[UNOFFICIAL TRANSLATION]

17 April 2015

Re: The Constitutional Court of Ecuador query regarding International Treaty No. 0030-13-TI

To The Honorable Wendy Molina Andrade,

The Office of the United Nations High Commissioner for Refugees ("UNHCR") welcomes the invitation from the Constitutional Court of Ecuador ("the Court"), by the Court's resolution dated 6 March 2015, to provide a technical opinion in the framework of the constitutional review of the agreement between Ecuador and Kazakhstan regarding the bilateral elimination of visa requirements for holders of diplomatic, official and ordinary passports (International Treaty No. 0030-13-TI, the "Treaty").

To the extent that the application of the Treaty may have an impact on refugees or asylum-seekers, UNHCR has a direct interest in this matter, 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.[1] According to its statute, 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."[2] UNHCR is mandated to supervise the application of international refugee law conventions, including the 1951 Convention Relating to the Status of Refugees (the "1951 Convention")[3] and its 1967 Protocol[4], and as such has a responsibility and unique expertise to present its views to the Court.

UNHCR acknowledges that Ecuador's incorporation of the concepts of "free human mobility" and "universal citizenship" in its Constitution make it a pioneer in the region. However, UNHCR is unable to provide the Court with an opinion regarding these concepts, as they are not yet regulated under international law. UNHCR nevertheless wishes to refer to questions of international refugee law that may arise where a refugee or an asylum-seeker may be subject to one of the measures contemplated in Article 5 of the Treaty, which provides that "[f]or reasons of national security and the public order, each Party reserves the right to refuse entrance to, or cut short or terminate the stay of, any national of the other State Party, if the receiving State considers that such person's presence in its territory is undesirable." (Unofficial translation).

The application of this provision is limited by Article 9 of the Treaty, which provides that the Treaty shall not affect the rights and obligations of the Parties under other international treaties to which they are party. This "savings clause" acknowledges that any measures to

[1] UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V)
[2] *Id.*, para. 8(a).
[3] Adopted 25 July 1951, entered into force 22 April 1954.
[4] Adopted 31 January 1967, entered into force 4 October 1967.

expel or otherwise remove a refugee or an asylum-seeker, or to deny such persons access to Ecuadorian territory under Article 5 of the Treaty would need to be consistent with Ecuador's obligations under international refugee law, including, in particular, the 1951 Convention[5] and 1967 Protocol,[6] and international human rights law, in particular the American Convention on Human Rights.[7]

With a view to assisting the Court in its consideration of the interpretation and application of Articles 5 and 9 of the Treaty in light of relevant principles and standards of international refugee and human rights law, UNHCR wishes to submit its views on three specific provisions of the 1951 Convention:

- the principle of *non-refoulement* (Article 33 of the 1951 Convention);
- the requirement for procedural safeguards against arbitrary expulsion of refugees from a country's territory (Article 32 of the 1951 Convention); and
- the principle of non-penalization for illegal entry or presence in a country (Article 31(1) of the 1951 Convention).

I. The principle of *non-refoulement* under international refugee law (Article 33 of the 1951 Convention) and international human rights law

The principle of non-refoulement *(Article 33(1) of the 1951 Convention) under international refugee law*

The principle of *non-refoulement* constitutes the cornerstone of international refugee protection. It is enshrined in Article 33 of the 1951 Convention, which is also binding on States Parties to the 1967 Protocol.[8] Article 33(1) of the 1951 Convention provides:

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

The protection against *refoulement* under Article 33(1) applies to any person who is a refugee under the terms of the 1951 Convention—that is, anyone who meets the requirements of the refugee definition contained in Article 1 of the 1951 Convention. Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfils the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition, but is recognized because he or she is a refugee.[9] It follows that the principle of *non-refoulement*

[5] Ratified by Ecuador on 17 August 1955.
[6] Ratified by Ecuador on 6 March 1969.
[7] Adopted 2 November 1968, entered into force 27 August 1978. Ratified by Ecuador on 12 August 1977, in particular, Article 22(7) (right to seek and be granted asylum); Article 22(8) (non-*refoulement*); Article 22(9) (prohibition of collective expulsion); and Article 5 (right to personal integrity).
[8] Article I (1) of the 1967 Protocol provides that the States Parties undertake to apply Articles 2–34 of the 1951 Convention.
[9] *See* UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, 1979, Reedited Geneva 1992, at para. 28.

applies not only to recognized refugees, but also to those who have not had their status formally declared.[10] The principle of *non-refoulement* is of particular relevance to asylum-seekers. As such persons may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending a final determination of their status based on the merits of their cases.

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 where this would have the effect of returning a person to territories where he or she is likely to face persecution or danger to life or freedom.[11] Bilateral and multilateral agreements such as visa liberalization or extradition treaties are also subject to the prohibition of *refoulement*. The application of Article 33(1) of the 1951 Convention to these situations is clear from its wording, which refers to expulsion or return (*refoulement*) "in any manner whatsoever." It applies not only in respect of return to the country of origin or, in the case of a stateless person, the country of former habitual residence, but also to any other place where a person has reason to fear threats to his or her life or freedom related to one or more of the grounds set out in the 1951 Convention, or from where he or she may be sent to such a risk.[12]

The *non-refoulement* obligation under Article 33 of the 1951 Convention is binding on all organs of a Contracting State and/or States Parties to the 1967 Protocol, as well as any other person or entity acting on such State's behalf.[13]

Within the framework of the 1951 Convention and 1967 Protocol, the principle of *non-refoulement* constitutes an essential and non-derogable component of international refugee protection.[14] It is a norm of customary international law,[15] as recognized by the Inter-

[10] This has been reaffirmed by the Executive Committee of UNHCR, for example, in its Conclusion No. 6 (XXVIII) "*Non-refoulement*" (1977), para. (c) (reaffirming "the fundamental importance of the principle of *non-refoulement* … 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."). The UNHCR Executive Committee is an intergovernmental group currently consisting of 94 Member States of the United Nations that advises UNHCR in the exercise of its protection mandate. While its Conclusions are not formally binding on States, they are relevant to the interpretation and application of the international refugee protection regime. Conclusions of the Executive Committee constitute expressions of opinion which are broadly representative of the views of the international community. The specialized knowledge of the Committee and the fact that its conclusions are reached by consensus adds further weight. Ecuador has been a member of ExCOM since 2002.

[11] A comprehensive review of the *travaux préparatoires* confirms that non-admission is one of the ways a State may act in breach of the principle of *non-refoulement*. For example, the Secretary General stated in a memorandum dated 3 January 1950 to the Ad Hoc Committee on Statelessness and Related Problems that "turning a refugee back to the frontier of the country where his life or liberty is threatened (…) would be tantamount to delivering him into the hands of his persecutors". *See* Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons – Memorandum by the Secretary General, U.N. Document E/AC.32/2, 3 January 1950, Comments on Article 24 of the preliminary draft, at para. 3.

[12] *See* UNHCR, *Note on Non-Refoulement* (EC/SCP/2), 1977, para. 4. *See also* P. Weis, The Refugee Convention, 1951: "*The Travaux Préparatoires Analyzed with a Commentary by Dr. Paul Weis*", Cambridge University Press, Cambridge (1995), at p. 341.

[13] Under applicable rules of international law, this applies to the acts, or omissions, of all organs, subdivisions and persons exercising governmental authority in legislative, judicial or executive functions, and acting in that capacity in the particular instance, as well as to the conduct of organs placed at the disposal of a State by another State, even if they exceed their authority or contravene instructions. Pursuant to Articles 4–8 of the International Law Commission's (ILC) Articles of State Responsibility, the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct (Articles on State Responsibility, Articles 4–8). The ILC Articles of State Responsibility were adopted by the International Law Commission without a vote and with consensus on virtually all points. The Articles and their commentaries were subsequently taken note of by the UN General Assembly in Resolution A/RES/56/83 of. 12 December 2001. *See* J. Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary. Cambridge University Press, UK: 2002. The General Assembly annexed the Articles on State Responsibility to its resolution 56/83 of 12 December 2001 on Responsibility of States for Internationally Wrongful Acts.

[14] Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted. The non-derogable nature of the principle of *non-refoulement* has also been

American Court of Human Rights, which held that "[t]he principle of *non-refoulement* constitutes a norm of customary international law and is, consequently, binding for all states, whether or not they are parties to the 1951 Convention or its 1967 Protocol."[16]

Non-refoulement *obligations under international human rights law*

Non-refoulement obligations complementing the obligations under the 1951 Convention, which preceded the major human rights treaties, have also been established under international human rights law. 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,[17] torture, or other cruel, inhuman or degrading treatment or punishment.[18] An explicit *non-refoulement* provision is contained in Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which prohibits the removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Obligations under the 1966 International Covenant on Civil and Political Rights, as interpreted by the Human Rights Committee, also encompass the obligation not to extradite, deport, expel or otherwise remove a person from a State's territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[19]

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emphasized by the UNHCR Executive Committee (Conclusion No. 79 (XLVII) – 1996, General Conclusion on International Protection) and the UN General Assembly (Resolution adopted by the General Assembly – Office of the United Nations High Commissioner for Refugees, A/RES/51/75, 12 February 1997).

[15] *See* 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), Civil Appeals Nos. 18, 19 & 20 of 2011*, 31 January 2013, with further references.

[16] *See* Inter American Court of Human Rights (I/A Court H.R.), Advisory Opinion OC/21/14 Requested by the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay on *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection*, August 19, 2014, at para. 211; *See also Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*, Preliminary objections, merits, reparations and costs, November 25, 2013, at para 151. In both decisions, the Inter American Court of Human Rights cited the United Nations High Commissioner for Refugees (UNHCR), *Global consultations on international protection: Ministerial Meeting of the States Parties to the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (12-13 December 2001)- Declaration of the States Parties to the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/MMSP/2001/9, adopted on 13 December 2001, paragraph 4 of which 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." The Inter-American Court of Human Rights also cites UNHCR's *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. 14 to 16.

[17] The right to life is guaranteed under Article 6 of the International Covenant on Civil and Political Rights (adopted 16 December 1966; entered into force 23 March 1976) ([the "ICCPR"] and, for example, Article 4 of the American Convention on Human Rights; Article 2 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, (adopted 4 November 1950; entered into force 3 September 1953) [the "ECHR"], and Article 4 of the African (Banjul) Charter on Human and People's Rights (adopted 27 June 1981; entered into force 21 October 1986) [the "Banjul Charter"].

[18] The right to be free from torture is guaranteed under Article 1 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (signed 10 December 1984; entered into force 26 June 1987) and Article 2 of the Inter-American Convention to Prevent and Punish Torture (signed 9 December 1985 entered into force 28 February 1987). Article 16 of the Convention Against Torture prohibits other cruel, inhuman or degrading treatment or punishment. A prohibition of torture and other cruel, inhuman or degrading treatment or punishment is guaranteed under Article 7 of the ICCPR and provisions in regional human rights treaties, such as, for example, Article 3 of the ECHR; Article 5(2) of the ACHR, or Article 5 of the Banjul Charter.

[19] With regard to the scope of the obligations under Article 7 of the ICCPR (right to be free from torture or other cruel, inhuman or degrading treatment or punishment), *see* Human Rights Committee in its *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, U.N. Doc. HRI/ GEN/1/Rev.7, at para. 9; and *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, at para. 12.

The prohibition of *refoulement* to a country where a person faces the risk of a serious human rights violation, particularly torture and other forms of ill-treatment, is also firmly established under regional human rights treaties. In the Americas, in particular, the principle of *non-refoulement* is enshrined in Article 22(8) of the American Convention on Human Rights, which provides that "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."[20]

Lastly, according to the recent jurisprudence of the Inter American Court of Human Rights, any proceeding that may result in a person's detention must be of an individual nature, in order that the personal circumstances of such individual must be taken into consideration, and such proceedings must not discriminate in respect of nationality, color, race, sex, language, religion, political opinion, social origin or other status, and must observe certain minimum guarantees.[21]

Exceptions to the principle of non-refoulement *(Article 33(2) of the 1951 Convention) under international refugee law*

While the principle of *non-refoulement* contained in Article 33(1) of the 1951 Convention is fundamental, Article 33(2) of the 1951 Convention allows for exceptions to be made, in the circumstances expressly enumerated therein. The 1951 Convention recognizes that there may be certain limited circumstances of overriding importance that would, within the framework of the 1951 Convention, legitimately allow for the removal or expulsion of refugees. Article 33(2) stipulates that:

> The benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Article 33(2) of the 1951 Convention thus provides for an exception to the obligation of *non-refoulement* in only the two aforementioned situations: (1) where there are "reasonable grounds for regarding [the refugee] as a danger to the security of the country in which he

[20] The Inter-American Court of Human Rights examined the scope of the principle of *non-refoulement* under Article 22(8) of the AHCR and concluded that "under the American Convention, the principle of *non-refoulement* established in Article 22(8) takes on a particular meaning, even though this provision was included in the paragraph following the recognition of the individual right to seek and receive asylum, and is a broader right in its meaning and scope than the one included in international refugee law. Thus, the prohibition of *refouler* established in Article 22(8) of the Convention, while clearly covering refugees and asylum-seekers, offers complementary protection to aliens who are not asylum-seekers or refugees, in cases in which their right to life or freedom is threatened for the above-mentioned reasons". *See* I/A Court H.R., Advisory Opinion OC/21/14, at para. 217 (*supra* note 16). *See also* Article 13(4) of the 1985 Inter-American Convention to Prevent and Punish Torture ("Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.")

[21] According to the Inter American Court of Human Rights (*supra* note 38), procedures must observe the following minimum guarantees: i) the person must be informed expressly and formally of the charges against him or her, if any, and the reasons for his or her expulsion or deportation. This notification must include information regarding the individual's rights, such as: a. The possibility to be heard regarding the reasons that he or she should not be expelled, or to rebut the charges against him or her; b. The possibility to request and receive legal advice, including through free public legal services, as applicable, and, as necessary, the right to a translator or interpreter, as well as to consular assistance, as applicable; ii) in the case of an unfavourable decision, the individual should have the right to submit his or her case for revision by the competent authority, and to appear or to be represented before such authority for such purposes; and iii) expulsion may only be effected after a duly justified decision in accordance with the law, and due notification to the individual in question.

is", and, (2) where the refugee, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country".

For the "security of the country" exception to apply, there must be an individualized finding that the refugee poses a current or future danger to the national security of the host country.[22] The danger envisaged must be very serious, rather than of a lesser order.[23] Under Article 33(2), Contracting States must demonstrate that there exist "reasonable grounds" for regarding a refugee as a danger to the security of the country of refuge. A finding of dangerousness can only be "reasonable" if it is adequately supported by reliable and credible evidence.[24]

For the "danger to the community" exception to apply, not only must the refugee in question have been convicted of a crime of a very grave nature, but it must also be established that, in light of the crime and conviction, the refugee constitutes a very serious present or future danger to the community of the host country. The fact that a person has been convicted of a particularly serious crime does not of itself mean that he or she also meets the "danger to the community" requirement. Whether or not this is the case will depend on the nature and circumstances of the particular crime and other relevant factors (*e.g.*, evidence or likelihood of recidivism). [25]
Furthermore, the removal of a refugee in application of an exception provided for in Article 33(2) of the 1951 Convention is lawful only if it is necessary and proportionate, and subject to appropriate procedural guarantees (*infra*, Section II), as with any exception to a human rights guarantee. This means that:

- There must be a rational connection between the removal of the refugee and the elimination of the danger resulting from his or her presence for the security of the host country or to its community;[26]

- *Refoulement* must be the last possible resort for eliminating the danger to the

[22] *See* U.N. doc. A/CONF.2/SR.16, 23 November 1951.
[23] *See* E. Lauterpacht and D. Bethlehem, "The scope and content of the principle of *non-refoulement: Opinion*", in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge (2003), at paras. 164-166; and A. Grahl-Madsen, *Commentary on the Refugee Convention, Articles 2–11, 13–37*, published by UNHCR (1997), commentary to Article 33, at para. (8), where the discussions of the drafters of the 1951 Convention on this point are summarized as follows: "Generally speaking, the 'security of the country' exception may be invoked against acts of a rather serious nature, endangering directly or indirectly the constitution, government, the territorial integrity, the independence, or the external peace of the country concerned." Similarly, Professor Walter Kälin, a European expert in international refugee law, has noted that Article 33(2) covers conduct such as "attempts to overthrow the government of the host State through violence or otherwise illegal means, activities against another State which may result in reprisals against the host State, acts of terror and espionage, and that the requirement of a danger to the security of the country "can only mean that the refugee must pose a serious danger to the foundations or the very existence of the State, for his or her return to the country of persecution to be permissible.". *See* W. Kälin: *Das Prinzip des Non-refoulement, Europäische Hochschulschriften* Bd./Vol.298, at 131, Bern, Frankfurt am Main: Peter Lang, 1982. Unofficial translation from the German original.
[24] *See* E. Lauterpacht and D. Bethlehem, *supra* note 23, at para. 168.
[25] For a detailed analysis of this exception, *See* Brief of the Office of the United Nations High Commissioner for Refugees as *Amicus Curiae* in Support of Petitioner in the case of *Ahmed Ali v. Deborah Achim et al.*, Supreme Court of the United States, No. 06-1346. *See also* Lauterpacht & Bethlehem, *supra* note 23, at paras. 186-192, and *Note on Non-Refoulement submitted by the High Commissioner for Refugees to the Executive Committee of the High Commissioner's Programme*, 29th Session, Subcommittee of the Whole on International Protection, (Aug. 23, 1977), at para. 14 (noting that "where the refugee has been convicted of a serious criminal offence, it is important to take into account any mitigating factors and the possibilities of rehabilitation and reintegration within society.").
[26] As Professor Grahl-Madsen has stated, the removal of a refugee must "have a salutary effect on those public goods", See A. Grahl-Madsen, *supra* note 23, commentary to Article 33, at (4). *See also* "Factum of the Intervener, UNHCR, Suresh v. the Minister of Citizenship and Immigration; the Attorney General of Canada, SCC No. 27790" in 19:1 International Journal of Refugee Law (2002), at para 75.

security or community of the host country if less serious measures, including, for example, expulsion to a third country where there is no risk of persecution, would be sufficient to remove the threat posed by the refugee to the security or the community of the host country, *refoulement* cannot be justified under Article 33(2) of the 1951 Convention;[27]

- In keeping with the general legal principle of proportionality, the danger for the host country must outweigh the risk of harm to the person as a result of *refoulement*.[28]

Moreover, the determination of whether or not one of the exceptions provided for in Article 33(2) is applicable must be made in a procedure that offers adequate safeguards. At a minimum, in UNHCR's view, these should be the same as the procedural safeguards required for expulsion under Article 32 of the 1951 Convention (*infra*, Section II). The provisions of Article 33(2) of the 1951 Convention do not however affect the requested State's *non-refoulement* obligations under international human rights law, which permit no exceptions. Thus, the requested State would be barred from extraditing a refugee if this would result in exposing him or her, for example, to a substantial risk of torture or other serious harm.[29]

II. Safeguards against arbitrary expulsion of refugees from a country's territory (Article 32 of the 1951 Convention)

Article 32 of the 1951 Convention provides that:

> 1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
> 2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
> 3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

This provision is intended to limit the right of States to expel refugees to even non-persecutory States on both procedural and substantive grounds.[30] Article 32(1) of the 1951 Convention prohibits the expulsion of refugees lawfully in the territory of a contracting State except on grounds of "national security" or "public order". Article 32(2) and (3) provide for minimum safeguards, including, in particular, the right to be heard and the right to appeal, as well as the right to be allowed a reasonable time within which to seek legal admission to another country.[31]

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[27] *See* UNHCR, *Suresh Factum supra* note 26, at para. 77.
[28] *See* UNHCR, *Suresh Factum*, *supra* note 26, at para. 81; *see also* E. Lauterpacht and D. Bethlehem, *supra* note 23, at paras. 177–178.
[29] See references made to the principle of *non-refoulement* under human rights law (*supra*, pp. 4-5)
[30] *See* J. Hathaway, "*The Rights of Refugees under International Law*", Cambridge University Press, Cambridge (2005), at p. 694.
[31] *See* E. Lauterpacht and D. Bethlehem, *supra* note 23, at para. 159.

Given the declaratory nature of refugee status, Article 32 is also applicable to asylum-seekers, including those who have entered the country illegally but have since entered the asylum procedures and may therefore be considered as "authorized" to be present in the territory of the country and lawfully therein.

Since a refugee, unlike an ordinary alien, cannot return to his or her home country, his or her expulsion may have particularly severe consequences. In this context and reaffirming State practice, UNHCR's Executive Committee, in its Conclusion No. 7 on Expulsion, has reiterated that "a refugee may only be expelled in exceptional circumstances." Thus, when applying Article 32, the principle of proportionality must be observed. That is, the expulsion must be the appropriate measure in the particular circumstances. Similarly, the seriousness of the measure has to be weighed against the interests of public order and national security. Expulsion should be a measure of last resort and should be applied only if it is the only practicable means of protecting the legitimate interests of the State.

The application of Article 32 is limited, nevertheless, by the principle of *non-refoulement* under Article 33 of the 1951 Convention; a refugee lawfully present in the territory of a contracting State should not be expelled to his or her country of origin, any other place where he or she would be at risk of persecution, or from where he or she risks being sent to a place of persecution. As indicated earlier, removal to a place where a refugee's life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion is permitted only in the exceptional circumstances specified in Article 33(2) of the 1951 Convention.

III. The principle of non-penalization for illegal entry or stay (Article 31 (1) of the 1951 Convention)

Article 31(1) of the 1951 Convention provides that:

> 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.

On the basis of the clear language contained in Article 31(1) of the 1951 Convention, the obligation not to impose penalties contained in the provision applies to refugees. Article 31(1) also applies to asylum-seekers.[32]

Article 31 covers all persons claiming international protection who come "directly" from a territory where their life or freedom was threatened in the sense of Article 1 of the 1951 Convention. The term "coming directly" covers the situation of a person who enters the country in which asylum is sought directly from his or her country of origin, or from

[32] UNHCR, *UNCHR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 2012, at Guideline 2.

another country where his or her protection, safety and security could not be assured. The term "directly" must not be taken in the literal sense as refugees are not required to have come without pause from their country of origin. To ensure its legal effect in practice, Article 31 was also intended to apply, and has been interpreted to apply, to persons who have briefly transited through other countries, or who are unable to find protection from persecution in the first country or countries to which they flee.[33] No strict time limit can be applied to the concept of "coming directly", and each case must be judged on its merits.

With regard to the expression "without delay", the promptness of presentation is a matter of fact and degree; it depends on the circumstances of the case, including the availability of advice.[34] Given the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of authority figures, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum-seeker to another, there is no time limit which can be mechanically applied or associated with the expression "without delay".[35]

The expression "show good cause for illegal entry or presence" requires a consideration of the circumstances under which the asylum-seeker fled. "Illegal entry" would, *inter alia*, include arriving or securing entry through the use of false or falsified documents, and the use of other methods of deception or clandestine entry, including entry into State territory with the assistance of smugglers or traffickers. "Illegal presence" would, for example, cover a person's remaining after the lapse of a short legal stay. Having a well-founded fear of persecution is recognized in itself as "good cause" for illegal entry. To "come directly" from such country via another country or countries in which a person is at risk, or where he or she has not received effective protection, is also accepted as "good cause" for illegal entry.[36] There may, in addition, be other factual circumstances that constitute "good cause".[37] Circumstances may also compel a refugee or asylum-seeker to resort to the use of fraudulent documentation when leaving a country in which his or her physical safety or freedom are endangered.[38]

IV. Conclusions

To ensure consistency with Ecuador's obligations under international law in implementing the Treaty, and in line with the provisions of the savings clause provided for in Article 9 thereof, any measure related to the admission or stay of a refugee or an asylum-seeker in Ecuadorian territory must be carried out in compliance with the requirements of, *inter alia*, Articles 33, 32 and 31 of the 1951 Convention.

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[33] *See* Guy s. Goodwin Gill "Article 32 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection" in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge (2003), at para. 18.

[34] *See* UNHCR, "Summary Conclusions on Article 31 of the 1951 Convention – Revised, Geneva Expert Roundtable, 8-9 November 2001" in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge (2003), at conclusion 10(f).

[35] *See* Goodwin Gill, *supra* note 33, at page 202.

[36] *See* Summary Conclusions, *supra* note 34, at. 10(e)

[37] For example, the non-penalization clause of Article 31(1) was found to be applicable even where an asylum-seeker has had an opportunity to file an asylum claim at the border entry point but did not do so because he or she had apprehensions of not being allowed entry. Swiss Federal Cassation Court, judgment of 17 March 1999, reported in Asyl 2/99, 21-3.

[38] UNCHR Executive Committee Conclusion No. 58, lit. (i).

[UNOFFICIAL TRANSLATION]

UNHCR Ecuador remains at your disposal to address any questions that may arise in this or other matters related to UNHHR's mandate, including refugee law issues and issues of statelessness.

Respectfully,

John Fredrikson
Representative
UNHCR Ecuador