *Non-refoulement*. No. 6 (XXVIII) (1977). UNHCR Executive Committee Conclusions are available at <http://www.unhcr.org/cgi-bin/texis/vtx/doclist?page=excom&id=3bb1cd174>.

24. The connection has been affirmed by the State Parties to the 1951 Convention¹⁸ and by the Executive Committee of the High Commissioner's Programme ("EXCOM") which has stated that "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, is among the most basic mechanisms for the international protection of refugees".¹⁹

25. The right to seek and be granted asylum recognised in the American Convention is closely linked to the recognition of refugee status under the 1951 Convention and its Protocol.²⁰ The Commission has had the opportunity to refer to this issue establishing that the pertinent international conventions referred to in the corresponding Article XXVII of the American Declaration are the 1951 Convention and its 1967 Protocol.²¹ The Commission based its opinion on the fact that these are the two most relevant treaties in the field of refugee protection, and they contain what could be considered the most basic set of rights in favour of refugees under international law.

26. In this same line of thought, Article 29.b of the American Convention proclaims that "(n)o provision of this Convention shall be interpreted as 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". In the case of those American States that are parties to both the American Convention and the 1951 Convention and/or its 1967 Protocol, the international protection guaranteed to refugees in the latter should clearly inform the interpretation of the scope and content of Article 22.7 of the former.

27. Regarding the phrase "*in accordance with the legislation of the state*", included in Article 22.7 of the American Convention, the guidance given by Article 29.a of the same Convention is that the provisions of the Convention should not be interpreted as permitting the suppression of the enjoyment or exercise of the rights and freedoms recognised in it or to restrict them to a greater extent than is provided for therein. Furthermore, under Article 2 of the American Convention, states do have a positive obligation to adopt legislative or other measures as may be necessary to give effect to the rights enshrined in the Convention. This is the case to ensure the effective exercise of the right to asylum.

28. The jurisprudence of this Court has been clear in stating that "the purpose of the American Convention is to recognise individual rights and freedoms and not simply to empower the States to do so."²² Furthermore, this Court considered "(t)he fact that the States Parties may fix the manner in which the right of reply or correction is to be exercised does

¹⁸ See UN High Commissioner for Refugees, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, Operative paragraph.6, available at: <http://www.unhcr.org/refworld/docid/3d60f5557.html> [accessed 13 March 2013].

¹⁹ See UNHCR Executive Committee. *Conclusion on safeguarding asylum*. N° 82 (XLVIII) (1997); and also *Asylum*. No. 5 (XXVIII) (1977).

²⁰ Twenty-eight OAS Member States are party to the 1951 Convention while two other States are parties only to the Protocol.

²¹ CIDH, *Caso de Interdicción de Haitianos*, (Estados Unidos) Informe N° 51/96 (fondo), Caso No. 10.675 (13 de marzo de 1997), párr. 155; CIDH. *Joseph vs. Canada*. Caso 11.092. Informe de Admisibilidad 27/93, para 31; CIDH. *Casos de Michael Edwards, Omar Hall, Brian Schroeter y Jeronimo Bowleg*, (Las Bahamas) Informe No. 48-01 (fondo), Casos Número 12.067, 12.068, 12.086 (4 de abril de 2001).

²² I/A Court H.R., *Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights)*. Advisory Opinion OC-7/86 of August 29, 1986. Series A No. 7, para. 24.

not impair the enforceability, on the international plane, of the obligations they have assumed under Article 1.1.”²³ By analogy this means that states might regulate all matters related to asylum and refugee protection under their national legislation, but this does not change the obligations assumed under international instruments.

29. Following this rationale, the right to seek and be granted asylum established in Article 22.7 of the American Convention could perfectly have provisions under municipal law extending the scope of protection, but never limiting it.

30. The principle of *non-refoulement*, as the cornerstone of the international protection of refugees and which is a norm of customary international law²⁴, and by which a State should not expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened, including non rejection at the border and indirect *refoulement*, has its regional corollary in the American Convention. While the regional provision enshrined in Article 22.8 is inspired by Article 33.1 of the 1951 Convention, its wording is broader and is considered as an individual human right since “in no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.” The protection against *non-refoulement* is extended to any alien, not only refugees, whose life or personal freedom might be at risk of violation for one of the protected grounds.

4. Due process guarantees in refugee status determination procedures

31. The Court has remarked that in light of Articles 8 and 25 of the American Convention, effective procedures with basic guarantees are the most adequate means to ensure that the rights contained therein could be effectively respected in every circumstance.²⁵ The Court has established that these basic procedural guarantees should be followed not only in judicial but also in administrative procedures affecting an individual’s rights²⁶, and independently of the migratory status of the person.²⁷

32. In the case of *Baena-Ricardo and others v. Panama* in which labour rights were at issue, the Court held that although Article 8 of the American Convention is entitled “judicial

²³ Ídem, para. 28.

²⁴ The *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, in its paragraph 4 indicates: “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”.

²⁵ Corte IDH. *Condición Jurídica y Derechos Humanos del Niño*. Opinión Consultiva OC-17/02 del 28 de agosto de 2002. Serie A No. 17. párr. 92. *El Hábeas Corpus bajo Suspensión de Garantías* (arts. 27.2, 25.1 y 7.6 Convención Americana sobre Derechos Humanos). Opinión Consultiva OC-8/87 del 30 de enero de 1987. Serie A No. 8, párr. 25.

²⁶ I/A Court H.R., Case of *Baena-Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C. No.72, para. 127.

²⁷ Corte IDH. *El Derecho a la Información sobre la Asistencia Consular en el Marco de las Garantías del Debido Proceso Legal*. Opinión Consultiva OC-16/99 del 1 de octubre de 1999. Serie A No. 16, párrs. 117 y 119;

y Corte IDH. *Caso Vélez Loor Vs. Panamá*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 23 de noviembre de 2010 Serie C No. 218, párr. 143.

guarantees”, its application is not limited to judicial remedies (*recursos judiciales*) in the strict sense, but, rather, establishes a series of requirements that must be observed in procedural instances (*instancias procesales*) in order for all persons to be able to adequately defend their rights before any type of state action that could affect them.²⁸

33. Article 8.1 of the American Convention refers to determination of rights by a ‘competent, independent and impartial tribunal’ but the Court clearly established in the *Baena-Ricardo case* that the obligations also apply to administrative authorities without requiring the existence of a tribunal *strictu sensu*.²⁹ At the same time, it is clear that the rights contained in Article 8 are not applicable merely to judicial review of administrative decisions, but to all administrative procedures, which involve the “determination of rights and obligations of a civil, fiscal or any other nature’, according to the Court.”

34. Article 25 of the American Convention is closely related to Article 8 and establishes the right to an effective, simple and prompt remedy to protect the fundamental rights of persons recognised by the Convention and by the Constitutions or laws of a state. This provision “establishes in broad terms the obligation of the States to provide to all persons within their jurisdiction an effective judicial remedy to violations of their fundamental rights”.³⁰ It is clear both from the ordinary meaning of the wording of Article 25 and the interpretation of the Court that it applies to non-nationals under the jurisdiction of the state.

35. Regarding due process guarantees in refugee status determination procedures, even though the 1951 Convention makes no explicit mention to a specific procedure to be followed for refugee status determination, the Executive Committee of UNHCR (or ExCom) has expressed “the importance of establishing and ensuring access consistent with the 1951 Convention and the 1967 Protocol for all asylum-seekers to fair and efficient procedures for the determination of refugee status in order to ensure that refugees and other persons eligible for protection under international or national law are identified and granted protection.”³¹ This same criterion is the one followed by the State Parties to the 1951 Convention in their Declaration of December 2001.³²

36. In the case of the Americas, to the extent that the rights established in Articles 8 and 25 exist to guarantee other rights contained in the American Convention, including the right to seek and be granted asylum, as well as the right to *non-refoulement*, it is UNHCR’s view that these guarantees are applicable in the context of refugee status determination proceedings, which are administrative in nature.

37. In the view of UNHCR, the rights contained in Articles 8 and 25, when read together with Articles 22.7 and 22.8 of the American Convention give rise to a series of obligations in

²⁸ I/A Court H.R., Case of Baena-Ricardo et al. v. Panama. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C. No.72, paras. 124-127.

²⁹ *Ibid.*, paragraph 130.

³⁰ Corte IDH. Garantías Judiciales en Estados de Emergencia (arts. 27.2, 25 y 8 Convención Americana sobre Derechos Humanos). Opinión Consultiva OC-9/87 del 6 de octubre de 1987. Serie A No. 9, para. 23.

³¹ See UNHCR Executive Committee. *Conclusions adopted by the Executive Committee on International Protection of Refugee*. No. 71 (XLIV) (1993), para i.

³² UN High Commissioner for Refugees, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, available at: <http://www.unhcr.org/refworld/docid/3d60f5557.html> [accessed 14 March 2013], Operative paragraph.6.

the context of refugee status determination proceedings. First, an asylum-seeker has the right to be heard, with due process guarantees and within a reasonable time, by a competent, independent and impartial tribunal or authority, previously established by law. As mentioned above, the term “tribunal” should be understood to apply to administrative as well as judicial authorities. Under Article 25, the asylum-seeker has a right to an effective judicial remedy for protection against acts, which violate his or her fundamental rights. The right to be heard requires that the asylum-seeker be allowed the opportunity to lodge an asylum claim before the competent authority. This presupposes that s/he is first granted access to safety and provided protection from *refoulement*, including non-rejection at the border and protection against indirect *refoulement*.

38. Accordingly, the first instance authorities in the procedures could have an administrative or judicial character. However, following the wording of Article 25 of the American Convention, the individual should have the right to appeal before a tribunal or court.

39. Protection from persecution implies that asylum-seekers and refugees should be granted access to refugee status determination procedures for the proper assessment of their claims, in accordance with certain standards and safeguards. Building upon the basic procedural guarantees to be respected in refugee status determination procedures, the Executive Committee and UNHCR have recommended the following:

1. The competent official, to whom the applicant addresses himself at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might fall within the purview of the relevant international instruments. He or she is required to act in accordance with the principle of *non-refoulement* and to refer such cases to a higher authority.³³
2. The applicant should receive the necessary guidance as to the procedure to be followed³⁴, in a language and manner they understand (for example, in an oral manner in the case of illiterate persons).
3. Given the particular vulnerabilities of asylum-seekers, the application should be examined within the framework of specially established procedures, by a clearly identified authority³⁵, and by qualified personnel having the necessary knowledge and experience, and an understanding of an applicant’s particular difficulties and needs.³⁶
4. The asylum procedure needs at all stages to respect data protection and confidentiality principles. No information on the asylum application to be shared with the country of origin.³⁷

³³ See UNHCR Executive Committee. *Determination of refugee status*, No. 8 (XXVIII) (1977), para e.i

³⁴ *Idem*, para e.ii

³⁵ See UNHCR Executive Committee. *Determination of refugee status*, No. 8 (XXVIII) (1977), para. e.iii.

³⁶ See UN High Commissioner for Refugees, *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*, Op.cit, para. 190.

³⁷ See UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html> [accessed 14 March 2013], para. 50.M.

5. The applicant should be given the necessary facilities, including the services of a competent interpreter, as well as access to legal advice and representation,³⁸ for submitting his or her claim to the authorities concerned. Where free legal aid is available, asylum-seekers should have access to it in case of need.³⁹ Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.⁴⁰
6. The applicant to be given access to the report of the personal interview and his/her approval is sought on the contents of the report of the personal interview in order to avoid misunderstandings and to clarify contradictions⁴¹. Subsequent interviews may be necessary to clarify any apparent inconsistencies and to resolve any contradictions in a further interview, and to find an explanation for any misrepresentation or concealment of material facts.⁴²
7. While the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner⁴³. The applicant needs to present his or her claim as fully as possible and with evidence supporting his or her claim and as available.⁴⁴ Because of the particular situation of asylum-seekers and the nature of their flight, further inquiries and information is likely to be needed by the examiner.⁴⁵
8. The reasons for not granting refugee status, in fact and in law, should be stated in the decision. Such information needs to be shared with the applicant in writing as soon as necessary for allowing an appeal to be prepared and lodged in due time.⁴⁶
9. If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial.⁴⁷

To conclude, the two main propositions presented to this Court are:

³⁸ UN High Commissioner for Refugees, *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*, 2 September 2005, available at: <http://www.unhcr.org/refworld/docid/432ae9204.html> [accessed 14 March 2013], p. 3.

³⁹ UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*. Op.cit. para. 50 (g).

⁴⁰ See UNHCR Executive Committee. *Determination of refugee status*, No. 8 (XXVIII) (1977), para e.iv.

⁴¹ See UN High Commissioner for Refugees, *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*. Op.cit, p. 4.

⁴² *Idem*, para 199.

⁴³ *Idem*, para 196.

⁴⁴ See UN High Commissioner for Refugees. *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 Reissued Geneva*. Op.cit, para. 205. b. i.

⁴⁵ UNHCR, *Handbook*, paras. 196-7.

⁴⁶ See UN High Commissioner for Refugees, *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*, 2005. Op.cit, pp. 5-6.

⁴⁷ See UNHCR Executive Committee. *Determination of refugee status*, No. 8 (XXVIII) (1977), para e.vi.

1. That the institution of asylum and the principle of *non-refoulement* are at the heart of international protection framework of refugees and part of the legal obligations of the American States.

2. That the basic guarantees of due process and judicial protection as mentioned in Article 8 and 25 of the American Convention on Human Rights are to be respected in refugee status determination procedures.

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