

***UNHCR’s intervention before the Constitutional Court of Ecuador
in the framework of Public Unconstitutionality Action No. 0014-19
(Ministerial Agreements and requirements for access to the territory of Venezuelans in Ecuador)***

1. Introduction

- 1.1 The Office of the United Nations High Commissioner for Refugees (“UNHCR”) welcomes the invitation from the Constitutional Court of Ecuador (“the Court”), through the Court’s resolution dated 23 May 2018, to provide a technical opinion in the framework of Public Unconstitutionality Action No. 0014-19 (Ministerial Agreements and requirements for access to the territory of Venezuelans in Ecuador).¹
- 1.2 The question to be determined by this Court is the constitutionality of the two Inter-ministerial Agreements between the Ministries of Foreign Affairs and Interior of Ecuador No. 0001-2019 and No. 0002-2019 (“Ministerial Agreements”) requiring certified (“apostilled”) records confirming that the holders do not have a criminal conviction as a precondition for Venezuelan citizens to access Ecuadorian territory. As the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with governments, to seek permanent solutions for the problem of refugees,² UNHCR has a direct interest in this matter as the Ministerial Agreements have an impact on refugees, asylum-seekers and others of concern to the Office. UNHCR is mandated to supervise the application of international refugee law conventions,³ including the 1951 Convention Relating to the Status of Refugees (“1951 Convention”)⁴ and its 1967 Protocol,⁵ and as such has a responsibility and unique expertise to present its views to the Court.
- 1.3 It is against this background that UNHCR has a particular interest in the case before the Constitutional Court, since it raises issues of law and of State practice that relate to the implementation of international refugee law instruments. The treatment that is accorded to asylum seekers and refugees under the 1951 Convention cannot be considered in isolation from relevant regional instruments, such as the American Convention on Human Rights (“American Convention”)⁶ and the Cartagena Declaration on Refugees (“Cartagena Declaration”).⁷

¹ This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

² UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), para. 1: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

³ UNHCR fulfils its mandate, inter alia, by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.” *Ibid.*, para. 8(a).

⁴ Adopted 25 July 1951, entered into force 22 April 1954.

⁵ Adopted 31 January 1967, entered into force 4 October 1967.

⁶ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969: <https://www.refworld.org/docid/3ae6b36510.html>.

⁷ *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984: <https://www.refworld.org/docid/3ae6b36ec.html>.

- 1.4 UNHCR recognizes the Government of Ecuador's efforts to ensure efficient border management, aimed at reconciling the legitimate security concerns of the State with its obligations to protect refugees in accordance with national and international standards on human rights and refugee protection. In this regard, UNHCR wishes to highlight the relevant aspects of international refugee law that may arise as a result of the imposition of additional requirements to access the territory for Venezuelan nationals, resulting in potential non-admission of persons in need of international protection.
- 1.5 Ecuador is bound by certain international treaty obligations as they relate to refugees, in particular those enshrined in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, to which Ecuador is formally a party. Essential to this body of international refugee law are core procedural and substantive rights that States must uphold, and which Ecuador has incorporated in its domestic legislation.
- 1.6 UNHCR is concerned that the Ministerial Agreements establishing the requirement of certified (“apostilled”) criminal records for Venezuelan citizens to access Ecuadorian territory may result in the push back from Ecuador’s borders and/or refusal of entry to persons in need of international protection under international refugee law. In particular, UNHCR is concerned about the impact that this measure might have on the right to seek asylum and the protection against *refoulement*, including the rejection at borders. This is because people arriving at Ecuador’s borders who are in need of international protection in the vast majority of cases may not, in practice, be able to obtain such documents prior to entry, because of administrative obstacles; or because requesting such documents from the state authorities of their country of origin may place them at risk of persecution or serious harm. Consequently, the requirement for such records may lead to refusal of entry of persons in need of protection who do not expressly request asylum, and therefore may be at variance with the right to seek asylum and the principle of *non-refoulement*.
- 1.7 With a view to assisting the Court in its consideration of the interpretation and application of the Ministerial Agreements UNHCR wishes to outline below the domestic legislative framework and practice applicable to the treatment of asylum-seekers and refugees in Ecuador, provide UNHCR’s interpretation of the relevant principles of international refugee law and human rights law, and draw the Court’s attention to its Guidance Note on International Protection Considerations for Venezuelans.

2. Ecuador is bound by international and regional instruments that recognize the right to asylum and the international protection of refugees

- 2.1 Ecuador is a State party to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. The 1951 Convention was drafted with the intent of providing those fleeing persecution with “the widest possible exercise of . . . fundamental rights and freedoms”.⁸ The treaty, which for more than six decades has served as the “cornerstone of the international system for the protection of refugees,” clarifies the obligations of States to refugees, as well as to persons seeking international protection whose refugee

⁸ 1951 Convention relating to the Status of Refugees, Preamble.

status has not yet been formally determined.⁹ The 1951 Convention specifically prohibits States from expelling refugees, penalizing them for unlawful entry, or returning them to territory where their lives or freedom would be threatened on account of “race, religion, nationality, membership of a particular social group or political opinion,” unless they fall within its specific and limited exclusion clauses.¹⁰

2.2 In addition to its obligations under the 1951 Convention, Ecuador is a State party to human rights instruments, such as the Inter-American Convention on Human Rights that recognizes the right to “seek and be granted asylum” and to protection against *refoulement*. In this regard, the Inter-American Court on Human Rights has recognized the crucial link that exists between the right to asylum in the Inter-American System of Human Rights and the international refugee protection regime. The Court has affirmed that:

“with the protection provided by the 1951 Convention and its 1967 Protocol, the institution of asylum assumed a specific form and mechanism at the global level: that of refugee status. Thus, the institution of asylum, which derives directly from the right to seek and enjoy asylum set out in Article 14 (1) of the 1948 Universal Declaration of Human Rights, is among the most basic mechanisms for the international protection of refugees”.¹¹

2.3 Moreover, in Ecuador, the right to asylum and the protection against *refoulement* are enshrined in the country’s domestic legislation. The Constitution of Ecuador (2008) states in Article 41 that:

“the rights to asylum and refuge are recognized, in accordance with the law and international human rights instruments. Persons who have been granted asylum or refuge shall benefit from special protection guaranteeing the full exercise of their rights. The State shall respect and guarantee the principle of *non-refoulement*, in addition to humanitarian and legal emergency assistance”.¹²

2.4 Constitutional provisions on the right to asylum and the international protection of refugees are complemented by domestic legislation adopted by the National Assembly on the regulation of human mobility. In 2017, Ecuador enacted The Organic Law on Human Mobility which incorporates the refugee definitions of the 1951 Convention and the Cartagena Declaration and key principles of international refugee law, along with specific migration categories and residence criteria for asylum-seekers and refugees, and due process guarantees in refugee status determination.

3. The Right to Asylum

3.1 The right to seek and enjoy asylum derives from Article 14(1) of the Universal Declaration of Human Rights that states, “[e]veryone has the right to seek and to enjoy in other countries asylum from

⁹ G.A. Res. 49/169, December 23, 1994.

¹⁰ 1951 Convention, art. 31–33.

¹¹ Caso Familia Pacheco Tineo vs Estado Plurinacional de Bolivia, Inter-American Court of Human Rights (IACrTHR), 25 November 2013: <https://www.refworld.org/cases,IACRTHR,52c53b154.html>.

¹² Constitution of the Republic of Ecuador, art. 41, October 20, 2008.

persecution”,¹³ and is supported in particular by the legal framework of the 1951 Convention and its 1967 Protocol.

- 3.2 The right has also been recognized in Article 22 (7) of the American Convention on Human Rights which states “[e]very 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”. This is further cemented in Article XXVII of the American Declaration of the Rights and Duties of Man (“American Declaration”) which states “[e]very 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”.
- 3.3 The Inter-American Court on Human Rights has recognized that both Article 22(7) of the American Convention and Article XXVII of the American Declaration have enshrined the subjective right of all persons to seek and receive asylum.¹⁴ 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.
- 3.4 The duty to determine the refugee status of a person lies with States Parties to the 1951 Convention, which should follow fair and efficient procedures for that effect, including measures to allow access to the territory of persons in need of protection and/or to identify persons in need of international protection at borders and to refer them to national asylum systems.

4. The obligation of *non-refoulement* and access to asylum procedures under international refugee and human rights law

- 4.1 Among the elements which are important to the realization of the right to seek asylum is the obligation of States not to expel or return (*refouler*) a person to territories where his or her life or freedom would be threatened. *Non-refoulement* is a cardinal international protection principle, most prominently expressed in Article 33 of the 1951 Convention and recognized as a norm of customary international law. The non-refoulement obligation is also restated in international and Inter-American human rights law.¹⁵

¹³ Art. 14. 1: Everyone has the right to seek and to enjoy in other countries asylum from persecution. 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. Universal Declaration of Human Rights, 1948 (UDHR) 10 December 1948, 217 A (III), <http://www.refworld.org/docid/3ae6b3712c.html>.

¹⁴ 2 I/A Court H.R., Rights and guarantees of children in the context of migration and/or in need of international protection. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, par.73.

¹⁵ More specifically, States are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life, or torture or other cruel, inhuman or degrading treatment or punishment. See also the jurisprudence of the Inter-American Court on Human Rights, which has held that non-refoulement is not only the cornerstone of protection but also a non derogable norm of international customary law. See Inter-American Commission on Human Rights (IACHR), Human Rights of Migrants, Refugees, Stateless Persons, Victims of Human Trafficking and Internally Displaced Persons: Norms and Standards of the Inter-American Human Rights System, 31 December 2015, OEA/Ser.L/V/II.;Doc. 46/15, p. 207: <https://www.refworld.org/docid/5821c778b.html>.

- 4.2 Importantly, given that a person is a refugee within the meaning of the 1951 Convention, as soon as s/he fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature.¹⁶ It follows that the prohibition of *refoulement* applies to all refugees, including those who have not formally been recognized as such, and to asylum-seekers whose status has not yet been determined.¹⁷
- 4.3 The prohibition of *non-refoulement* applies wherever a State exercises jurisdiction.¹⁸ Consequently, States have a duty to establish, prior to implementing any removal measure -including at the border- that persons under their jurisdiction are not at risk of harms covered by the prohibition on *refoulement*.¹⁹ If such a risk exists, the State is precluded from forcibly removing the persons concerned, and shall not deny their entry or admission, but shall ensure protection from *refoulement*.²⁰
- 4.4 The Executive Committee of the High Commissioner's Programme (ExCom) has confirmed that the obligation includes a duty not to reject an asylum-seeker at the frontier.²¹ Moreover, there is no single correct formula or phrase for how the fear of persecution needs to be expressed.²² States have a duty to

¹⁶ "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 does not become a refugee because of recognition but is recognized because he is a refugee." UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/IP/4/ENG/REV. 4, para. 28: <https://www.refworld.org/docid/5cb474b27.html>.

¹⁷ Executive Committee of the High Commissioner's Programme (ExCom), Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 79 (XLVII), 1996, para. (j); ExCom Conclusion No. 81 (XLVII), 1997, para. (i), <http://www.unhcr.org/pages/49e6e6dd6.html>. See also, Note on International Protection, A/AC.96/815, ExCom Reports, 31 August 1993, para. 11, <http://www.unhcr.org/refworld/docid/3ae68d5d10.html>; UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, January 2007, paras. 26-31, <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

¹⁸ See, e.g., UN Human Rights Committee General Comment No. 31, Nature of the General Legal Obligations imposed on States parties to 42 the Covenant, CCPR/C/21/Rev.1/Add.13, para. 10, <http://www.refworld.org/docid/478b26ae2.html>; Inter-American Court of Human Rights, Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, 19 August 2014, para. 61, <http://www.refworld.org/docid/54129c854.html>; UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, paras. 24, 26, 32-43, <http://www.unhcr.org/refworld/docid/45f17a1a4.html>; UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the case of Hirsi and Others v. Italy, March 2010, paras. 4(1)(1)-4(2)(3), <http://www.unhcr.org/refworld/docid/4b97778d2.html>. UNHCR, Submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by MERCOSUR, 17 February 2012, para. 2(4), <http://www.refworld.org/docid/4f4c959f2.html>.

¹⁹ ExCom Conclusion No. 6 (XXVIII), 1977, para. (c), reaffirming the fundamental importance of the observance of the principle of non-refoulement at the border.

²⁰ ExCom Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 22 (XXXII), 1981, para. II.A.2; ExCom Conclusion No. 81 44 (XLVIII), 1997, para. (h); ExCom Conclusion No. 82 (XLVIII), 1997, para. (d)(ii); ExCom Conclusion No. 85 (XLIX), 1998, para. (q); EXCOM No. 99 (LV), 2004, para. (l). See also, Summary Conclusions: The Principle of Non-Refoulement, Global Consultations on International Protection, June 2003, para. 4, <http://www.refworld.org/docid/470a33b00.html>.

²¹ *Ibid.*, ExCom Conclusions cited above.

inquire into the reasons an individual seeks to enter the territory and to keep the situation in the possible State of return under deliberative review, in order to conform to that obligation.²³

- 4.5 Furthermore, the prohibition on refoulement applies not only with respect to return to the country of origin but also with regard to forcible removal to any other – third – country where a person has reason to fear persecution, serious human rights violations or other serious harm, or from where he or she risks being sent to his or her country of origin (indirect or chain refoulement).²⁴ Under the obligation of non-refoulement, States have a duty to establish, prior to implementing any removal measure, that the person whom they intend to remove from their territory or jurisdiction is not at risk of harms covered by the prohibition on refoulement.
- 4.6 While the 1951 Convention does not indicate what type of procedures are to be adopted to ensure a proper inquiry is made, it is accepted that, as a general rule in order to give effect to their obligations under the 1951 Convention, including the prohibition on refoulement, refugees have to be identified.²⁵ Furthermore, asylum procedures should satisfy a number of basic requirements, aimed at allowing an individual assessment of an asylum application by a competent authority.²⁶ The State is required to consider, in good faith and with due diligence, the individual circumstances of the person concerned. The Handbook recognizes that a person fleeing from persecution may arrive ‘very frequently without personal documents’, and urges authorities to accord him or her the benefit of the doubt when examining documentary and other evidence.²⁷ In the same vein, a state cannot demand the production of a particular document by a refugee as a precondition for considering his or her application.

5. UNHCR’s Guidance Note on International Protection Considerations for Venezuelans

²² UNHCR, UNHCR’s oral intervention at the European Court of Human Rights (ECtHR) - Hearing of the case *Hirsi and Others v. Italy*, 22 June 46 2011, Application No. 27765/09, <http://www.refworld.org/docid/4e0356d42.html>. Furthermore, See ECtHR, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, 23 February 2012, para. 133, <http://www.refworld.org/docid/4f4507942.html>.

²³ ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011, para. 359, <http://www.refworld.org/docid/4d39bc7f2.html>. See also, Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents) and United Nations High Commissioner for Refugees (Intervener), Hong Kong: Court of Final Appeal, 25 March 2013, paras. 56 and 64, <http://www.refworld.org/docid/515010a52.html>; UNHCR, Intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents), 31 January 2013, Civil Appeals Nos. 18, 19 & 20 of 2011, paras. 74 and 75, <http://www.refworld.org/docid/510a74ce2.html>.

²⁴The prohibition of indirect or ‘chain refoulement’ has been recognized by the European Court of Human Rights in its decision *T.I. v. The United Kingdom*, Appl. No. 48 43844/98, 7 March 2000, page 15, <http://www.refworld.org/docid/3ae6b6dfc.html> and reiterated in *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, 22 September 2009, paras. 88-89, <http://www.refworld.org/docid/4ab8a1a42.html> and in *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011, paras. 286, 298 and 321, <http://www.refworld.org/docid/4d39bc7f2.html>.

²⁵ UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (‘UNHCR Handbook’), para. 189, http://www.unhcr.org/49_3d58e13b4.html.

²⁶ ExCom Conclusion No. 8 (XXVIII) 1977, para. (e); ExCom Conclusion No. 30 (XXXIV) 1983, para. (e) (i).

²⁷ UNHCR Handbook, para 196.

5.1 In May 2019, UNHCR published a Guidance Note on International Protection Considerations for Venezuelans – Update I,²⁸ which sets out the following conclusions on the international protection needs of persons leaving Venezuela (para. 2-5, footnotes omitted), as well as UNHCR’s position on forced returns to Venezuela (para. 10):

2. Since the issuance of the Guidance Note on the Outflow of Venezuelans, the security and humanitarian situation has worsened in Venezuela, causing outflows to neighboring countries, other countries in the region, and countries further afield to reach 3.7 million people. Given the deteriorating circumstances in Venezuela, UNHCR reiterates its call to States receiving Venezuelans to allow access to their territory and highlights the critical importance of ensuring access to asylum procedures or to group-based protection arrangements with adequate safeguards.

3. Based on reports received by UNHCR and its partners, as well as reliable information in the public domain from a wide range of sources about the situation in Venezuela, UNHCR considers that for a number of profiles, international protection considerations are likely to arise under the 1951 Convention/1967 Protocol relating to the Status of Refugees depending on the circumstances of the individual case. Such risk profiles can be made available by UNHCR to eligibility commissions of interested host countries.

4. The magnitude of the current outflows poses complex challenges and may lead to asylum systems being overwhelmed. Where this is the case, a State may recognize refugee status through group-based determinations. UNHCR is ready to provide to interested States the required technical assistance and operational support to enhance government capacities to respond appropriately to a mass influx of refugees and to determine their legal status effectively. UNHCR encourages States to rely on regional instruments as a basis for the elaboration of group-based responses.

5. For States that have incorporated the refugee definition contained in the Cartagena Declaration into national law, or for States that apply this definition in practice, following the guidelines of the InterAmerican Court of Human Rights, UNHCR considers that the majority of Venezuelan nationals, or stateless persons who were habitually resident in Venezuela, are in need of international protection under the criteria contained in the Cartagena Declaration on the basis of threats to their lives, security or freedom resulting from the events that are currently seriously disturbing public order in Venezuela.

10. In view of the current situation in Venezuela, UNHCR calls on States to ensure Venezuelan nationals, stateless persons or individuals who were habitually resident in Venezuela will not be deported, expelled, or in any other way forced to return to

²⁸ UNHCR, Guidance Note on International Protection Considerations for Venezuelans – Update I, May 2019: <https://www.refworld.org/docid/5cd1950f4.html>.

Venezuela in accordance with international refugee and human rights law. This guarantee would need to be assured either in the official residence document issued to Venezuelans or through other effective means, such as clear instructions to law enforcement agencies.

5.2 In light of the current circumstances in Venezuela, UNHCR calls the Court's attention to the above-mentioned provisions of the Guidance Note on International Protection Considerations for Venezuelans, and in particular the recommendation to all States to allow access to their territory and to ensure access to asylum procedures, and to suspend forcible returns to Venezuela.

6. Conclusions

6.1 UNHCR is concerned that the implementation of Ministerial Agreements No. 0001-2019 and No. 0002-2019 establishing the requirement of certified ("apostilled") criminal records for Venezuelan citizens to access Ecuadorian territory may result in obstacles to the enjoyment of the right to asylum and/or the push back from the border or denial of entry to the territory of persons in need of international protection, and therefore could be at variance with Ecuador's obligations under international law, and requests the Court to consider those obligations in its assessment of the constitutionality of these norms.