CONSTITUTIONAL
COURT OF
ECUADOR

Quito, D. M., June 24, 2015

RULING. N. ° 007-15-DTI-55
CASE N. ° 0030-13-TI
CONSTITUTIONAL COURT OF ECUADOR

I. BACKGROUND

Summary of admissibility

Dr. Alexis Mera, legal national secretary of the Presidency of the Republic, through document N. ° T.6900-SGJ-13-1005 of November 12, 2013, drew the attention of the Constitutional Court to this instrument given that "(...) in accordance with the provisions of Art. 109 of the Organic Law on Jurisdictional Guarantees and Constitutional Review, prior to the ratification of international treaties by the President of the Republic, these must be brought to the Constitutional Court, in order to resolve whether they require legislative approval". On November 21, 2013, the general legal undersecretary of the Presidency of the Republic, Vicente Peralta Leon, sent the certified copies of the agreement in question.

The Plenary of the Constitutional Court proceeded to transfer case N. ° 0030-13-IT N.0 on the "Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Kazakhstan on the abolition of visa requirements for holders of diplomatic, official and ordinary passports", corresponding its analysis and processing to constitutional judge Wendy Malina Andrade as Presiding Judge.

At an extraordinary session held on December 19, 2013, the Plenary of the Constitutional Court approved the preliminary report, which established that the "Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Kazakhstan on the abolition of visa requirements for holders of diplomatic, official and ordinary passports", requires legislative approval, and thus proceeds the automatic constitutional review by the Constitutional Court.

Official letter N. ° CCE-001-SG-SUS-2014 of January 10, 2014, provided for the publication of the "Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Kazakhstan on the abolition of visa requirements for holders of diplomatic, official and ordinary passports", in the Official Gazette, so that any citizen may intervene to defend or to contest the total or partial constitutionality of the international treaty concerned. It was published on January 21, 2014 in the second supplement of the Official Gazette N. ° 166.

II. TEXT OF THE INTERNATIONAL INSTRUMENT

AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF ECUADOR AND THE GOVERNMENT OF THE REPUBLIC OF KAZAKHSTAN ON THE ABOLITION OF VISA REQUIREMENTS FOR HOLDERS OF DIPLOMATIC, OFFICIAL AND ORDINARY PASSPORTS

The Government of the Republic of Kazakhstan and the Government of the Republic of Ecuador, hereinafter referred to as “the Parties”;

Desiring to develop and deepen the existing friendly relations and to strengthen the commercial, cultural, scientific and other bilateral relations between the two States;

In order to establish a legal framework for the travel of citizens from both States;
They have agreed as follows:

Article 1
Citizens of a State Party, carrying valid passports (diplomatic, service and ordinary), that grant them the right to cross the border (hereinafter referred to as "passports"), may enter, exit, transit and stay in the territory of the other Party without a visa for thirty (30) days, during each period of one hundred eighty (180) days, counted from the date of first entry.

Citizens of a State Party wishing to stay or reside in the territory of the other State for over thirty days (30) days, or who wish to carry out work or commercial activities in its territory, must obtain a visa in the Diplomatic or Consular Mission of the receiving State, in accordance with its laws.

Article 2
The Parties, in the shortest time possible, shall inform each other through diplomatic channels, of any change in the regulations for foreign citizens to enter, stay and leave the territories of their States.

Article 3
Citizens of a State Party, holders of valid diplomatic and service passports, who are in service in the territory of the other Party as a member of a Diplomatic Mission or Consular Post, as well as their families, being carriers of diplomatic and service passports, may enter, stay and leave the territory of the other Party without a visa for the period of their accreditation.

Article 4
Without prejudice to the privileges and immunities contained in the Vienna Convention on Diplomatic Relations of April 18, 1961 and the Vienna Convention on Consular Relations of April 24, 1963, citizens of a State Party, which are exempt of visa requirements under this Agreement, while in the territory of the other Party, are obliged to abide by the laws of the State of the other Party, including the rules of registration, stay and movement, established for foreign citizens and stateless persons.

Article 5
For measures of national security and public order, each Party reserves the right to refuse

entry, shorten or terminate the stay of nationals of the other State Party if their stay is considered non grata to the receiving State.

Article 6
Citizens of a State Party, whose passport has expired, has been lost, stolen or damaged, while in the territory of the other State, may leave the territory of that State, on the basis of a new valid passport or temporary identification document that confers them the right to return to the State of citizenship, issued by the Diplomatic Mission or Consular Office of the State of their citizenship. In the same way, these citizens will receive a permit from the competent authorities of the receiving State.

Citizens of a State Party who cannot leave the territory of the other Party during the period specified in Article 1 of this Agreement, due to unforeseen circumstances (disasters, disease, etc.), which are certified with authentic documents or other form of confirmation, must receive permission to stay in the territory of the Party in accordance with its legislation, during the period required to leave the territory.

Article 7
For reasons of national security, public order or protection of the health of the population, each Party reserves the right to suspend, either completely or partially, the validity of this Agreement. Such decision shall be notified in writing through diplomatic channels to the other Party not later than seventy-two (72) hours prior to entry into force.

The Party that took the decision to suspend the validity of this Agreement due to the reasons mentioned in the first paragraph of this Article, shall notify the other Party through diplomatic channels as soon as possible, about the suspension of the existence of such reasons.

Article 8
The competent authorities of the States Parties shall exchange, through diplomatic channels, specimens of the passports and temporary documents mentioned in Article 6 of this Agreement, which give the right to cross the border within thirty (30) days of the date of signature of this Agreement.

The competent authorities of the State Parties shall inform each other on any amendments relating to passports and temporary documents, which give the right to cross the border, at least thirty (30) days prior to the introduction of these amendments and simultaneously deliver, through diplomatic channels, specimens of the new travel documents.

Article 9
The provisions of this Agreement shall not affect the rights and obligations of the Parties arising from other from other International Treaties to which the States are parties.

Article 10
The differences arising from the interpretation or application of this Agreement shall be settled through consultations and negotiations between the Parties.

Article 11
The Parties may, by mutual agreement, introduce changes and supplements to this Agreement. Changes, being an integral part of this Agreement, shall be executed as

separate protocols, which shall come into force in accordance with the procedure laid down in Article 12 of this Agreement.

Article 12

This Agreement is concluded for an indefinite period and will take effect from the date of receipt, through diplomatic channels, of the last written notice of the Parties on the completion of the internal procedures necessary for its entry into force.

This Agreement shall cease to have effect after ninety (90) days from the day of receipt, through diplomatic channels, of a written notice from other Party of its intention to terminate its effect.

Held in the city of New York on September 24, 2013, in duplicate in the Kazakh, Spanish, Russian and English languages being equally authentic.

In case of any dispute of interpretation of the text of the Agreement, the English text shall prevail.

By the Government of the Republic of Ecuador	By the Government of the Republic of Kazakhstan
Ricardo Patiño Aroca Minister of Foreign Affairs and Human Mobility of the Republic of Ecuador	Erlan A. ldrissov Minster of Foreign Affairs of the Republic of Kazakhstan

Intervention by the National Legal Secretary of the Presidency of the Republic of Ecuador

Doctor Alexis Mera Giler, national legal secretary of the Presidency of the Republic of Ecuador, through official letter N.0 T.6900-SNJ-13-1005 of November 12, 2013, emphasizes the need for the Constitutional Court to address this international instrument on whether it requires legislative approval.

Report on the need for legislative approval

In accordance with Article 107 paragraph 1 of the Organic Law on Jurisdictional Guarantees and Constitutional Review, the Plenary of the Constitutional Court, in extraordinary session of December 19, 2013, resolved that said agreement requires legislative approval, since it falls within the cases established by Article 419 of the Constitution; in particular, in its fourth paragraph, given that the legal framework established for the travel of citizens from both States regulates the right to human mobility.

In that sense, the Constitutional Court will carry out the automatic constitutional review of the "Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Kazakhstan on the abolition of visa requirements for holders of diplomatic, official and ordinary passports" under the terms provided in Articles 110 subsection 1 and 111 subsection 2, numerals a, b, c and d of the Organic Law of Judicial guarantees and Constitutional Review; for which the respective publication was made in the second supplement of the Official Gazette N.° 166 of January 21, 2014.

The intervention of citizens pursuant to subsection b of Article 111 de the Organic Law on Jurisdictional Guarantees and Constitutional Review

Once the "Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Kazakhstan on the abolition of visa requirements for holders of diplomatic, official and ordinary passports" was published in the Official Gazette, there was no intervention by citizens.

Request of reports by the Plenary Organism

The Plenary Organism in session of February 19, 2015, requested that the Ministry of Foreign Affairs and the Ministry of Planning and National Development (SENPLADES), be asked to report on the elements of the public policy that have been developed regarding the concept of universal citizenship and free human mobility prescribed in subsection one of Article 40 and paragraph 14 of Article 66 of the Constitution of the Republic; and what is the scope of the "non grata" figure by the Ecuadorian State. In that same session, the United Nations High Commissioner for Refugees (UNHCR), was requested to report to this Court on the content of the concept of universal citizenship and free human mobility implemented by that organization.

Given this requirement and in response to Article 19 of the Rules of Substantiation of Processes Competence of the Constitutional Court, the consulted entities submitted their respective reports.

The following appeared before the Court through their reports: Andrés Horado Terán

Parral, director of ceremonial and protocol of the Ministry of Foreign Affairs and Human Mobility, through letter N.0 MREMH-DCP- 2015-0429-0, the economist, Verónica Elizabeth Artola Jarrín, national planning and development secretary, deputy, through letter No. SENPLADES SNPD-2015-0154-0F and Mr. John Fredrikson in his capacity as representative of UNHCR-Ecuador, through letter 15/ECU/HCR/163. Reports that will be analyzed in the further development of the judicial review of the international agreement under consideration.

III. CONSIDERATIONS AND GROUNDS OF THE CONSTITUTIONAL COURT

Jurisdiction of the Court

The Constitutional Court to hear the present case and issue its ruling, according to the provisions of Article 438 paragraph 1 of the Constitution of the Republic, in accordance with Article 75 paragraph 3 letter d, Articles 107 to 112 of the Organic Law of Jurisdictional Guarantees and Constitutional Review and in accordance with articles 69 to 72 of the Rules of Substantiation of Processes Competence of the Constitutional Court.

Legal nature, scope and outcomes the of judicial review of international treaties

Constitutional reviews, which are this Court´s competence, enable the operation of the principle of constitutional supremacy, stipulated in article 424 of the Constitution of the Republic. Specifically, regarding international instruments, Article 417 explicitly states that treaties ratified by Ecuador are subject to the constitutional provisions, thus requiring consistency between the provisions of this agreement and the Supreme Charter.

Constitutional supremacy is legally expressed in a formal and material framework. Within the formal scope, it requires the Court to determine if the agreed international standards have been issued in compliance with the procedure required by the Constitution; while the material sense implies the superiority of the content of constitutional norms over conventional standards, with regard to its content. Analyzing the compatibility of national and international standards enables the coherence and unity of the legal system, which, in turn, prevents the violation of the rights recognized by the Constitution during its entry in force and implementation.

Judicial reviews are not only necessary for the principles that govern our constitutional model, but also because there are international rules that must be observed by the Ecuadorian State. So, to comply with the principle of international law *pacta sunt servanda*, stated in Article 26 of the Vienna Convention on the Law of Treaties, it is necessary that Ecuador, prior to the ratification of an international instrument and in order to implement the treaty in good faith, verifies that what was agreed upon is compatible with its national law. It should be noted that Article 27 of the Convention, states that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty", thus making judicial reviews an essential exercise to avoid the incorporation of unconstitutional standards whose breach would entail Ecuador's international responsibility.

Identification of the relevant constitutional provisions

The Court shall preform a constitutional review of the "Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Kazakhstan on the abolition of visa requirements for holders of diplomatic, official and ordinary passports", regarding the following constitutional provisions, as they are directly related to the instrument *sub examine*:

> Article 9. - Foreign persons in Ecuadorian territory shall have the same rights and duties as those of Ecuadorians, in accordance with the Constitution.
>
> Article 11. - The exercise of rights shall be governed by the following principles:
> 3. - (…) For the exercise of rights and constitutional guarantees, no conditions or requirements shall be established other than those set forth in the Constitution or by law.
>
> Article 40. - The right to migrate of persons is recognized. No human being shall be identified or considered as illegal because of his/her migratory status.
> The State, through the relevant entities, shall develop, among others, the following actions for the exercise of the rights of Ecuadorian persons abroad, regardless of their migratory status:
> 1. - The State shall provide them and their families, whether they live abroad or in the country, with assistance.
> 2. - The State shall provide care, advisory services and integral protection so that they can freely exercise their rights.
>
> Article 66. - The following rights of persons are recognized and guaranteed:
> 14. - The right to travel freely throughout the nation's territory and to choose one's place of residence or to freely enter and leave the country, whose exercise shall be regulated by law. Prohibition from leaving the country can only be ordered by a judge authorized to do so.
> Foreigners cannot be returned or expelled to a country where their lives, liberty, safety or well-being or those of their families are in danger because of their ethnic belonging, religion, nationality, ideology, belonging to a given social group or political opinions.
> The expulsion of groups of foreigners is forbidden. Migratory processes must be singled out.
>
> Article 82. - The right to legal security is based on respect for the Constitution and the existence of prior legal regulations that are clear, public and applied by the competent authorities.
>
> Article 83. - Ecuadorians have the following duties and obligations, without detriment to others provided for by the Constitution or by law:
> 1. - To abide by and enforce the Constitution, the law and the legitimate decisions taken by the competent authority.
>
> Article 147. - The following are the attributions and duties of the President of the Republic, in addition to those stipulated by law:
> 10. - To draw up the country's foreign affairs policy, to sign and ratify international treaties, and to remove from office ambassadors and heads of mission.
> 17. - To safeguard the country's sovereignty, the independence of the State, domestic law and order and public security and to exercise the political leadership of national defense.
>
> Article 261. - The central State shall have exclusive jurisdiction over:
> 2. - International relations.

3. - The registration of persons, naturalization of foreigners and immigration control.

Article 276. - The development structure shall have the following objectives:
5. - To guarantee national sovereignty, promote Latin American integration and boost strategic insertion into the global context, which contributes to peace and a democratic, equitable world system.

Article 392. - The State shall safeguard the rights of persons with respect to human mobility and shall exercise leadership of migration policy through the competent body, in coordination with the different levels of government. The State shall design, adopt, implement, and evaluate policies, plans, programs, and projects and shall coordinate the action of its bodies with that of other States and civil society organizations that work on human mobility at the national and international levels.

Article 416. - Ecuador's relations with the international community shall respond to the interests of the Ecuadorian people, to which those persons in charge of these relations and their executors shall be held accountable, and as a result:
1. - It proclaims the Independence and legal equality of the States, peaceful coexistence, and the self-determination of the people, as well as cooperation, integration, and solidarity.
2. - It advocates the peaceful settlement of disputes and international conflicts and rejects the use of threats and force to settle the above.
6. - It advocates the principle of universal citizenship, the free movement of all inhabitants of the planet, and the progressive extinction of the status of alien or foreigner as an element to transform the unequal relations between countries, especially those between North and South.

7. - It demands observance of human rights, especially the rights of migrant persons, and promotes their full enjoyment by complying with the obligations pledged with the signing of international human rights instruments.
9. - It recognizes international law as a standard of conduct and calls for the democratization of international institutions and the equitable participation of States inside these institutions.

Article 417. - The international treaties ratified by Ecuador shall be subject to the provisions set forth in the Constitution. In the case of treaties and other international instruments for human rights, principles for the benefit of the human being, the nonrestriction of rights, direct applicability, and the open clause as set forth in the Constitution shall be applied.

Article 419. - The ratification or denunciation of international treaties shall require prior approval by the National Assembly in the following cases:
4. - When they refer to the rights and guarantees provided for in the Constitution.

Article 424. - The Constitution is the supreme law of the land and prevails over any other legal regulatory framework. The standards and acts of public power must be upheld in conformity with the provisions of the Constitution; otherwise, they shall not be legally binding (…).

Article 425. - The order of precedence for the application of the regulations shall be as follows: the Constitution; international treaties and conventions; organic laws; regular laws; regional regulations and district ordinances; decrees and regulations; ordinances; agreements and resolutions; and the other actions and decisions taken by public authorities.
In the event of any conflict between regulations from different hierarchical levels, the Constitutional Court, judges, administrative authorities and public servants, it shall be settled by the application of the standard of higher order of precedence (…).

Constitutionality of the international instrument

Article 107 of the Organic Law on Jurisdictional Guarantees and Constitutional Review indicates the methods in which the Constitutional Court can intervene in the review of constitutionality of international treaties. In this regard, the Law provides the following mechanisms: "l. Ruling on the need for legislative approval 2. Constitutional Review prior to legislative approval 3. Control over decisions by which legislative approval is given". The mechanism referred to and used in this case, as determined under that rule, in accordance with Article 71 subsection 2 of the Rules of Substantiation of Processes Competence of the Constitutional Court, and Article 110 subsection 1 of the Organic Law of Jurisdictional Guarantees Constitutional and Constitutional Review, is the automatic constitutional review prior to the legislative approval.

Given the automatic review, the Court will perform both a formal and material review of this Agreement.

Formal review

As has been noted, the formal dimension of the constitutional review consists of determining whether the negotiation and signing of the instrument is in compliance with the procedural rules.

Subsection **a** of paragraph 2 of Article 111 of the Organic Law on Jurisdictional Guarantees and Constitutional Review, states that the President of the Republic will send the Constitutional Court a certified copy of international treaties within a reasonable time, requirement which was fulfilled through document N. ° N.0 T.6900-SGJ-13-1005 of November 12, 2013, by which Dr. Alexis Mera Giler, as general legal secretary of the Presidency of the Republic, representing the President of the Republic of Ecuador, informed the Constitutional Court on the matter, and through document N. ° 6900-SGJ-13-1048, Dr. Vicente Peralta Leon, assistant general legal secretary of the Presidency of the Republic, sent certified copies of the instrument under analysis. Thus, the attribution to define the foreign policy and sign and ratify international treaties that subsection 10 of Article 147 of the Constitution grants the President is exercised.

As for the formalities for the signing of a treaty, the Constitution provides that their compliance corresponds to the President and while the instrument in question was signed by the Ministry of Foreign Affairs and Human Mobility, as stated in jurisprudence by the Constitutional Court for the transition period, said authority acts with full powers to represent the State for the conclusion of a treaty, in accordance with Article 7 paragraph 2 subsection **a** of the Vienna Convention on the Law of Treaties.[1] Therefore, the Minister of Foreign Affairs was competent to sign the agreement under review.[2]

Article 419 of the Constitution of the Republic indicates the cases in which the ratification or denunciation international instruments will require the approval of the National Assembly for their validity. Because the main objective of the "Agreement between the Government of the Republic of Ecuador and the Government of the Republic of

[1] Art. 7 paragraph 2 subsection a) "In virtue of their functions and without having to produce full powers, the following are considered as representing their State: a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty".
[2] Constitutional Court of Ecuador, for the transitional period, judgment N. ° 013-11-DII-CC, case N. ° 0053-10-TI, p. 10.

Kazakhstan on the abolition of visa requirements for holders of diplomatic, official and ordinary passports" is to establish a legal framework for the travel of citizens of both countries, its object is immersed within the cases provided by paragraph 4 of Article 419 of the Constitution. For these reasons, the Plenary of the Constitutional Court decided, in extraordinary session of December 19, 2013, to approve the report signed by the rapporteur judge for this cause, Wend Malina Andrade, complying with the formal requirements established in the Constitution the Republic, prior to the approval and ratification of the Agreement.

Material Review

The present Agreement requires a prior constitutional review as a preliminary step to its legislative approval, which, as has been stated, in accordance with Article 108 of the Organic Law on Jurisdictional Guarantees and Constitutional Review, the review must also be aimed at verifying "(...) the conformity of its content with the constitutional rules". In this regard, after reviewing the "Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Kazakhstan on the abolition of visa requirements for holders of diplomatic, official and ordinary passports", the Court notes the following observations regarding the compatibility of the provisions contained therein with the constitutional norms.

In relation to the object and purpose of the Agreement, -the establishment of a legal framework for the travel of citizens of both Ecuador and Kazakhstan to develop and deepen the existing friendly relations and to strengthen the economic, commercial, cultural and scientific bilateral relations between the two States - it shows that it's consistent with paragraph 5 of Article 276 of the Constitution of the Republic. This article states that the objective of the development regime is to promote a strategic insertion of the State in the international context in order to contribute to the achievement of peace and a democratic and equitable global system. The coherence between the object and purpose of this international instrument is also verified, as well as the provisions of section 10 of article 147, paragraphs 2 and 3 of Article 261 and Article 392 of the Constitution, given that it's within the competence and attributions of the central government and specifically the President and within the definition of foreign policy, international relations and immigration control.

Specifically, Article 1 of this international instrument, which gives the right to holders of valid passports (diplomatic, service and ordinary) to enter, exit, transit and stay in the territory of the other Party without visa for thirty (30) days during each period of one hundred eighty (180) days from the date of first entry, is consistent with the provisions of paragraph 6 of Article 416 of the Constitution. It advocates the principle of universal citizenship and free human mobility of all inhabitants of the planet with the aim of progressively ending with the condition of foreigner, conceiving this as an element of transformation of the unequal relations between States. The relaxation of immigration policies through such provisions, which are applicable not only to diplomatic and service staff, promotes the goal set by this constitutional disposition and makes the progressive development of the right to free human mobility and freedom of transit possible.

The establishment of the visa requirement for those wishing to stay or reside in the territory of the other Party for more than thirty (30) days, or who wish to work or carry out commercial activities in its territory, is not considered contrary to the Constitution, given

that the text of the Agreement mentions that the document shall be obtained in accordance with the State's legislation, which complies with the principle of application and interpretation of constitutional rights, under which treaties will not require conditions or requirements that are not established in the Constitution or the law, under the second paragraph of subsection 3 of Article 11 of the Constitution. At the national level, said requirements and conditions are set forth in the immigration laws in force. On the other hand, this provision, in turn, is respectful of the sovereign character of the Ecuadorian State and its ability to self-determine its internal regulations.

According to Article 2 of the Agreement, any change in the regulations for foreign citizens to enter, stay and leave the territories of their States should be communicated between the Parties in the shortest time possible, which is consistent with the right to legal certainty, enshrined in Article 82 of the Constitution of the Republic.

The exemption from the visa requirement for holders of valid diplomatic and service passports who are in the territory of the other Party as members of the Diplomatic Mission or Consular Post and their families during the accreditation period, is considered to be in accordance with Articles 1, 416 paragraph 1, 147 paragraph 10 and 261 paragraph 2 of the Constitution, given that the State's free and sovereign nature allows it to define the foreign policy and the diplomatic and consular relations that it sustains with other States; these relationships are developed through the staff that executes the interests and purposes of the foreign policy, so the privileges they enjoy, such as admission to a State without a visa for a period of accreditation, are not granted to benefit individuals, but in order to ensure the efficient performance of their functions[3].

Similarly, regarding the requirement of diplomatic and consular staff to abide by the laws of the host State during their stay, enshrined in Article 4 of the Agreement, we found that this obligation is consistent with the Constitution, as well as the obligations for holders of ordinary passports, bearing in mind that the constitutional order provides that foreigners who are in the Ecuadorian territory have the same rights and duties of Ecuadorians. By duties and responsibilities, it is understood as the obligation to abide by and enforce the Constitution, the law and the legitimate decisions of competent authorities, as prescribed in Articles 9 and 83 paragraph 1 of the Constitution. Under the Vienna Conventions on Diplomatic and Consular Relations, ratified by Ecuador, that obligation is contained in Articles 55 and paragraph 1 of Article 41, respectively.

With regard to the measures of security and public order found in Article 5 of the Agreement, by which the States Parties retain the right to reject, shorten or terminate the stay of nationals of the State of the other Party if their stay is considered non grata to the receiving State, certain considerations must be made prior to determining the constitutionality of said provision.

Two facts shall be considered for the analysis of this provision: first, that defining the foreign policy, international relations and immigration control is responsibility of the central government and the President of the Republic, it allows, through international instruments such as the present Agreement, the regulation of diplomatic relations with

[3] The basis of diplomatic privileges and immunities is developed in the preamble of the he Vienna Convention on Diplomatic and Consular Relations, ratified by Ecuador in Supreme Decree N. ° 1647 of November 18, 1964 and Supreme Decree N. ° 2830 of April 5, 1965, who respectively mention "(...) Recognizing that such immunities and privileges are granted not to benefit individuals but to ensure effective performance of the functions of diplomatic missions as representatives of States (...)."

other States and second, that it is the duty and responsibility of the President of the Republic to ensure the maintenance of the sovereignty, independence of the State, internal order and public security, as it provided in paragraph 17 of Article 147 of the Constitution of the Republic. In this regard, generally, the central government represented by President of the Republic, is fully empowered to include in the international instruments undersigned, provisions to maintain the sovereignty, independence, internal order and public safety.

Furthermore, there are two elements to be taken into account in Article 5: 1) This instrument is intended for two different subjects. On the one hand, the holders of valid diplomatic and service passports and, secondly, ordinary citizens with valid passports; and 2) The measures of security and public safety by which States may refuse, shorten or terminate the stay of nationals of the State of the other Party, is conditioned to the State considering the stay as non grata. This circumstance makes it necessary for this Court to examine how this figure is applied in international law.

The subjects addressed by this international instrument are the diplomatic and service staff and those with an ordinary passport. Regarding the first subjects, as mentioned above, the privileges enjoyed when entering a State part of the international community are based on the effective performance of their duties as representatives of the State which appoints them and constitutes legal mechanisms to ensure equality between sovereign nations.

International diplomatic law has no legal institution through which the stay of a person can be declared as non grata, as is done by this international instrument. Nevertheless, it does consider the figure of persona non grata, which allows, as noted by the by the International Court of Justice, a fine balance between the immunities and privileges of diplomatic staff and the respect for the sovereignty of the receiving State, since the declaration of persona non grata inhibits the abuse of privileges by diplomats, preventing, for example, that they threaten national security and public order of the receiving State.

Article 9 of the Vienna Convention on Diplomatic Relations, by regulating the declaration of persona non grata, provides that:

> 1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.
> 2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a member of the mission.

Additionally, Article 23 of the Vienna Convention on Consular Relations provides that:

> PERSONS DECLARED "NON GRATA"
> 1. The receiving State may at any time notify the sending State that a consular officer is persona non grata or that any other member of the consular staff is not acceptable. In that event, the sending State shall, as the case may be, either recall the person concerned or terminate his functions with the consular post.
> 2. If the sending State refuses or fails within a reasonable time to carry out its obligations under paragraph 1 of this article, the receiving State may, as the case may be, either

withdraw the exequatur from the person concerned or cease to consider him as a member of the consular staff.
3. A person appointed as a member of a consular post may be declared unacceptable before arriving in the territory of the receiving State or, if already in the receiving State, before entering on his duties with the consular post. In any such case, the sending State shall withdraw his appointment.
4. In the cases mentioned in paragraphs 1 and 3 of this article, the receiving State is not obliged to give to the sending State reasons for its decision

The International Court of Justice has ruled that the declaration of persona non grata, is "entirely efficacious" in order to achieve a balance between the privileges granted by the receiving State of the diplomatic staff and its sovereignty, "for unless the sending State recalls the member of the mission objected to forthwith, the prospect of the almost immediate loss of his privileges and immunities, because of the withdrawal by the receiving State of his recognition as a member of the mission, **will in practice compel that person, in his own interest, to depart at once**"[4] (emphasis added by the author). Article 5 of the international agreement is intended to reject the entrance of diplomatic or service staff, or to shorten or terminate their stay in the event that they threaten the security or public order of the receiving State, which is precisely the effect achieved with the declaration of persona non grata.

We see that, quintessentially, the declaration of persona non grata is the ideal international law channel to remove a diplomatic or consular official from his functions in the receiving State and therefore finish his stay in that State. For this reason, the Court considers that, whether the declaration of non grata is applied on the person itself or on their stay, these figures should be analyzed similarly and observing the international legal provisions that regulate the matters ratified by the Ecuadorian State[5], as well as the domestic laws, such as the Law on Immunities, Privileges and Diplomatic Franchises in force[6], and the Regulations of Pro Bono Consuls and Fees[7], as they result in the same legal effect.

The possibility and circumstances in which diplomatic and service staff enter or leave the States to which they are assigned to perform their functions, are regulated primarily by the Vienna Conventions[8] and are expressions of friendly relations between nations which depend primarily on the consent of the sending State and the receiving State. Therefore, the entrance and exit of a diplomatic officer from a receiving State is a privilege that is granted to the official, not granted to them as individuals, as a result, it lacks the nature of unavailable and inalienable[9]; for that reason, the Court considers that the power that the State reserves in Article 5 of the Agreement, to reject, shorten or terminate the stay of the diplomatic service officer and, in the case of qualifying it as non grata, is part of its sovereign ability to determine its diplomatic relations and does not constitute, in any

[4] International Court of Justice, Judgment of May 24, 1980. Case Concerning United States Diplomatic and Consular Staff in Tehran, para. 86.
[5] Vienna Conventions on Diplomatic and Consular Relations, ratified by Ecuador through Supreme Decree N. ° 1647 of November 18, 1964 and Supreme Decree N. ° 2830 of April 05, 1965, Art. 9 and 23, respectively.
[6] Republic of Ecuador, Law on Immunities, Privileges and Diplomatic Franchises, Art. 31.
[7] Republic of Ecuador, Regulations of Pro Bono Consuls and Fees, Arts. 32 and 42.
[8] Vienna Conventions on Diplomatic and Consular Relations, ratified by Ecuador through Supreme Decree N. ° 1647 of November 18, 1964 and Supreme Decree N. ° 2830 of April 05, 1965, Art. 9 and 23, respectively.
[9] The jurisprudence of the Constitutional Court has developed the structure and content of constitutional rights, as such, in case N.0 0470-12-EP, it states that "constitutional rights are rules of thetic character (structure of principle, with a vocation of abstraction and generality that cannot result in a reduced hypothesis), recognized in the Constitution, which enjoy universal and unavailable features, while their content derives directly from the need to protect individuals as a result of the need for conditions that guarantee their dignity.

measure, a restriction on constitutional rights.

To provide clarity regarding the use of the figure of not grata in Ecuador and its application to diplomatic and non-diplomatic staff, we refer to the report submitted by the representative of the Ministry of Foreign Affairs, which, conclusively, mentioned that non grata is a term used in diplomacy, with a specific legal meaning, it mentioned that the qualifying a person as non grata usually indicates a state of diplomatic tension between the Governments and or States concerned, or when a member of the foreign diplomatic delegation is accused of espionage or other activities that undermine the sovereignty or the interests of the host country (for example, intervening in the domestic affairs), therefore it is mentioned that, potentially, any member of a diplomatic service who commits offenses, misdemeanors or crimes in the host country can be declared persona non grata.

As for the application of this figure to non-diplomatic staff, it is mentioned that by extension, this term applies to the subject or group of subjects who have committed crimes, especially if the crimes are crimes against humanity, regardless of the part of the world in which they were committed, but makes it clear that in a non-diplomatic use, qualifying someone as a <<persona non grata >> has no legal consequences, even when the person making such declaration is a Public Administration, which would only mean that the persona non grata is not to the liking of the members of the board who chose this qualification.

With the aforementioned clarifications we note that declaring as non grata the stay of a citizen with an ordinary passport is not a consideration of international law, subject to certain exceptions, under the category of non grata, which has been exhibited in the preceding paragraph, and that this declaration has no legal effects on non-diplomatic subjects. Such reasons lead this Court to interpret that the provision established by the States in Article 5 of the Agreement, by which it is possible to deny the entry, shorten or terminate the stay of nationals of the other State if their stay is considered non grata, shall only apply to diplomatic and service staff.

Certainly, in the exercise of State sovereignty, national security and public order are justifying elements that may be used to motivate the refusal of entry or termination of stay of a person with an ordinary passport. However, for subjects with an ordinary passport, entering and leaving the country are constitutional rights that are governed by the principle of universal citizenship, which condemns State practices that pretend to, arbitrarily and without due procedure, restrict the exercise of the rights of migrants, which is precisely what is achieved by applying this figure to them.

While it has become clear that the legal effects of the provision contained in Article 5 of the Agreement are constitutional solely for its application to diplomatic staff; this Court considers it necessary, in order to deepen the content of the concepts of free human mobility and universal citizenship, proclaimed by the Constitution of the Republic, to clarify certain national and international standards to be observed by the Ecuadorian State when signing international commitments involving the rights of migrants, for which it is particularly important to read Article 5 of the Agreement in accordance with what is prescribed by Article 9 of the same instrument, which states the following: “The provisions of this Agreement shall not affect the rights and obligations of the Parties arising from other from other (sic.) International Treaties to which the States are parties”.

The concepts of free human mobility and universal citizenship have been introduced to the constitutional field in response to a phenomenon where mobility is no longer occasional but has become a constant feature in all clusters, where migration flows have experienced unprecedented accelerations and it has become necessary "to recognize migrants as subjects of law that have begun to embark on the great global march for the full exercise of their citizenship".[10]

In the Constitution we find principles of international relations such as universal citizenship, the free mobility of all peoples on earth, the progressive end of the foreign condition as a transforming element of unequal relations between countries and the respect for rights humans, particularly, the rights of migrants, and the duty to promote their full exercise through the fulfillment of the obligations assumed by signing international instruments.[11]

Given that the Ministry of Foreign Affairs' report before the Constitutional Court states that one the public policy's elements created for the application of the principle of free human mobility, has been the elimination of tourist visas for citizens of different nationalities and also a bilateral foreign policy aimed at the exemption or abolition of visas for holders of diplomatic and special passports; the Court understands that policies aimed at realizing those international instruments should safeguard the rights of migrants and preventing unjustified restrictions and be strictly implemented in accordance with the principles imposed by the Constitution of the Republic and international standards

The agreement under review has invoked reasons of public order and national security for declaring a person's stay as non grata and consequently refuse their entry and shorten or terminate their stay.

Although, for the present case, said effects shall only be applicable to diplomatic subjects, as has been stated before, it should be made clear that the Constitution and international instruments signed by Ecuador impose certain parameters that must be observed when altering the immigration status of a subject with ordinary passport.

Provisions which generally regulate the refusal of entry to the country of a person or the immediate termination of his stay, cannot ignore the existence of the rights of migrants and the existence of individuals who have enhanced protection, such as of refugees.

In the case of refugees, an important constitutional obligation imposes respect to the principle of non-refoulement, which prevents States from transferring, extraditing, deporting or expelling a person to another country if this will cause exposure to serious violations of their human rights. In that sense, the Ecuadorian State, before deciding on the transfer, extradition, deportation or expulsion of a refugee or an asylum seeker, must assess the impact that this decision has on the human rights of the individual.

In the inter-American level, the Inter-American Convention to Prevent and Punish Torture provides in Article 13 that 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

[10] Muñoz, J (2009). Derechos Humanos, Migraciones y Ciudadanía Universal. *Díalogos Migrantes* (2), in Spanish, p. 8-20.
[11] Constitution of the Republic of Ecuador, Arts. 11 and 416.

special or ad hoc courts in the requesting State, the prohibition, in conjunction with Article 22 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, in a progressive interpretation of these rights found in Advisory Opinion OC/21/14, the Inter-American Court of Human Rights prohibits the refoulement, not only of refugees and asylum seekers, but also of those who are not asylum seekers, when their lives are threatened in the country they are being returned to.

Therefore, the international inter-American standard is even more severe regarding the observance of the principle of non-refoulement, thus applying it not only to refugees but to all citizens whose life may be threatened in the country where he will be returned.

As for the procedure to be observed for the return of a person, developing jurisprudence from the inter-American system determines that it must be of an individual nature, in order to allow the personal circumstances of each person to be assessed, and there must be no discrimination based on nationality, color, race, sex, language, religion, political opinions, social status or other condition, and the following minimum guarantees must be observed, such as, to be informed, expressly and formally, of the charges against him, if applicable, and the reasons for the expulsion or deportation. This notification must include information on his rights, such as: a) The possibility of presenting the reasons why he should not be deported and defending himself from any charges against him and b) The possibility of requesting and receiving legal assistance, even by free public services if applicable and, if necessary, translation and interpretation, as well as consular assistance, when required. In the case of an unfavorable decision, people have the right to submit the case to review before the competent authority, and to appear or to be represented before the competent authorities for this purpose and the eventual deportation may only be carried out following a reasoned decision in keeping with the law, which has been duly notified. [12]

In the system of universal protection of human rights, the Convention relating to the Status of Refugees of 1951 provides for an exception to the principle of non-refoulement, in cases where there are reasonable grounds for regarding the refugee as a danger to the security of the country where he is located, and where the refugee has been convicted for a particularly serious crime and constitutes a danger to the community of that country; but even in those cases, developing jurisprudence and interpretation of this system of protection has established certain specific dispositions for the implementation of such exceptions. Thus it has been established that, in order to apply the national security exception, the decision must be of an individual nature, the danger generated by the individual must be very serious and should always be a decision based on reasonable grounds with existence of reliable evidence.[13]

According to what is mentioned in the report submitted to this Court by UNHCR, the exception to the principle of non-refoulement applies when it's necessary and proportional and respecting the following procedural guarantees

> There must be a causal nexus between the expulsion of refugees and the removal of the danger posed by their presence to the security or community of the host country.

[12] Inter-American Court of Human Rights, Case of the Pacheco Tineo Family, para. 133.
[13] E. Lauterpacht and D. Bethlehem, paras. 167, 190-192.

> The refoulement should be the last resort to eliminate the threat to the security or community of the country host. If less serious measures (including for example, the removal to a third country where there is no danger of persecution) allow the removal of the threat posed by the refugee, then the refoulement cannot be justified under Article 33 (2) of the Convention and,
>
> In accordance with the principle of proportionality, the danger for the host country must outweigh the risk of harm that the person may suffer as a result of their refoulement.

Additionally, it should be emphasized that the exceptions to the principle of non refoulement established by the 1951 Convention do not prevail over the obligation imposed by international human rights law, the Universal and Inter-American Convention on Torture, which without exception prohibit refoulement when there are dangers to life, threat of torture or cruel, inhumane or degrading treatments.

These national and international standards must be observed by the Ecuadorian State in the signing of bilateral international instruments, as is the present Agreement. In this respect, Article 9 is of special importance, as it states that the Agreement will not affect the rights and obligations of the Parties arising from other international treaties to which States are members, for Ecuador, these are the conventions on torture, refugees and the American Convention on Human Rights, among others; circumstance that reinforces this Court's interpretation regarding the inapplicability of the legal effects of Article 5 of the Agreement to individuals carrying ordinary passports.

To continue with the analysis of the Agreement, we will analyze the provisions of Article 6, which establish the mechanism by which the citizens of the State Party will return to their country when they carry expired passports, or these have been lost, stolen or damaged while in other territory, this mechanism reflects the right to migrate, recognized by Article 40, according to which it is prohibited to consider a person as illegal because of immigration status, and the right to enter and leave the country freely.

As for the period of validity, possible suspension, modification, notifications to be exchanged and how to resolve differences arising from the interpretation or application of the Agreement, regulated in Articles 7, 8, 10, 11, 12, the Court considers these compatible with the principle of free consent, that governs international law and specifically, with paragraphs 1 and 2 of Article 416 of the Constitution, which proclaim the independence and legal equity of States and the peaceful settlement of international disputes and conflicts.

Given that in the preceding paragraphs the Court has identified in Article 5 a provision that, if applied to subjects with ordinary passport, would be unconstitutional, one must refer to the provisions established in Articles 10 and 11 of the Agreement, which provide mechanisms to resolve disputes arising from the interpretation or application of the Agreement and the introduction of changes to it; those provisions state that:

> Article 10
> The differences arising from the interpretation or application of this Agreement shall be settled through consultations and negotiations between the Parties.
>
> Article 11
> The Parties may, by mutual agreement, introduce changes and supplements to this

> Agreement. Changes, being an integral part of this Agreement, shall be executed as separate protocols, which shall come into force in accordance with the procedure laid down in Article 12 of this Agreement.

For its part, the Vienna Convention on the Law of Treaties, Article 39, allows the possibility to amend or modify the treaty, requiring an agreement between the Parties.

For these reasons and considering that Article 5 of the Agreement is estimated to be consistent with constitutional provisions while it is understood that the legal effects it entails are not applicable to subjects with an ordinary passport, the Court proceeds according to Articles 10 and 11 of the Agreement and 39 of the Vienna Convention on the Law of Treaties in order to seek the consent of the Republic of Kazakhstan and unify the interpretation of the Agreement, from which this instrument shall enjoy, in all its provisions, of formal and material constitutionality.

IV. RESOLUTION

In light of the foregoing, administering constitutional justice and by mandate of the Constitution of the Republic of Ecuador, the Plenary of the Constitutional Court issues the following:

RULING

1. The "Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Kazakhstan on the abolition of visa requirements for holders of diplomatic, official and ordinary passports", signed in New York on September 24, 2013 requires prior legislative approval by the National Assembly, for it falls within the provisions established in Article 419, paragraph 4 of the Constitution of the Republic.
2. Declare that the "Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Kazakhstan on the abolition of visa requirements for holders of diplomatic, official and ordinary passports" holds formal compliance with the Constitution of the Republic.
3. Declare that the "Agreement between the Government of the Republic of Ecuador and the Government of the Republic of Kazakhstan on the abolition of visa requirements for holders of diplomatic, official and ordinary passports" holds material compliance with the Constitution and is compatible with its principles and rights. With respect to Article 5 of the Agreement, it's consistent with the constitutional provisions as long as it is understood that the legal effects that it contains do not apply to subjects with an ordinary passport.
4. In order to circumscribe the legal effects of Article 5 to subjects with diplomatic and service passports, the Court determines that the present ruling shall be presented to the constitutional president of the Republic, in order to proceed with the competent authorities in accordance with Articles 10 and 11 of the Agreement and Article 39 of the Vienna Convention on the Law of Treaties.
5. To be communicated, published and enforced.

Patricio Pazmiño Freire
PRESIDENT

Jaime Pozo Chamorro
SECRETARY-GENERAL

GROUNDS. – For such, the above ruling was adopted by the Plenary of the Constitutional Court, with five votes of the judges: Antonio Gagliardo Loor, Wendy Molina Andrade, Alfredo Ruiz Guzmán, Manuel Viteri Olvera y Patricio Pazmiño Freire, without the presence of judges Marcelo Jaramillo Villa, María del Carmen Maldonado Sánchez, Tatiana Ordeñana Sierra and Ruth Seni Pinoargote, in session of June 24, 2015. I certify this.

Jaime Pozo Chamorro
SECRETARY-GENERAL