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Re: Report by Asylum Access Ecuador regarding Ecuador's adherence with its obligations under the Convention against Torture, Cruel, Inhuman and Degrading Treatment, in regards to the principle of non-refoulement with respect to refugees.

Dear Ms. Gaer:

Via this communication, we would like to inform the OHCHR of measures recently taken by the government of the Republic of Ecuador that, in our opinion, effectively constitute a breach of the principle of non-refoulement under Article 3, paragraph 1 of the Convention against Torture, Cruel, Inhuman and Degrading Treatments (CAT).¹

New efforts have been deployed by the State to limit holders of refugee visas in ways that contravene the 1951 Geneva Convention relating to the Status of Refugees (1951 Convention) and the Protocol of 1967. We will first address the legal arguments in support of the opinion that i) the principle of non-refoulement is a fundamental principle of the right to asylum under Ecuador's Constitution and international human rights instruments and ii) the actions of the Directorate of Refuge in each of the cases articulated in the paragraph below violate the principle of non-refoulement, also in violation of the CAT.

We will proceed to delineate the following concerns, as an NGO with offices in six Ecuadorian provinces, most of which are directly on the border with Colombia: (1) The State has imposed an excessively short term for asylum-seekers to submit their applications – a directive that both contravenes administrative regulations and is

¹ Ecuador signed this Convention on February 4, 1985 and ratified it on March 30, 1988.

applied mechanically and systematically, thereby denying access to asylum-seekers; (2) Asylum-seekers who lack identity documents are barred from applying for asylum, and (3) The Directorate of Refuge, a body under Ecuador's Ministry of Foreign Affairs, Trade and Integration, is currently ceasing the refugee status of recognized refugees, and performing actions that prevent refugees from accessing the appeal procedure provided by Act 1182 dated May 31, 2012, thereby contravening the principle of non-refoulement.

I. The principle of non-refoulement is a fundamental principle in the right to asylum under the Ecuadorian Constitution and international human rights instruments.

Article 3, paragraph 1 of the Convention against Torture, Cruel, Inhuman and Degrading Treatment², ratified by Ecuador, enshrines the principle of non-refoulement. Moreover, Ecuador has enshrined the universal principle of non-refoulement in arts. 41 and 66 of the Constitution and directly applies a number of other international treaties that provide for or complement this principle. This principle has earned the status of a *jus cogens* rule, a peremptory norm from which derogation is never permitted.

The Constitution of Ecuador provides as follows in art. 41:

The right to asylum and refuge are recognized in accordance with the law and international human rights instruments. People who are recognized as refugees or asylees shall enjoy special protection to ensure the full exercise of their rights. The State shall respect and ensure the principle of non-refoulement, as well as humanitarian assistance and emergency law (...). [Emphasis added] [*unofficial translation*]

Subsequently, art. 66, paragraph 14 provides:

Foreign persons cannot be returned or expelled to a country where their life, liberty, security, or integrity, or that of their families, is

² Ecuador signed this Convention on February 4, 1985 and ratified it on March 30, 1988.

threatened on account of their ethnicity, religion, nationality, ideology, membership in a particular social group, or political opinion.

Similarly, art. 33 of the 1951 of the Geneva Convention on Refugees provides that:

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

The American Convention on Human Rights, ratified by Ecuador in 1977, also enshrines this principle, which is one of the backbones of the right to asylum.

Importantly, the Inter-American Commission on Human Rights considered that it had breached the principle of non-refoulement when several individuals were returned to their home country without having had **access to an appropriate process** regarding their refuge.³ [Emphasis added].

In Conclusion No. 6 on the non-refoulement principle, the Executive Committee of the High Commissioner on Refugees reaffirmed the fundamental importance of observing this principle with respect to persons who may be subject to persecution if they were returned to their country of origin, regardless of whether or not they have been formally recognized as refugees.⁴

It is important that we emphasize that the recommendations of this Committee denounce Ecuador’s violation of the non-refoulement principle due to flaws in domestic regulations and in practice., In its 2010 examination of reports submitted by Ecuador under Article 19, the CAT Committee warned the State precisely about the deportation of Colombian asylum seekers before they had received a reply to their appeal⁵, and recommended that the State party should, *inter alia*:

³*Id.*

⁴ UNHCR, Executive Committee, Conclusions adopted by the Executive Committee on the International Protection of Refugees, 1975 – 2009, p. 7; Available at <http://www.unhcr.org/refworld/pdfid/4b28bf1f2.pdf>, last visited 5 September 2012. Available in English at <http://www2.ohchr.org/english/bodies/cat/docs/A.66.44.pdf#page=10&zoom=auto,0,842>.

⁵ Committee Against Torture, United Nations, CAT/C/ECU/CO/4-6, 45th Session, 1-19 November 2010, “*Examination of the Reports presented by the States as parties to Article 19 of the Convention: Final*

Take the necessary steps to ensure that individuals within their jurisdiction are treated fairly at all stages of the asylum procedure and, in particular, are afforded an effective review, impartial and independent of the decision to expel, return or deportation.⁶.
[Emphasis added.]

Moreover, in the same report, the Committee also recommended the elimination of requirements established by state decree deemed discriminatory and against the principles of non-refoulement and confidentiality⁷, and recommended that the State examine the conformity of its legislation with principles of international law and human rights⁸.

In this communication, we will continue on to articulate certain problems faced by refugees in Ecuador today.

II. The deadline set by the 1182 Act, and its restrictive application by state officials, violates the principle of non-refoulement.

The 1182 Act provides that, upon entering the country, a person may seek only refuge within a term of 15 days from the date of entry⁹; any request made after that time shall not be accepted¹⁰. In addition, the Act does not provide for a right to challenge any asylum application that has been declared inadmissible for having been filed outside of said term.

While there is no specific time limit deemed reasonable for filing for asylum status, international jurisprudence indicates that **these limits should be flexible**. Under

Observations of the Committee against Torture: Ecuador, (“Examen de los informes presentados por los Estados partes en virtud del artículo 19 de la Convención: Observaciones finales del Comité contra la Tortura: Ecuador”), 20 January 2011, p. 5.

⁶ *Id.*, p. 6.

⁷ *Id.*, p. 4. Executive Decree No. 1471, from December 3, 2008, which established as a prerequisite to entrance to Ecuadorian territory for Colombian citizens the presentation of a criminal record certificate (“judicial history”) issued by the internal intelligence agency of the Executive Power of Colombia. The decree was partially modified in 2009; nevertheless, the Committee recommended that it be eliminated, opining that, in its judgment, the decree did not respect the principles of non-discrimination, non-refoulement, and confidentiality in the area of refugee rights.

⁸ *Id.*, p. 5.

⁹ 1182 Act, Art. 27.

¹⁰ *Id.*

UNHCR criteria, the failure to file the application within a specified period should not lead *per se* to preventing the application from being subject to due consideration¹¹. The European Court of Human Rights develops this theme in its judgment *Jabari v. Turkey*¹², declaring that the automatic and mechanical application of terms within which applications must be submitted is contrary to international protection standards¹³.

However, the 1182 Act provides that applications submitted after the 15-day term should be not admitted, i.e. should be systematically rejected. This contravenes standards of international law as prescribed by UNHCR guidelines. The time limits prescribed by Ecuador should be flexible according to UNHCR; although the tardy filing of an application may influence the credibility analysis in certain cases.¹⁴ It should not be denied completely. There should be an analysis of the applicant's fear¹⁵ that considers the grave danger, torture, or degrading or inhumane treatment to which refugees may be exposed if returned to their country of origin¹⁶ in violation of the non-refoulement obligation under Article 3 of the Convention Against Torture, Cruel, Inhuman and Degrading Treatment¹⁷, Article 66, Clause 14 of the Constitution¹⁸ and Article 31 of the Geneva Convention.

¹¹ UNHCR, Global Consultations on International Protection, *Asylum Processes: Fair and Efficient Asylum Procedures*, EC/GC/01/12, 31 May 2001, p. 5, par. 20.

¹² In this case, it was stipulated that a 5-day term and the mechanical and automatic application of the time limits limited the petitioner's right to be free of torture and of inhumane or degrading treatment.

¹³ "(...) In the Court's opinion, the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention." (Emphasis added)

¹⁴ UNHCR, Global Consultations on International Protection, *Asylum Processes: Fair and Efficient Asylum Procedures*, EC/GC/01/12, 31 May 2001, p. 5, par. 20.

¹⁵ *Id.*

¹⁶ See *Jabari v. Turkey*, European Court of Human Rights, 10 July 2000, par. 40.

¹⁷ Ecuador signed this Convention on February 4, 1985 and ratified it on March 30, 1988.

¹⁸ "Foreigners will not be returned or expelled to a country where their lives, liberty, safety or well-being or those of their families are endangered because of their ethnicity, religion, nationality, ideology, belonging to a given social group or their political opinions. (*"Las personas extranjeras no podrán ser devueltas o expulsadas a un país donde su vida, libertad, seguridad o integridad o la de sus familiares peligran por causa de su etnia, religión, nacionalidad, ideología, pertenencia a determinado grupo social, o por sus opiniones políticas."*) English translation is unofficial and cited, in part, from Georgetown University's Database of the Americas, available at: <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>, last updated 31 January 2011, last viewed 7 May 2013.

Furthermore, in practice, officers of Ecuador's Directorate of Refuge, the body that administers the right to asylum, incorrectly interpret this provision by counting the 15-day term as calendar days instead of business days. This constitutes a violation of the Statute of the Administrative Legal System of the Executive Function, which provides in Article 116 that all deadlines must be counted in business days.

As an example of this problem, and without prejudice to filing any formal complaint with the CAT Committee or any other international resource, we present the case of "CLAUDIA"¹⁹. A Colombian national, age 36, she entered Ecuador on December 30, 2012. On January 14, 2013, still within 15 days of arriving in the country, she attempted to file a refugee petition at the Directorate of Refuge at 7:30 a.m. However, the Directorate would not accept her petition, claiming that it would only serve 20 people per day. When she returned the next day, she received a notice of rejection of her claim for failing to file within 15 days.

III. Repeated rejection of applicants lacking identity documents

We often see cases of asylum-seekers without identity documents. While this should not be cause for rejection, the Directorate of Refuge is not even receiving their applications.

In this regard, UNHCR recognizes that

"often, however, an applicant may not be able to support his statements by documentary or other proof... In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents... In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt."²⁰

It also states that:

¹⁹ The names included in this document are pseudonyms, in order to protect the identity of the individuals so that their applications in Ecuador will not be harmed.

²⁰ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, par. 196. (henceforth, "Handbook on Procedures and Criteria") Available at: <http://www.refworld.org/docid/3ae6b3314.html>. Last viewed 7 May 2013.

Many States have faced a growing problem of asylum-seekers who arrive with no or forged documents...A number of States tend to presume such asylum applications are abusive and often subject them to expedited removal or other separate accelerated processing... A lack of appropriate documentation...does not alone render a claim abusive or fraudulent and should not be used to deny access to a procedure...²¹

Therefore, automatic rejection of an asylum-seeker for failing to present identification documents is a discriminatory provision that breaches the principle of non-refoulement, as is the requirement to provide a "police record," ²²which demands that "many people in need of international protection"²³ follow a procedure that could endanger their safety."²⁴ It is worth noting that the CAT Committee has recommended that the State remove discriminatory requirements that do not respect the principle of non-refoulement.²⁵

For example, and without prejudice to filing any formal complaint with the CAT Committee or any other international resource, we present the case of "WILLIAM", a 37-year-old Somali national. This case was rejected during the admissibility procedure of Ecuador's expedited proceedings for lack of identifying documents. The case consists of a child soldier who was able to defect. When he was 9, the armed group killed his Sutu parents in order to forcibly recruit him. He decided to defect because he did not agree with their actions. In retaliation, the Sutu group killed his 3-year old daughter, and his wife disappeared. He then fled to Congo, where he continued to be persecuted by the same group. The applicant's birth was never registered with the authorities of his country, which is why he lacked identity documentation.

We also helped submit the case of "OLIVIA", a Colombian who entered Ecuador on January 14, 2013. Upon arrival, her purse was stolen and she lost all of her

²¹ UNHCR, Global Consultations on International Protection, *Asylum Processes: Fair and Efficient Asylum Procedures*, EC/GC/01/12, 31 May 2001, p. 5, pars. 34 and 35. Available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3b36f2fca>, last visited 7 May 2013.

²² *Supra*, note 6.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*, p. 5.

identifying documents. She unsuccessfully attempted to submit her application to the Directorate of Refuge of the Ministry of Foreign Affairs, Trade and Integration of Ecuador. As she was told by the officer who attended her, her application was not received because she failed to supply any personal identification.

IV. The procedure established by the 1182 Act provides that a final decision must be issued before any deportation. It also specifically provides that the definitive instance is that which corresponds to the decision on an appeal.

The 1182 Act, in its second paragraph of art. 53, establishes the following procedure when cessation of a refugee visa is ordered: "Once the cessation has been served, the parties shall proceed according to the provisions of the second paragraph of art. 49 of this Regulation."*[Unofficial translation]*

The second paragraph of art. 49 provides:

Any person whose application for refugee status has been definitively denied, shall, in a period not to exceed 15 days, regularize her/his immigration status or leave the country. *[Unofficial translation]*

When an application for refugee status is definitively denied due to reasons corresponding to security or public order, the applicant must immediately leave the country. [Emphasis added] *[Unofficial translation]*

In this regard, art. 49 stipulates that the term "definitively denied" in its text refers to an appeal that has been denied or, if applicable, has not been presented. This definition is drawn from art. 47, which specifically provides that the definitive (or final) instance is that which corresponds to the decision on an appeal:

An appeal may be lodged in administrative fora, against decisions of the DR and the Commission. With respect to the resolutions issued by these bodies, the Minister of Foreign Affairs, Trade and Integration is competent, in second and final instance, and will issue a decision within two months from the date of filing. This appeal decision on refugee claims terminates the administrative proceedings and the applicant must be deported.

While an appeal is pending, the person may remain in the country until there is a final decision. (Emphasis added) [*Unofficial translation*]

Therefore, the 1182 Act provides for deportation after refusal of an appeal. Moreover, the Ecuadorian Constitution, in Art. 76, paragraph 7, guarantees the right to due process, including the guarantees to "b) Have the time and means to prepare one's defense" and "m) Appeal the judgment or ruling in all proceedings in which a decision is made on one's rights." [*Unofficial translation*] These considerations, supported by the Commission's case law²⁶ and by the CAT Committee's recommendations to the State²⁷, constitute a presumption in favor of the asylum-seeker; until it is established that the person does not meet the requirements set in the 1951 Convention, he or she must be treated as a refugee. Therefore, a presumption must be applied in favor of the asylum-seeker until it is decided, in the final instance, that he or she is not a refugee²⁸. Prior to that final determination, the refugee in this instance is still a refugee.

Nevertheless, by way of example and without prejudice to any submission of a formal complaint before an international body, we wish to highlight the cases of "Gary" and his son, "James", two Colombian nationals and residents of the village of Sandi Yacu in the Putumayo Canton, who were once recognized as refugees by the Ecuadorian state. On Saturday, October 20, 2012 both were intercepted and detained by members of the armed forces while shelling corn on their porch.

On October 23, 2012, the Commission that determines the Status of Refugees in Ecuador resolved in a single notification to cease both their respective refugee statuses and issued Resolution No. 097/25R 2012, which was served upon them same day by the Sucumbíos Police Intendant, via Official Letter No. 552-DR-LA. One minute later, the General Intendant of the Police of Sucumbíos issued the order for deportation. Specifically, at 3:59 p.m., the Police Intendant received a resolution

²⁶ *Supra*, note 3

²⁷ *Supra*, note 4.

²⁸ Hathaway, James, *The Rights of Refugees Under International Law*, Cambridge University Press, p. 159 (citing UNHCR, Note on International Protection," UN Doc. A/AC.96/815 (1993), par. 11 "Every refugee is, initially, an asylum-seeker; therefore, to protect refugees, asylum seekers must be treated on the assumption that they may be refugees until their status has been determined.")

providing for the cessation of the detainees' refugee status, and at 4:00 p.m., the Intendant issued the deportation order, which was forwarded to the Immigration Police barely an hour later. Based on this order, Gary and James were transferred to the border town of Tulcan that very night at about 9:30 p.m., only 17 hours after the Commission's decision to cease their refugee visas, thereby precluding their respective rights to appeal the decision of the Police Intendant.

In ordering the deportation of these men within minutes after the cessation resolution and in depriving them of the opportunity to challenge the decision, the State infringed upon the procedure provided for in 1182 Act and the principle of non-refoulement. That is, the immediate deportation of these refugees violated their right to appeal. In this case, the refugees were denied the simple opportunity to present an appeal, as both were deported within 24 hours the cessation of their respective refugee statuses.

The Women's Federation of Sucumbíos filed a formal complaint with the Ombudsman's Office regarding this case. AAE provided an amicus brief in support of this complaint, expanding on aspects related to refuge.

V. Considerations Regarding Extraordinary Review Recourses in Refugee Proceedings under Ecuadorian Administrative Law

In addition, it is noteworthy that, apart from the ordinary appeal, the 1182 Act provides for the presentation of an Extraordinary Review Recourse [*Recurso Extraordinario de Revisión*] as a last resort, in the event that substantive or procedural flaws are proven in the administrative process of a refugee case. However, the filing of such an appeal is not protected by the principle of non-refoulement nor does it suspend a possible deportation; this is in violation not only of the right to non-refoulement, but also of the right to a defense.

As stated in Article 50 of 1182 Act:

The decision rendered shall ultimately be subject to an extraordinary review recourse. However, this does not preclude deportation of a person who has been refused asylum, except in cases where there is a more than evident wrongdoing by the Commission in the respective procedure.

In this regard, Article 178 of ERJAFE establishes that within an Extraordinary Review:

“[T]he administered parties [...] in the case of decisions issued by these bodies [public administration bodies...] may request that the ministers of State and the highest authorities of the autonomous Central Public Administration review actions or final decisions when any of the following causes arise: a) Decisions issued with obvious error of fact or law that is clear from the record or from express legal provisions b) When, subsequently, documents appear with transcendental value that were ignored when the decision or act in question was issued, [...]” [*Unofficial translation*]

Although it is clear that this resource may result in important changes in the erroneous decisions made in a refugee proceeding, there is no guarantee of the applicant's presence in the country during the time in which the decision is pending. Instead, the petitioner is forced to either remain in the country in an undocumented state, be deported or refouled without any guarantee of his or her safety, even though the decision is clearly not yet final.

On October 26, 2012, AAE filed a constitutional challenge precisely aimed at this article of the 1182 Act. The action was admitted to substantive review on March 14, 2013, and AAE is monitoring the constitutional process in an effort to obtain the repeal of this article.

VI. Conclusion

Denying access to the refugee status determination process, and deporting a refugee prior to a final decision violate the principle of non-refoulement under the Constitution and international human rights instruments. In accordance with the observations of the CAT Committee, Ecuador continues to violate the right to non-refoulement in both its regulations and in practice.

VII. Specific Request

NOTING THAT these cases involve and are representative of a breach of the principle of non-refoulement to the detriment of refugees and asylum-seekers in Ecuador,



WE DEMAND a review of state responsibility for its arbitrary actions and violations of the following rights caused by the above-referenced actions: the right to a final decision before any deportation, the right to appeal, the right to due process, and the principle of non-refoulement. The Ecuadorian government must be asked to take the necessary measures to ensure these rights;

WE ASK that the United Nations High Commissioner for Refugees consider presenting an advisory opinion on the above-referenced situation and the legal duties of the State offices.

Sincerely,
Carmen E. Atkins
Coordinator of Strategic Litigation