



UNHCR Submissions to the Inter-American Court of Human Rights in the framework of the request for an Advisory Opinion on the scope and purpose of the right to asylum

1. Introduction*

1.1 By letter dated 22 November 2017, (*REF: CDH-OC-25-187*), the Inter-American Court of Human Rights (hereinafter “the Court”) invited the Office of the United Nations High Commissioner for Refugees (hereinafter “UNHCR”) to submit a written opinion in the context of a request for an Advisory Opinion on the content and scope of the right to seek and receive/be granted asylum.

1.2 UNHCR welcomes the opportunity to provide its expert opinion on specific considerations regarding the content of the right to seek and receive asylum in the context of international refugee law. UNHCR will not address other forms of asylum as they fall outside of its mandate.

2. The right to seek and receive asylum under International Refugee Law and the Inter-American Human Rights System

2.1 The right to seek and enjoy asylum, derives from Article 14(1) of the Universal Declaration of Human Rights,¹ and is supported in particular by the legal framework of the 1951 Convention and its 1967 Protocol.

2.2 The right has also been recognized in Article 22 (7) of the American Convention on Human Rights (hereinafter “the American Convention”) which states:

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.

And is further cemented in Article XXVII of the American Declaration of the Rights and Duties of Man (hereinafter “the American Declaration”) which states:

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.

2.3 The Court has previously recognized that both Article 22(7) of the American Convention on Human Rights and Article XXVII of the American Declaration of the Rights and Duties of Man have enshrined the subjective right of all persons to seek and receive asylum, thereby overcoming the historical

¹ 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>.

understanding of this mechanism as a “mere State prerogative” under various inter-American conventions on asylum.²

2.4 The right to seek asylum has also been recognized in other regional instruments such as the Charter of Fundamental Rights of the European Union (Art.18)³, and the African Charter on Human and Peoples' Rights (Art.12.3).⁴

The Prohibition of *non-refoulement* (including *non-rejection* at the border)

2.5 Central 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 protection principle, most prominently expressed in Article 33 of the 1951 Convention which states:

“No Contracting State shall expel or return (“refouler”) a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.
[emphasis added]

2.6 In *Advisory Opinion 21/14* this Court determined that the principle of *non-refoulement* constitutes the cornerstone of the international protection of refugees and asylum-seekers.⁵ For the Court, the principle of *non-refoulement* constitutes a norm of customary international law⁶ and is, consequently, binding for all States, whether or not they are parties to the 1951 Convention or its 1967 Protocol.⁷

2.7 Moreover, for the Inter-American Tribunal, all of these modalities of asylum have acquired the level of an individual human right in the Inter-American System. The Court has stated in this sense that:

In sum, by a harmonious interpretation of the internal and international laws that permeate, in a converging and complementary manner, the content of the right established in Articles 22(7) of the Convention and XXVII of the Declaration (...) the Court is of the opinion that the right to seek and receive asylum in the context of the inter-American system is enshrined as an individual human right to seek and receive international protection on foreign territory, including with this expression refugee status in accordance with pertinent instruments of the United Nations or corresponding domestic legislation, as well as asylum in accordance with the different inter-American conventions on this matter.⁸

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.

³ Art.18: The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community. *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, <http://www.refworld.org/docid/3ae6b3b70.html>.

⁴ Art.12.3: Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions. OAU, *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), <http://www.refworld.org/docid/3ae6b3630.html>.

⁵ I/A Court H.R., Advisory Opinion OC-21/14, Op.cit, para. 209.

⁶ UNHCR, Note on the Principle of Non-Refoulement, November 1997, <http://www.unhcr.org/refworld/docid/438c6d972.html>; and UNHCR, The Scope and Content of the Principle of Non-Refoulement (Opinion) [Global Consultations on International Protection/Second Track], 20 June 2001, paras. 193-253, <http://www.unhcr.org/refworld/docid/3b3702b15.html>, and UNHCR ExCom Conclusions No. 15(XXX) – 1979, (b); 17 (XXXI) – 1980 (b); 25 (XXXIII) – 1982, (b); 68 (XLIII) – 1992, (f).

⁷ *Ibid*, para. 211.

⁸ *Idem*, par. 78.

2.8 Due to the serious consequences of expelling or returning a refugee or an asylum-seeker to a country where his/her fundamental human rights may be at risk, this Court has stated:

States are bound not to return (“*refouler*”) or expel a person – asylum seeker or refugee – to a State where her or his life or liberty may be threatened as a result of persecution for specific reasons or due to generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order, nor to a third State from which she or he may later be returned to the State where she or he suffered this risk – a situation that has been called “*indirect refoulement*.”⁹

2.9 In relation to what could constitute refoulement, UNHCR has expressed that:

The prohibition of refoulement to a danger of persecution under international refugee law is applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or “renditions”, and non-admission at the border in the circumstances described below.¹⁰

2.10 Indeed, the Court expressed that, “*in view of the declarative nature of the determination of refugee status, the protection provided by the principle of non-refoulement applies to all refugees, even if they have not yet been deemed refugees by authorities based on the requirements of the definition of Article 1 of the 1951 Convention and its 1967 Protocol or by domestic legislation*”.¹¹ This necessarily means that asylum-seekers may not be rejected at the border or expelled without an adequate and individualized examination of their request.¹²

3. Extraterritorial effect of right to seek and receive asylum and non-refoulement obligations

3.1 UNHCR’s position has been elaborated in its *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, which states that:

(...) an interpretation which would restrict the scope of application of Article 33(1) of the 1951 Convention to conduct within the territory of a State party to the 1951 Convention and/or its 1967 Protocol would not only be contrary to the terms of the provision as well as the object and purpose of the treaty under interpretation, but it would also be inconsistent with relevant rules of international human rights law (...) As with *non-refoulement* obligations under international human rights law, the decisive criterion is not whether such persons are on the State’s territory, but rather, whether they come within the effective control and authority of that State.¹³

3.2 When analysing the *ratione loci* of the obligations and rights established in the Convention, this Court has determined that this provision establishes:

⁹ I/A Court H.R., Advisory Opinion OC-21/14, Op.cit, par. 212.

¹⁰ 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, Op.cit, par.7.

¹¹ *Idem*, para. 210. See also, UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/IP/4/ENG/REV. 3, para. 28, <http://www.refworld.org/docid/4f33c8d92.html>.

¹² *Idem*. See IACHR, Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System – at para 25. States must ensure that the person who requests asylum is able to access appropriate international protection by means of fair and efficient asylum proceedings. See also, I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*, Op.cit, par.153.

¹³ 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, par.43, <http://www.refworld.org/docid/45f17a1a4.html>.

(...) the State's obligation to respect and ensure the human rights of "all persons subject to [the] jurisdiction" of the State in question, that is, of every person in the territory or who is in any way subjected to its authority, responsibility or control – in this case upon trying to enter the territory – and without any discrimination for the reasons stipulated in the norm. Thus, the word "jurisdiction" used by this article refers to every person regarding whom the State exercises either its territorial jurisdiction or its personal jurisdiction and even, its jurisdiction concerning public services.¹⁴

3.3 The Court has emphasized that, in terms of Article 1(1) of the American Convention, the fact that a person is subject to the jurisdiction of the State is not the same as being in its territory, and that the principle of *non-refoulement* can be invoked by any alien over whom the State in question is exercising authority or who is under its control, regardless of whether she or he is on the land, rivers, or sea or in the air space of the State.¹⁵

3.4 The Inter-American Commission holds this same position and has stated that:

While the extraterritorial application of the American Declaration has not been placed at issue by the parties, the Commission finds it pertinent to note that, under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with but required by the norms which pertain. The fundamental rights of the individual are proclaimed in the Americas on the basis of the principles of equality and non-discrimination - "without distinction as to race, nationality, creed or sex."

Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.¹⁶

3.5 The findings of the Inter-American System treaty based organs have built upon the considerations of the Human Rights Committee,¹⁷ the European Court of Human Rights (ECtHR),¹⁸ along with the International Court of Justice.¹⁹

3.6 The European Court of Human Rights has also found that the responsibility of States can be engaged extra-territorially, for example, in *Loizidou v. Turkey*, indicating:

(...) the concept of "jurisdiction" under this provision is not restricted to the national territory of the High Contracting Parties. (...) In addition, the responsibility of Contracting Parties can be involved because of acts of their authorities, whether performed within or outside national boundaries, which produce effects outside their own territory.²⁰

¹⁴ I/A Court H.R., Advisory Opinion OC-21/14, Op.cit, par.61.

¹⁵ *Ibid*, para. 219.

¹⁶ *Coard et al. v. United States*, Report N. 109/99 - Case 10.951, Inter-American Commission on Human Rights (IACHR), 29 September 1999, par. 37 <http://www.refworld.org/cases.IACHR.502a39642.html>

¹⁷ HRC. General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 12.

¹⁸ ECtHR, *Loizidou v. Turkey* (Preliminary Objections), Application No. 15318/89, Judgement of 23 February 1995, Series A, No. 310, para. 62

¹⁹ Advisory Opinion of the International Court of Justice in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (2004) ICJ Gen. List No. 131, 9 July 2004, paras. 109-111.

²⁰ ECtHR. *Loizidou v. Turkey* (Preliminary Objections), Op.cit.

3.7 Likewise, the ECtHR in *Al-Skeini and others* stated in relation to the extraterritorial character of the obligations under the European Convention on Human Rights, that first, “(...) it is clear that the acts of diplomatic and consular agents, who are present on foreign territory in accordance with provisions of international law, may amount to an exercise of jurisdiction when these agents exert authority and control over others”.²¹ Secondly, the ECtHR, indicated that it recognizes the exercise of extra-territorial jurisdiction by a State when, “through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government”.²²

3.8 In sum, all of these international bodies have consistently agreed that the decisive criterion to determine that the *ratione loci* of human rights obligations is not whether a person is within the territory of the State concerned, but whether or not, in respect of the conduct alleged, he or she is under the effective control of the authorities.

3.9 In the case of the protection of the right to asylum, Article 1(A)(2) of the 1951 Convention requires the person to be outside their country of nationality to be considered a refugee. It does not require the person to be physically in the territory of the asylum State. Similarly, the right to seek and receive asylum as expressed in the Inter-American System human rights treaties, which requires the person to be in a “foreign territory” to claim this protection abroad.

3.10 In this regard, in the *Haitian Centre for Human Rights et al. v. United States* case, the Inter-American Commission determined that the interdiction on the high seas and repatriation of Haitian nationals to Haiti without making an adequate determination of their status, and without granting them a hearing to ascertain whether they qualified as “refugees” violated the right to seek and receive asylum. Indeed, the Commission found that the criteria of being in “foreign territory” was met as the victims were outside Haiti, even when they were not in the U.S territory.²³

3.11 The Commission found that the U.S Government's interdiction program had the effect of prohibiting the Haitians from gaining entry into Bahamas, Jamaica, Cuba, Mexico, the Cayman Islands, or any other country in which they might have sought safe haven. The Commission indicated expressly that, as part of the right to seek and receive/be granted asylum, States should avoid conduct which may have the effect of prohibiting a person from seeking safe haven in the territory of third States²⁴. It concluded that the mere exercise of power by a State in a specific situation does not authorize the return of refugees to the country where the risk exists²⁵.

4. Maintenance and continuity of refugee status

4.1 UNHCR's *Note on the Extraterritorial Effect of the Determination of Refugee Status* recognized that the “provisions of the 1951 Convention, seen against the background of the travaux préparatoires leading to its adoption and of earlier international refugee instrument, illustrate a fundamental concern

²¹ ECtHR. Grand Chamber. Case of *Al-Skeini and others v. the United Kingdom* (*Application no. 55721/07*), Judgment. Strasbourg, 7 July 2011, par.134.

²² *Idem*, p. 135. See also, *Hirsi Jamaa and Others v. Italy*, the ECtHR held that the State exercised jurisdiction over the applicants given that they had been under the continuous and exclusive de jure and de facto control of the Italian authorities. Application no. 27765/09, ECtHR, 23 February 2012, par.81, http://www.refworld.org/cases/ECHR_4f4507942.html.

²³ *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997). Report n° 51/96. Decision of the Commission as to the merits of Case 10.675. United States. March 13, 1997, par. 163.

²⁴ *Ibid*, par. 161.

²⁵ *Ibid*.

of Contracting States to safeguard the maintenance and continuity of refugee status once it has been determined”.²⁶

4.2 Indeed, UNHCR’s Executive Committee, has recognized that one of the essential aspects of refugee status is its international character,²⁷ and that “the desirability for maintenance and continuity of refugee status once it has been determined by a Contracting State”.²⁸ The Executive Committee has stated that:

(...) refugee status as determined in one Contracting State should only be called into question by another Contracting State in exceptional cases when it appears that the person manifestly does not fulfil the requirements of the Convention, e.g. if facts become known indicating that the statements initially made were fraudulent or showing that the person concerned falls within the terms of a cessation or exclusion provision of the 1951 Convention (...).²⁹

4.3 The Inter-American Court in the *Pacheco Tineo* decision affirmed this position, by recalling that given the nature of the determination of refugee status, once a person’s status as a refugee has been declared, “it is maintained, unless he comes within the terms of one of the cessation clauses”.³⁰ The Court held that:

[O]nce a State has declared refugee status, this protects the person to whom this has been recognized beyond the borders of that State, so that other States that the said person enters must take into account this status when adopting any measure of a migratory character in his regard and, consequently, guarantee a duty of special care in the verification of this status and in the measures that it may adopt.³¹

4.4 Finally, UNHCR has advised that the maintenance, safeguarding, and continuity of the refugee status of a person determined as such by another State, would not, “in any way, affect the right of States to re-examine the refugee status in cases where there are serious reasons for believing that a determination was wholly unjustified”.³²

April 2017
UNHCR

²⁶ UNHCR, *Note on the Extraterritorial Effect of the Determination of Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 24 August 1978, para. 35, <http://www.refworld.org/docid/3ae68ccc.html>.

²⁷ UNHCR ExCom Conclusion No.12 (XXIX), *Extraterritorial Effect of the Determination of Refugee Status* (1978), para. a.
²⁸ *Ibid.*, para. b.

²⁹ *Ibid.*, para. g. With regards to the cessation and exclusion clauses, see: UNHCR, *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, <http://www.refworld.org/docid/3e50de6b4.html>; UNHCR, *Note on the Cancellation of Refugee Status*, 22 November 2004, <http://www.refworld.org/docid/41a5dfd94.html>, and UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, <http://www.refworld.org/docid/3f5857684.html>.

³⁰ I/A Court H.R., *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*, Op.cit, par.148.

³¹ *Ibid.*, para. 150.

³² UNHCR, *Note on the Extraterritorial Effect of the Determination of Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 24 August 1978, *supra*, para. 39.

Annex A:

Other fundamental rights of refugees and asylum-seekers to ensure the effective enjoyment of asylum

- *Non penalization for illegal entry and prohibition of detention*

1. Article 31.1 of the 1951 Convention establishes that States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened.³³

2. The object and purpose of Art. 31 is to prohibit the imposition of penalties (in general, and not just criminal sanctions) on refugees and asylum-seekers for their unlawful entry or presence. Therefore, taking into account the plain meaning of the term “penalty” as a loss inflicted for violation of a law, it must be concluded that Art. 31.1 denies governments the right to subject refugees to any detriment for reasons of their unauthorized entry or presence in the asylum country.³⁴ The term ‘*penalties*’ is not defined in Article 31, but it could include prosecution, fine, imprisonment, and other restrictions on freedom of movement.³⁵

3. In particular, the detention of asylum-seekers and refugees as a punitive measure, or a disciplinary sanction is not permitted.³⁶ UNHCR makes clear in its *Detention Guidelines*, that in light of the right to seek asylum, the non-penalization for irregular entry or stay, the right to liberty and security of the person, and freedom of movement, taken together, mean that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position.³⁷ Furthermore, “any detention or deprivation of liberty must be in accordance with and authorized by national law’, and can only be resorted to when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose.³⁸

- *Right to an identity document*

4. Article 27 of the 1951 Convention establishes that “[c]ontracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document”. Regarding this right, UNHCR’s Executive Committee has recognized the need for refugees and asylum seekers to have documentation enabling them to establish not only their identity, but also to certify their refugee status to ensure that they are protected against expulsion or refoulement.³⁹

- *Right to due process of law*

³³ Article 31:1: The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

³⁴ See Hathaway, James C., “The Rights of Refugees under International Law”, Cambridge University Press, 2005

³⁵ Guy Goodwin Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, Cambridge University Press June 2003, para. 108, <http://www.refworld.org/docid/470a33b10.html>.

³⁶ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 32, available at: <http://www.refworld.org/docid/503489533b8.html>. See also, the UN Working Group on Arbitrary Detention, *Report to the Seventh Session of the Human Rights Council, A/HRC/7/4/*, 10 January 2008, para. 53, which states: “criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and therefore arbitrary] detention.” <http://www.unhcr.org/refworld/docid/502e0eb02.html>.

³⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 12, <http://www.refworld.org/docid/503489533b8.html>.

³⁸ *Ibid.*, paras 15 and 34

³⁹ UNHCR Executive Committee, Conclusion No. 35 (XXXV) Identity documents for refugees (1984), para. c.

5. This 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. 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 rights, and independently of the migratory status of the person.⁴⁰

6. In addition to this Court's findings both in the *Pacheco Tineo* case and in the *Advisory Opinion 21/14* regarding due process of law in status determination procedures, UNHCR considers that in order to ensure effective access to fair asylum systems⁴¹, an initial determination must be made with regard to persons arriving in a country, why they have left their own country and where their intended destination is.⁴² This preliminary assessment would not constitute a refugee status determination, but a measure to have a good indication of a person's motives for fleeing their country of origin and to ensure the person's situation is met with the most appropriate response.⁴³ In this context, counselling provides an opportunity to establish whether they wish to seek asylum in case they are in need of international protection.⁴⁴

7. To assist in the identification of persons in need of international protection, UNHCR has developed a set of Guidelines which elaborate on the proper interpretation of child asylum claims⁴⁵, gender-related persecution claims⁴⁶, and claims to refugee status based on sexual orientation and/or gender identity,⁴⁷ as well as elaborating on the application of procedural guarantees in these types of cases.

- *Freedom of movement and residence*

8. The right of refugees to choose their place of residence and to move freely within the territory of the State of Asylum is established in Article 26 of the 1951 Convention. Indeed, restrictions to freedom of movement can, amongst other things, deeply affect the ability of refugees to access or implement many other rights, including rights which are key to their functional integration and capacity to become self-reliant, such as the right to employment, State assistance, and education.⁴⁸

9. Additionally, Article 28 of the 1951 Convention obliges States to "issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and [...] to give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence." Thus, refugees shall be granted

⁴⁰ UNHCR's Expert Witness Testimony before the Inter-American Court of Human Rights, Hearing in the case of *Pacheco Tineo vs. Bolivia*, 19 March 2013, Case 12.474, <http://www.refworld.org/docid/516e58704.html>. Internal footnotes omitted.

⁴¹ ExCom Conclusion 71 – para i.

⁴² UN High Commissioner for Refugees (UNHCR), *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, p.3, <http://www.refworld.org/docid/4d9430ea2.html>.

⁴³ *Idem*.

⁴⁴ *Idem*.

⁴⁵ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, <http://www.refworld.org/docid/4b2f4f6d2.html>.

⁴⁶ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, <http://www.refworld.org/docid/3d36f1c64.html>.

⁴⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, <http://www.refworld.org/docid/50348afc2.html>.

⁴⁸ UNHCR, *Rights of Refugees in the Context of Integration: Legal Standards and Recommendations*, Op.cit, par.162.

the unrestricted possibility of travelling outside the territory of their country of asylum, without the need to seek previous authorization or be obliged to inform the corresponding authorities.

- *Right to family unity*

10. While the right to family unity is not expressly provided in the 1951 Convention, it is important to recall that the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, unanimously considered that the “unity of the family, the natural and fundamental group of society, is an essential right of the refugee” and recommended that governments take the necessary measures to protect such with a view to maintaining family unity.

11. Thus, UNHCR is of the view that:

Refugees have a right to family unity. Maintaining and facilitating family unity helps ensure the physical care, protection, emotional well-being and economic support of individual refugees. This may be achieved through various means. Granting derivative refugee status to the family members/dependants of a recognized refugee is one way of doing so in certain cases where the family members/dependants do not qualify for refugee status in their own right.⁴⁹

12. Moreover, UNHCR ExCom Conclusion 24 states that in applying the right to family unity, every effort should be made to ensure the reunification of separated refugee families, and that countries of asylum should apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family.⁵⁰

- *Rights of the child*

13. The *Advisory Opinion 21/14* of this Court contains a comprehensive set of standards applicable to the protection of children in need of international protection. In addition, for UNHCR it is essential that the standard for the protection of refugee children and child asylum-seekers include the obligation of States to guarantee the survival and development of the child, their right to an adequate life style, and the social reinsertion of all children victims of abandonment or exploitation, taking positive actions to fully ensure the effective exercise of the rights of the child.⁵¹

14. For example, as part of its findings, this Court has stated that States must provide free primary education to all children in an appropriate environment and under the conditions necessary to ensure their full intellectual development, a duty that should apply without discrimination to asylum-seekers and refugee children.⁵²

- *Sexual and gender based violence and discrimination related cases*

15. In its *Guidelines for Prevention and Response against Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons*, UNHCR specifies that the term sexual and gender-based violence (SGBV) is used to distinguish common violence from violence that targets individuals or groups of individuals on the basis of their gender and sex, and it includes acts that inflict physical, mental or, sexual harm or suffering, threat of such acts, coercion and other deprivations of

⁴⁹ UN High Commissioner for Refugees (UNHCR), *UNHCR RSD Procedural Standards - Processing Claims Based on the Right to Family Unity*, 2016, <http://www.refworld.org/docid/577e17944.html>.

⁵⁰ UNHCR Executive Committee, Conclusion No. 24 (XXXII) Family reunification (1981), paras 2 and 5.

⁵¹ **I/A Court H.R., Case of Servellón García et al. v. Honduras. Merits, Reparations and Costs. Judgment of September 21, 2006. Series C No. 152, par. 114.**

⁵² **I/A Court H.R., Case of the Yean and Bosico Girls v. Dominican Republic, Op.cit, 185.**

liberty.⁵³ UNHCR employs an inclusive conception of sexual and gender-based violence that recognizes that, although the majority of victims/survivors are women and children, men are also targets of sexual and gender-based violence.⁵⁴

16. Persecution on the basis of gender can include intimate partner violence, femicide, sexual assault, rape, forced marriage, domestic violence, denial of resources and opportunities⁵⁵, and also children sexual abuse, early marriage and female genital mutilation.⁵⁶

17. In terms of protection of women and girls, the CEDAW Committee has pointed out that:

In the context of asylum, refugee status, nationality and statelessness, the obligation to respect requires that States parties refrain from engaging in any act of discrimination against women that directly or indirectly results in the denial of the equal enjoyment of their rights with men and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with that obligation.⁵⁷

18. LGBTI individuals could also face multiple layers of discrimination and violence for their sexual orientation and/or gender identity, and are often highly marginalized in society and isolated from their communities and families, amounting to persecution. Intersecting factors that may contribute to and compound the effects of violence and discrimination include sex, age, nationality, ethnicity/race, social or economic status and HIV status.⁵⁸

19. Moreover, UNHCR ExCom Conclusion No.73 noted that “refugees and asylum-seekers, including children, in many instances have been subjected to rape or other forms of sexual violence and discrimination during their flight or following their arrival in countries where they sought asylum, including sexual extortion in connection with the granting of basic necessities, personal documentation or refugee status”.⁵⁹

20. In light of all of the above, States are urged to respect and ensure the fundamental rights of all individuals claiming asylum within their territory, *inter alia*, by enforcing relevant national laws in compliance with international legal standards and by adopting concrete measures to prevent and combat sexual and gender based violence, and by protecting those persons that are victims/survivors of any form of persecution related to it.⁶⁰

- *Economic, Social and Cultural Rights*

21. The 1951 Convention contains a set of socio-economic rights in order to ensure that refugees have access to livelihood, self-reliance and sustainable solutions, some of them related to employment such as the right to wage earning employment (Art.17); self-employment (Art. 18); and access to practice

⁵³ UN High Commissioner for Refugees (UNHCR), *Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response*, May 2003, p.10, <http://www.refworld.org/docid/3edcd0661.html>.

⁵⁴ *Idem*.

⁵⁵ See UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, Op.cit, p.3.

⁵⁶ UN High Commissioner for Refugees (UNHCR), *Guidance Note on Refugee Claims relating to Female Genital Mutilation*, May 2009, <http://www.refworld.org/docid/4a0c28492.html>.

⁵⁷ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 5 November 2014, CEDAW/C/GC/32, par. 8, <http://www.refworld.org/docid/54620fb54.html>.

⁵⁸ UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, Op.cit, par.3.

⁵⁹ UN High Commissioner for Refugees (UNHCR), *Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, December 2009, 1975-2009 (Conclusion No. 1-109), <http://www.refworld.org/docid/4b28bf1f2.html>.

⁶⁰ *Idem*.

liberal professions (Art.19). Regarding welfare, the 1951 Convention regulates the rights of refugees within the scope of rationing systems (Art.20); housing programs (Art.21); public education (Art.22); public relief (Art.23); and labour rights and social security (Art.24).

22. For UNHCR, an effective solution for refugees should not be seen as an aspect independent and separate from protection.⁶¹ On the contrary, “solution should be seen in a general context of human rights and as the final purpose of protection, and protection was to be seen as governing the entire process towards solution and as determining what was or what was not a solution”.⁶² Therefore, “the principles of non-refoulement and asylum as well as the other basic rights of the refugee should be considered integral elements of any process towards solution”,⁶³ and which should be seen “as the preservation or the restoration of the rights of the individual”.⁶⁴

23. Due to their specific vulnerable situation, any solution in favor of refugees and asylum seekers in general requires States to take the necessary steps to ensure non-discriminatory access, along with the other rights described above, to the following economic, social and cultural rights as set in the Inter-American Instruments on the matter⁶⁵.

- *Right to facilitation of nationality*

24. Although the type of legal residency status to be granted to recognized refugees is not explicitly addressed in the 1951 Convention, Article 34 of the Convention does impose a duty on States to “facilitate the assimilation and naturalization of refugees.”⁶⁶ Acquisition of an effective nationality of the State of asylum allows refugees to exercise the right to full legal and diplomatic protection of the State in question (both within and outside the country). Thus, “residency status is a critical factor in the integration process affecting the regime of rights applicable to refugees”, and granting recognized refugees residency status may be interpreted as a concrete measure facilitating their integration and their ability to fully access a broader set of human rights.⁶⁷

25. Measures to facilitate the naturalization of a refugee may include the following⁶⁸:

- ❖ A reasonable period of residency in order to be eligible for naturalization, not exceeding 5 years.
- ❖ The waiver of conditions for naturalization incompatible with refugee status, or which refugees may be unable to fulfil, such as:
 - Release from a former citizenship. States shall not make the renunciation or loss of another nationality a condition for the acquisition or retention of the new nationality where such renunciation or loss is not possible or cannot reasonably be required. In cases where States are not allowing dual or multiple citizenship, authorities could simply require a declaration of renunciation to the former citizenship.

⁶¹ UN High Commissioner for Refugees (UNHCR), *Solution to the Refugee Problem and the Protection of Refugees*, 23 August 1989, EC/SCP/55, para.13, <http://www.refworld.org/docid/3ae68cd21c.html>. See also UNHCR Executive Committee Conclusion No.56 (XL) Durable Solutions and Refugee Protection. (1989).

⁶² *Idem*.

⁶³ *Ibid.*, par.13.

⁶⁴ *Ibid.*, par.21.

⁶⁵ Along with Art.26 of the American Convention, the "Protocol of San Salvador" contains a specific list of economic, social and cultural rights that may be ensured by States Parties. See: Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights "Protocol of San Salvador", Adopted at San Salvador, El Salvador on November 17, 1988 (Articles 6-18). Additionally, the American Declaration contains the rights to health (Art.XI), education (Art.XII), benefits of the culture (Art.XIII), work and fair remuneration (XIV), and social security (Art.XVI).

⁶⁶ Article 34: The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

⁶⁷ UN High Commissioner for Refugees (UNHCR), *Rights of Refugees in the Context of Integration: Legal Standards and Recommendations*, June 2006, POLAS/2006/02, p.41, <http://www.refworld.org/docid/44bb9b684.html>.

⁶⁸ *Ibid.*, p.186-191.

- Proof of a clean criminal record from the country of origin, which should be waived or modified in the case of recognized refugees.
 - Providing original documents, including passports, birth certificates or diplomas. Alternative means of proof and documentation should be made available.
 - Conditions relating to financial self-sufficiency and housing, or a language requirement. Naturalization should be facilitated for the children of recognized refugees and other close family members, as a common citizenship can help safeguard the principle of family unity.
- ❖ Refugees who become eligible for naturalization should be given priority and permitted to adjust their status in this way as quickly as possible, especially in cases where they suffer from an inadequate legal status or situation of insecurity.
 - ❖ States should be providing assistance with applications for naturalization or for permanent resident status.
 - ❖ Accurate and timely information on nationality and naturalization issues should also be proactively accessible to refugees who may traditionally have less access to information.
 - ❖ Given that some refugees may be stateless as well, legislation and procedures relating to naturalization should be compatible with State obligations under the Convention on Statelessness (1954) and the Convention on the Reduction of Statelessness (1961).