AMICUS CURIAE BRIEF PRESENTED TO
THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

BY

THE INTERNATIONAL HUMAN RIGHTS CLINIC OF THE LOYOLA LAW SCHOOL LOS ANGELES

in support of the

Petition filed on 22 September 2011 by Jeimmy Rodriguez, legal tutor of Linda Rodriguez, against Ecuador.

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Prof. Cesare P.R. Romano
Joseph W. Ford Fellow
Director, International Human Rights Clinic
Co-Director, Project on International Courts and Tribunals (PICT)
Loyola Law School Los Angeles
919 Albany Street
90015 Los Angeles, CA
Tel: 213-736.8198
Email: cesare.romano@lls.edu
Interest of Amicus Curiae

The International Human Rights Clinic of Loyola Law School Los Angeles is a program that gives students first-hand experience in human rights advocacy under the supervision of international human rights lawyers. The Clinic undertakes litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses throughout the world. Prof. Cesare Romano is the director of the clinic. Prof. Romano has supervised the preparation of this brief by one of his students, Mr. Karl Durow.

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I. Introduction

This amicus brief delineates the protections accorded to refugees under international law, and in particular the special protections that States must afford refugees who are women and children.

All refugees are inherently a vulnerable group enjoying special international and domestic law protections. The primary international law protections afforded to refugees can be found in the 1951 Convention Relating to the Status of Refugees (also referred to as “Refugee Convention”). Additionally, refugees also derive protection from other treaties, most relevantly in the context of the case of L.R. are: The International Convention on the Elimination of All Forms of Racial Discrimination; The International Convention on Civil and Political Rights; The International Convention on Economic, Social and Cultural Rights; The UN Convention on the Elimination of All Forms of Discrimination Against Women; and the UN Convention on the Rights of the Child.

According to the 2008 Constitution of the Republic of Ecuador, the special protections refugees enjoy must be provided, “... in accordance with the law and international human rights instruments.” In other words, existing international law instruments provide guidance as to what specific protections must be given to refugees.

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7 Constitution of the Republic of Ecuador, 20 October 2008, Art. 41: «Se reconocen los derechos de asilo y refugio, de acuerdo con la ley y los instrumentos internacionales de derechos humanos. Las personas que se encuentren en condición de asilo o refugio gozarán de protección especial que garantice el pleno ejercicio de sus derechos. El Estado respetará y garantizará el principio de no devolución, además de la asistencia humanitaria y jurídica de emergencia. No se aplicará a las personas solicitantes de asilo o refugio sanciones penales por el hecho de su ingreso o de su permanencia en situación de irregularidad. El Estado, de manera excepcional y cuando las circunstancias lo ameriten, reconocerá a un colectivo el estatuto de refugiado, de acuerdo con la ley ». Article
Moreover, while all refugees are particularly vulnerable, and thus afforded special protection as a matter of international law, refugees that are also female and/or children require further enhanced special protection. L.R. is a refugee, a female, and a child, and thus her need for special protection is tri-fold. Arguably, it is even four-fold, as L.R. is also the victim of a crime.  

The Constitution of Ecuador (2008) recognizes that certain vulnerable individuals need multiple special protections.  

Thus, this brief first lays out the general protections that States must afford refugees as a matter of international law. Second, we address the special protections female refugees must be given. Third, we describe the special protections that minors must be given. Lastly, we conclude by emphasizing the protections that Ecuador should provide L.R. and the contention that her case should be prioritized.

II. General Protections for Refugees

To begin with, States have a general obligation to safeguard the human rights of anyone subject to their jurisdiction, whether they are nationals or non-nationals and regardless of their status. This obligation stems from several international human rights legal instruments, including, but not limited to: the Universal Declaration of Human Rights, the American

423.5 of the 2008 Constitution is also relevant: « La integración, en especial con los países de Latinoamérica y el Caribe será un objetivo estratégico del Estado. En todas las instancias y procesos de integración, el Estado ecuatoriano se comprometerá a ... propiciar la creación de la ciudadanía latinoamericana y caribeña; la libre circulación de las personas en la región; la implementación de políticas que garanticen los derechos humanos de las poblaciones de frontera y de los refugiados; y la protección común de los latinoamericanos y caribeños en los países de tránsito y destino migratorio. »

8 Ibid. Art. 78. Article 78 of the Constitution provides: “The victims of criminal offenses shall benefit from special protection; guarantees shall be provided to them for preventing their revictimization, especially in obtaining and assessing the evidence; and they shall be protected against any threat or other forms of intimidation. Mechanisms shall be adopted for integral reparation, which shall include, without delay, knowledge about the truth of the facts and restitution, compensation, rehabilitation, guarantee of non-repetition, and satisfaction with respect to the infringed right.”

9 Ibid. Art. 35. Article 35 of the Constitution provides: “Elderly persons, girls, children and adolescents, pregnant women, persons with disabilities, persons in prison and those who suffer from disastrous or highly complex diseases shall receive priority and specialized care in the public and private sectors. The same priority care shall be received by persons in situations of risk, victims of domestic and sexual violence, child mistreatment, natural or manmade disasters. The State shall provide special protection to persons who are doubly vulnerable.”

10 The Universal Declaration of Human Rights; Adopted on 10 December 1948.
Declaration of Human Rights,11 the International Covenant on Civil and Political Rights,12 the American Convention on Human Rights,13 and many others. Thus, as a matter of customary international law, all States must protect refugees within their jurisdiction.14 Additionally, States have a positive obligation to guarantee an effective remedy to violations of human rights.15 Moreover, the American Convention imposes an obligation to remedy the consequences of human rights violations.16 Therefore, States must actively protect against human rights violations and also remedy violations that have already transpired.

The 1951 Convention relating to the Status of Refugees is the main international legal instrument detailing the rights of refugees and the obligations of States in this regard. To date, it has been ratified by 144 States.17 Ecuador acceded to the Refugee Convention on August 17, 1955, and it must comply with its terms, as a matter of both international law and the Ecuadorian Constitution.18

The Refugee Convention defines refugees and sets forth several specific crucial protections they are entitled to. In the case of L.R. the most important are the rights to non-discrimination (Article 3), the right to public relief and assistance (Article 23), and the right to free access to courts of law on the territory of all States parties to the convention (Article 16).19 These are rights that all refugees have. Yet in addition to these, female refugees are recognized special protections.

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11 The American Declaration of Human Rights; Adopted on April 1948. It should be noted that the Cartagena Declaration on Refugees, adopted by the Organization of American States on 22 November 1984, calls on, “... States parties to the 1969 American Convention on Human Rights to apply this instrument in dealing with asilados and refugees who are in their territories.” Cartagena Declaration on Human Rights; Adopted on 22 November 1984. Part III. 10.
12 Supra note 3.
15 Supra note 10, Art. 8.
16 Supra note 13, Art. 63.
17 UN High Commissioner for Refugees; States Parties to the Convention and Protocol, April 2011, available at: http://www.unhcr.org/3b73b0d63.html [accessed 24 February 2012].
18 Supra note 7, Art. 417.
19 Supra note 1, Art. 3, 23, and 16.
III. Special Protections for Female Refugees

The guidelines of the Office of the United Nations High Commissioner for Refugees on the protection of refugee women declares that, “...refugee women and girls have special protection needs that reflect their gender: they need, for example, protection against manipulation, sexual and physical abuse and exploitation, and protection against sexual discrimination in the delivery of goods and services.”\textsuperscript{20} The Office of the United Nations High Commissioner for Refugees (UNHCR) is an agency created by the United Nations General Assembly to oversee the protection of refugees throughout the world.\textsuperscript{21} These specific guidelines have been issued to guide States as to how they should discharge their obligation to provide female refugees special protection. One of the UNHCR goals is to, “...promote or provide legal and physical protection, and minimize the threat of violence - including sexual assault - which many refugees are subject to, even in countries of asylum.”\textsuperscript{22}

The Guidelines on Prevention and Response to sexual violence against refugees lay out many special protections that States should afford female refugees.\textsuperscript{23} Specifically, in Annex 4 of those Guidelines, entitled “Executive Committee Conclusion”, the UNHCR directs States to create and enforce specific measures to prevent and combat sexual violence including implementing non-discriminatory legal remedies for victims and to prosecute offenders; providing victims and families with medical and psychological care; treating victims with enhanced sensitivity; and to use female field staff to work with victims.\textsuperscript{24}

The UNHCR also specifically urges States to combat impunity and instructs its staff to do so: “Refugee workers and their organizations should stress to the authorities their duty to

\textsuperscript{21} UN High Commissioner for Refugees; What we Do, available at: http://www.unhcr.org/pages/49c3646cbf.html [accessed 24 February 2012].
\textsuperscript{22} UN High Commissioner for Refugees; Safety Net, available at: http://www.unhcr.org/pages/49c3646cc8.html [accessed 24 February 2012].
\textsuperscript{23} Supra note 14.
\textsuperscript{24} Ibid. Annex 4: UN High Commissioner for Refugees Executive Committee Conclusion NO. 73 (XLIV) (1993) on Refugee Protection and Sexual Violence. [Additional protections enumerated in Annex 4 include: developing training programs to protect against sexual violence and promoting activities that stress the rights of refugee women].
investigate, prosecute and punish perpetrators of sexual violence.”25 It urges States to respect and ensure the fundamental right of all individuals within their territory to personal security, inter alia, “...by enforcing relevant national laws in compliance with international legal standards and by adopting concrete measures to prevent and combat sexual violence...”26 In other words, the UNHRC makes clear that prosecution and enforcement is a paramount aspect of ensuring special protection for female refugees. Ecuador must be particularly vigilant in its efforts at prosecution and enforcement in the context of sexual violence against female refugees lest it would violate its international obligations.

Yet, refugees, and in particular female refugees, derive protections from other international law instruments and from customary international law, and these sources of law furthermore provide protections against sexual violence. Indeed the UNHCR makes this point clear: “International law prohibits sexual violence. This prohibition is found in several international human rights instruments as well as in customary international law.”27 Amongst the many international instruments relevant to sexual violence, one should include the following:

i. Universal Declaration of Human Rights (1948);28

ii. The International Covenant on Civil and Political Rights (1966);29

iii. The International Covenant on Economic, Social and Cultural Rights (1966);30

iv. The Convention on the Elimination of All Forms of Discrimination against Women (1979);31

v. The UN Convention against Torture and Other Cruel, Inhuman or Degrading

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25 Ibid. Section 2.3 [italics added].
26 Ibid. [italics added].
27 Ibid. Section 4.2.
28 Supra note 10, Art. 3 and 5.
29 Supra note 3, Art. 7, 9, and 10.
30 Supra note 4, Art. 12.
31 Supra note 5, Art. 6.
Treatment or Punishment (1984),\(^{32}\)


vii. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994) ("Convention of Belém do Para").\(^{34}\)

It should be noted that in 1992, the Committee on the Elimination of Discrimination against Women, the UN body in charge of supervising implementation of the Convention on the Elimination of Discrimination against Women (CEDAW), issued a General Recommendation specifically on violence against women.\(^{35}\) The CEDAW Committee stated that gender-based violence is a form of discrimination, which seriously inhibits a woman's ability to enjoy rights and freedoms on an equal basis with men. It defined gender-based violence as that which is directed against a woman because she is a woman or which affects women disproportionately. It included "sexual harm or suffering" and "threats of such acts" as constituting gender-based violence and it concluded that: "Gender-based violence may breach specific provisions of the Convention, regardless whether those provisions expressly mention violence."\(^{36}\)

Additionally, it is also pertinent to note that the Inter-American Commission on Human Rights recognizes that women face particularized vulnerabilities and thus may require special protections, as the Commission reminds States to, “…take affirmative action as a temporary measure in order to diminish or eliminate conditions which cause or help to perpetuate discrimination, including vulnerabilities, disadvantages or threats encountered by particular groups such as minorities and women.”\(^{37}\)

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\(^{32}\) The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Entered into Force 26 June 1987. Ecuador ratified it on 30 March 1988.

\(^{33}\) Supra note 13, Art. 5 and 7.


\(^{36}\) Ibid. Section 6.

In sum, it is apparent that female refugees have the right to special protections above and beyond those normally afforded to refugees that derive from these various sources.

IV. Special Protections for Minor Refugees

As with female refugees, minor refugees also are a particularly vulnerable class of refugees and are also entitled to special protections above and beyond those normally afforded to refugees. “Because of their dependence, their vulnerability and their developmental needs, all children, including refugee children, require special protection and care to realise their potential.”

Again, the UNHCR details what specific obligations States have when discharging their duty to provide special protection to children refugees, including ensuring that minors are protected from physical abuse and monitoring for indications of abuse.

Refugees, and in particular children refugees, derive protections from other international law instruments and from customary international law. Amongst the many international instruments relevant, one should mention the Convention on the Rights of the Child, and in particular, the Refugee Convention’s section on the principle of the unity of the family.

Ecuador should pay particular attention to the duty, under Article 19.1 of the Convention on the Rights of the Child, “...to protect the child from all forms of physical or mental violence ... including sexual abuse...”, Art. 34, “... to protect the child from all forms of sexual exploitation and sexual abuse.”, and part B of the Refugee Convention, “...take the necessary measures for... the protection of refugees who are minors, in particular unaccompanied children and girls.”

39 Ibid. pp. 99-101 [Additional protections include: promoting minor’s rights generally, promoting education programs for refugees, sharing information regarding human rights violations with NGOs and UNHCR, ensuring that children are not detained unlawfully, promoting access to play, ensuring that minors have access to status determination, ensuring access to food, water and shelter, and helping minors stay with their families.]
40 Supra note 6, Art. 19, 24, 34, 37, and 39.
41 Supra note 1, Part B(2) (Principle of Unity of the Family).
Thus it is clear that international law recognizes that minors are particularly vulnerable and require special protections, including protection from sexual violence. Indeed, the Inter-American Commission on Human Rights also recognizes that minors need special protections, as it considers a victim’s status as a minor as an aggravating circumstance that, “…under Article 19 of the Convention, is to be afforded special protection.”42 The international law provisions that provide protections for minors apply, mutatis mutandis, to minor refugees. However, these special protections are ineffectual if States do not comport with them and if States do not diligently safeguard these rights with adequate legal proceedings.

V. Conclusion

In sum, there are several layers of legal protection for refugees, from customary international law and human rights in general, to specific treaties, the principal of which is the 1951 Refugee Convention. It is also clear that female refugees enjoy special protection and that children enjoy special protection too. The status of L.R. as a refugee who is female, a child, and a victim of a crime, creates a four-fold obligation for Ecuador to provide her with the guarantees required by international law and the Ecuadorian 2008 Constitution. Ecuador must provide meaningful adjudicative proceedings for refugees who seek to uphold their rights. Moreover, because L.R. is a minor, her case is aggravated and thus should be prioritized, due to her heightened vulnerabilities as a child seeking redress for especially grave human rights violations.