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The eye of the beholder: Asylum adjudication by diplomatic authorities in Latin America

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Abstract:

Adjudication on territorial asylum claims is considered to be one of the most difficult forms of legal decision-making, a fact which is further complicated by the lack of substantive guidance in international instruments as to minimum standards regarding the nature of the adjudicator. In this context, some States in Latin America have adopted procedures that are either carried out by their Ministries of Foreign Affairs or by inter-institutional committees where they hold prominent positions, which leads to the situation where the body charged with maintaining relations with foreign nations also has to determine whether they persecute their citizens, violate their fundamental rights or are unwilling or unable to protect them from the actions of third parties. The purpose of this article is to analyse the origins and implications of this situation and respond to the lack of research in this field, through both legal analysis and preliminary original research conducted in collaboration with NGOs working with asylum-seekers in the region. The author argues that this practice, which has recently received attention due to the Snowden case, leads to unfairness in adjudication and to the use of asylum as a foreign policy tool, consequently breaching both universal and regional legal obligations.

Keywords: Refugee Status Determination, asylum adjudication, Latin America, foreign policy, Edward Snowden

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Introduction

In August 2012 the world was introduced to the strange realm of asylum[1] in Latin America, in which the institutions of diplomatic and territorial asylum intertwine. Julian Assange, founder of the Wikileaks website, lost his bid before the UK Supreme Court to stop his extradition to Sweden[2], where he was under investigation for alleged sexual offences. Fearing this was a ruse to allow his eventual transfer to the United States for punishment for revealing classified information, he sought protection at the Ecuadorean Embassy in London, where he was later granted diplomatic asylum[3], sparking a row between both nations. As of early 2014, he continues to reside within the embassy, surrounded by both members of the press and UK security officers.

A few months later Edward Snowden, an analyst in the intelligence sector in the United States, leaked documents that allegedly proved that the Government was engaged in continued efforts to spy on its citizens and allied nations. These disclosures caused considerable domestic and diplomatic embarrassment for the U.S., and charges were brought against him. After fleeing to Russia, it was revealed that he was seeking asylum in Ecuador, causing tension between the three countries[4] and opening a new window into the generally secretive relation between asylum and foreign policy in Latin America.

Having received the request, the Ecuadorean Ambassador in Washington issued a statement declaring that the asylum request would be reviewed 'responsibly', as its 'legal basis' should be 'rigorously established' in accordance to his State's human rights obligations and other relevant national and international norms.[5] A few days later, however, the Minister of Foreign Affairs noted during a press conference that when deciding whether to grant Snowden asylum he would take into account his country's relationship with the United States.[6] Ecuador ultimately declared it would not offer Snowden asylum after hinting at the fact that the situation was being controlled by Assange.[7]

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[1] A working definition for the purposes of this article is that 'Asylum can be considered to relate to the provision of protection to refugees who reach the territory of that state' (Gil Loescher and Alexander Betts (eds.), Refugees in International Relations (OUP 2011), 27). A similar definition is provided in (Institut de Droit International, 'L'asile en droit international public (à l'exclusion de l'asile neutre)' [1950] 43 (II) AIDI, 375). The general term covers several forms of international protection and is understood to include admission and legal permanence in the host country and protection from return to the country of origin (Roman Boed, 'Right of asylum' [1994] 5 (1) Duke J. Comp. & Int'l L 1, 3).

[2] *Assange v Swedish Prosecution Authority* [2012] UKSC 22.

[3] Ministerio de Relaciones Exteriores, Comercio e Integración, 'Declaración del Gobierno de la República del Ecuador sobre la solicitud de asilo de Julian Assange' (16 August 2012) <http://www.webcitation.org/69xdGRSLN> accessed 31 July 2013.

[4] Renee Montagne, 'For Edward Snowden, a convoluted path to possible asylum' *National Public Radio* (24 June 2013) <http://www.npr.org/2013/06/24/195172970/for-edward-snowden-a-convoluted-path-to-possible-asylum> accessed 31 July 2013.

[5] Embassy of Ecuador to the United States, 'Statement by Ambassador Efrain Baus, Chargé d'Affaires A.I., on asylum request by Edward Snowden'. (Washington, 26 June 2013) <http://www.ecuador.org/blog/?p=2999> accessed 27 June 2013.

[6] David M. Herzenhorn and Rick Gladstone, 'Ecuador Hints at Slow Process on Snowden Asylum' *New York Times* (New York, 27 June 2013) <http://www.nytimes.com/2013/06/27/world/snowden.html?hpw> accessed 27 June 2013.

[7] Rory Carroll and Amanda Holpuch, 'Ecuador cools on Edward Snowden asylum as Assange frustration grows' *The Guardian* (London, 28 June 2013) <http://www.guardian.co.uk/world/2013/jun/28/edward-snowden-ecuador-julian-assange> accessed 9 July 2013.

A few days later, Evo Morales, the Bolivian president, stated during a visit to Moscow that he was considering granting Snowden asylum. After the visit ended and while he was flying back to Bolivia, his aircraft was forced to make an emergency landing in Austria after several European countries denied access to their airspaces, having been informed that Snowden was on board. After the plane was inspected and the rumours proved to be unfounded, president Morales denounced the situation as an 'aggression' and later stated that, 'in just protest' he would 'now grant asylum to that North American persecuted by his compatriots. We have no fear'[8]. Echoing his call, the Venezuelan president, taking a cue from his predecessor's 'anti-imperialistic' rhetoric, offered Snowden asylum to shield him from 'persecution from the empire'[9].

These declarations, and the media frenzy that followed them, offered an insight into the world of asylum adjudicators in Latin America, a field that has received little attention from scholars in the field of forced migration studies. But most of all, they demonstrated in a very crude way how territorial asylum, which should be apolitical and humanitarian[10], is tainted by foreign policy concerns in the region – an unsurprising conclusion considering the role of diplomatic bodies in adjudicating claims.

Without diminishing the personal drama behind his story, Snowden is just one man, and the diplomatic calculations that lie behind a State's decision to deny or grant asylum also affect thousands of asylum-seekers in the region each year. Most of their claims do not benefit from the oversight of the media, or in many cases, any oversight at all. This paper will demonstrate that the Snowden case is but a well-publicised example of a systematic issue that affects asylum-seekers in the region and exposes them to arbitrary decision-making, denying them the essential right of being heard by an impartial adjudicator.

To this effect, Chapter I will give a short introduction to the intricacies of decision-making in asylum claims and the difficulties inherent to this form of adjudication. Chapter II will briefly outline the current state of international protection in Latin American countries, identify those where diplomatic authorities play a role in the process, and analyse the evolution and origins of this institutional design. Building on these premises, Chapter III will show that a) diplomatic asylum has adversely affected the region's approach to other forms of international protection, before moving to demonstrate that b) the identity of the decision-maker affects impartiality, and that c) foreign policy considerations further diminish impartiality.

Therefore, it is contended that a decision-maker that has been traditionally linked to diplomatic asylum and that is in charge of a State's foreign affairs is extremely prone to partial decision-making, prioritising foreign policy goals over the individual merits of a case. This hypothesis is supported by preliminary original research conducted with the collaboration of NGOs in the region. In light of the above, Chapter IV argues that this outcome is contrary to international human rights obligations, including those contained in

[8] Translated from Spanish by the author (El Día, 'Morales dice que "como justa protesta ahora daremos asilo" a Snowden' *El Día* (Buenos Aires, 6 July 2013) <http://www.eldia.com.ar/edis/20130706/Morales-dice-como-justa-protesta-ahora-daremos-asilo-Snowden_-20130706152518.htm> accessed 9 July 2013).

[9] Daniel Arkin and F. Brinley Bruton, 'Venezuela: Snowden has until Monday to respond to asylum offer' *CNBC* (7 July 2013) <http://www.cnbc.com/id/100868360> accessed 31 July 2013.

[10] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Refugee Convention).

the Inter-American regime, and Chapter V offers legal and policy recommendations to correct this situation.

I. The importance of 'getting it right' in asylum adjudication

Evaluating the impact of foreign policy on asylum claims implies, first and foremost, recognizing that it occurs in a particularly complex context. Indeed, adjudication of asylum claims is held to be one of the most difficult forms of legal decision-making[11]. Claimants are necessarily foreigners and in many cases fail to understand the language, culture and legal system of their host country. Additionally, due to the fact that their migration was forced, they often exhibit psychological trauma[12] that may impact even their ability to recall the facts that led to their flight[13] and generally have little or no evidentiary support to back their claims.

This, in turn, leaves a wide margin of consideration to the decision-maker, who must rely on third party sources to corroborate the information he or she is provided with and on a personal evaluation of the claimant's credibility, in which translation can make a considerable difference. It is only after clearing these hurdles that he or she can approach domestic and international norms and try to apply them. For all of these reasons, an extreme burden of care, diligence and professionalism is placed upon the decision-maker[14] if he or she is to come to a fair decision that adequately upholds the law and addresses the individual needs of the applicant. Consequently, 'the importance of 'getting it right' cannot be overestimated'.[15]

The two essential prerequisites for this to happen are, obviously, the existence of a relevant norm and a procedure to determine whether it is applicable to an individual case. Regarding the first requirement, it seems only natural that a State is bound to decide strictly within the international and national norms to which it has subscribed[16]. The procedure to do so, namely, Refugee Status Determination is open for debate, as the 1951 Convention[17] and its Protocol[18] are silent on the matter, giving each State the discretion to establish the procedure and the decision-maker as it sees fit[19]. Decision-making in other forms of international protection, such as complementary protection and non-refoulement in cases where there is a risk of torture, has been largely integrated into mechanisms for refugee protection, and is therefore also affected by the lack of treaty-level procedural standards[20].

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[11] Cécile Rousseau, Francois Crépeau, Patricia Foxen and France Houle, 'The complexity of determining refugeehood: a multidisciplinary analysis of the decision-making process of the Canadian Immigration and Refugee Board' [2002] 15 (1) JRS 43.

[12] Jane Herlihy and Stuart W. Turner, 'The psychology of seeking protection' [2009] 21 (2) I.J.R.L. 171.

[13] Hilary Evans Cameron, 'Refugee status determinations and the limits of memory' [2010] 22 (4) I.J.R.L. 469.

[14] Advocates also play a substantial role in making sure international norms are brought down to national contexts and properly applied to individual cases (Jacqueline Babha, 'Internationalist gatekeepers? The tension between asylum advocates and human rights' [2002] 23 Immigr. & Nat'lity L. Rev. 159).

[15] Brian Gorlick, 'Improving decision-making in asylum determination' [2005] New Issues in Refugee Research Working Paper No. 119, UNHCR/EPAU, Geneva, 3.

[16] Danièle Joly, *Heaven or Hell: Asylum policies and refugees in Europe* (Macmillan 1996).

[17] 1951 Refugee Convention (n 9).

[18] Protocol relating to the status of refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (Refugee Protocol).

[19] UN High Commissioner for Refugees, 'Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the status of refugees' [1992]. See also UNHCR 'Note on determination of refugee status under international instruments' (24 August 1977); Guy S. Goodwin-Gill and Jane McAdam, *The refugee in international law* (3rd edition, OUP 2007), 54.

[20] With notable exceptions, such as the Common European Asylum System (Commission (EC), 'Green paper on the future Common European Asylum System' COM (2007) 301 final).

Evidently, this leads to different approaches and different conclusions across jurisdictions and even within them, and makes consistency difficult. When all of these factors are considered, the result is that a disproportionate amount of discretion is granted to the adjudicator, and therefore *who* he or she is has a direct impact on the decision: asylum is in the eye of the beholder. Nowhere is this truer than in Latin America.

II. The decision-maker in Latin America

As States are presumed to have the faculty to establish their own procedures for determining protection needs[21], there are many different institutional arrangements across the globe. Some States have supported independent government agencies or court systems, while others have established international protection sections within their immigration agencies.

Yet other States, especially in Latin America, have established their asylum adjudication system within their Ministries of Foreign Affairs (MOFAs) – as in the case of Colombia[22], Ecuador[23], Paraguay[24] and Uruguay[25] – or as a collective organ where members from different agencies, including a representative of the MOFA, are seated – as in the case of Argentina[26], Bolivia[27], Brazil[28], Chile[29], Costa Rica[30], Guatemala[31], Nicaragua[32] and Panama[33]. Belize[34] and Honduras[35] are the only States in the region with a system where the decision is taken by a body that is completely isolated from the MOFA. Lastly, Mexico has an independent system where the MOFA provides an opinion on the case[36] and El Salvador has a *sui generis* two-man committee headed by the Minister of Foreign Affairs[37] that places it closer to the second group. Guyana is not a party to the universal instruments and does not have any domestic procedure in place.

The following table summarizes the current adjudicatory systems in the region:

Table 1. Institutional design in asylum adjudication in Latin America

Institutional arrangement	**States**
GROUP A: Asylum adjudication within MOFA	Colombia, Ecuador, Paraguay, Uruguay
GROUP B:	Argentina, Bolivia, Brazil, Chile, Costa Rica,

[21] UNHCR Handbook (n 19) 189. See also James C. Hathaway, 'A reconsideration of the underlying premise of refugee law' [1990] 31 (1) Harv. Int'l. L. J. 163.
[22] Decreto 4503 de 2009.
[23] Decreto 1182 de 2012.
[24] Ley No. 1938 de 2002.
[25] Ley No. 18.076 de 2007.
[26] Ley No. 26.165 de 2006.
[27] Ley de refugio No. 251 de 2012 and Decreto Supremo No. 1440 de 2012.
[28] Lei No. 9.479 de 1997.
[29] Ley No. 20430 de 2010 and Decreto 837 de 2011.
[30] Ley No. 8764 de 2009.
[31] Acuerdo Gubernativo No. 383 de 2001.
[32] Ley No. 655 de 2008 de protección a refugiados.
[33] Decreto Ejecutivo No. 23 de 1998.
[34] 1991 Refugees Act.
[35] Decreto-Ley No. 2008 de 2003.
[36] Ley sobre refugiados y protección complementaria, 2011.
[37] Decreto 918 de 2002.

Asylum adjudication outside MOFA but with MOFA participation or direction	El Salvador, Guatemala, Mexico, Nicaragua, Panama
GROUP C: Asylum adjudication independent of MOFA	Belize, Honduras

For the purposes of this study, I have focused on Group A and Group B States, as the direct involvement of diplomatic authorities suggests that they have a higher risk of having diplomatic interests interfere in decision-making. The available evidence indicates that there is no significant difference between these two groups when it comes to the impact on individual cases, but the question is certainly open for further research.

From this data it is apparent that the overall trend in Latin America is a prevalence of direction or involvement of the MOFA in determining eligibility for the different forms of international protection. As the next chapter will illustrate, this may be explained due to a regional tradition of relying on *diplomatic asylum* (a term interchangeably used with *political asylum* in Latin America) as a means of international protection[38], a practice that predates International Refugee Law (*territorial asylum*)[39]. Under this figure, a State protects a third-party national (the *asylee*[40]) from persecution by his State due to political offences through the use of its diplomatic organs, in a decision of a political nature[41]. The intertwining between both institutions – which are guided by different principles and follow very different objectives – considerably weakens territorial asylum.

III. The eye of the beholder: The role of the decision-maker and foreign policy

Having analysed the institutional design that is prevalent in Latin America, I will proceed to study the three factors that affect impartial decision-making in the region: the influence of the tradition and mind-set behind diplomatic asylum, the role that the decision-maker plays in the outcome of a case, and the effect of foreign policy considerations. All of these components have led to a system that strongly privileges foreign policy interests over the needs of international protection.

i. The intersection with diplomatic asylum

One of the main factors that reduce the impartiality of asylum adjudication in the region is its tradition of relying on diplomatic asylum and the institutional design that makes it possible. This tradition can be clearly noted when studying the regional and sub-regional instruments on diplomatic asylum, such as the 1889 *Treaty on International Criminal Law* (Tratado de Derecho Penal Internacional)[42], the 1928 *Convention on Asylum* (Convención

[38] Francisco Galindo Vélez, 'El asilo en América Latina: Uso de los sistemas regionales para fortalecer el sistema de protección de refugiados de las Naciones Unidas' in ACNUR, *La protección internacional de refugiados en las Américas* (ACNUR 2011) 173. See also Comisión Interamericana de Derechos Humanos, *Informe anual* 1981-1982, Cap. VI B. 2.

[39] For the different usages of the term asylum see Roman Boed (n 1).

[40] UNHCR ' Note on determination of refugee status under international instruments' (24 August 1977).

[41] See Chapter III Section *i*, infra.

[42] Tratado de Derecho Penal Internacional, (adopted 23 January 1889, entered into force for each Party on the date of deposit of its instrument of ratification, as per article 47), depositaries: República Oriental del Uruguay and República Argentina.

sobre Asilo)[43], the 1933 *Convention on Political Asylum* (Convención sobre Asilo Político)[44], the 1939 *Treaty on Political Asylum and Refuge* (Tratado sobre Asilo Político y Refugio)[45] and the 1954 *Convention on Diplomatic Asylum* (Convención sobre Asilo Diplomático)[46], all of which are still in effect[47]. Although the practice of diplomatic/political asylum has been studied by the United Nations, it has considered it abandoned in general international law[48] and there have been no further discussions about it in the universal regime[49]. It is therefore clear that diplomatic asylum is actively used only in Latin America, where it coexists with territorial asylum.

This coexistence has been far from peaceful. At the inception of the universal instruments, States refrained from embracing International Refugee Law wholeheartedly due to their preference for their own regional figure[50] and when they did they were often confused by the way both regimes interacted[51]. This is partly due to the fact that the universal regime was initially perceived as a European response to European issues – an assertion supported by Article 1 – that would impose unwanted international oversight over a local institution[52] that States considered more than adequate[53]. Although over time the universal system has become prevalent in the region, political/diplomatic asylum still exists, and instruments continued to be drafted even after the adoption of the 1951 Convention[54]. This coexistence has led to two direct consequences that have hindered the effectiveness of territorial asylum in the region.

The first consequence is the existence of a grave situation of terminological - and therefore legal - confusion. While official UNHCR documents in Spanish use the word *'asilo'* (asylum) in its international sense, authors, Latin American States – and in some limited instances, regional UNHCR documents – use the word *'refugio'* ('refuge') to refer to asylum derived from the universal instruments, reserving the term *'asilo'* for diplomatic

[43] Convención sobre Asilo (adopted 20 February 1928, entered into force 21 May 1929) 132 LNTS 323.
[44] Convención sobre Asilo Político (adopted 26 December 1933, entered into force 28 March 1935) 34 OASTS.
[45] Tratado sobre Asilo Político y Refugio (adopted 8 April 1939, entered into force for each country on the date of deposit of its instrument of ratification as per article 18), depositary: Ministerio de Relaciones Exteriores de Uruguay.
[46] Convención sobre Asilo Diplomático (adopted 28 March 1954, entered into force 29 December 1954) 18 OASTS.
[47] Galindo Vélez (n 38) 193.
[48] UNGA, 'Question of diplomatic asylum: Report of the Secretary-General' UN GAOR Thirtieth session UN Doc A/10139 (1975).
[49] UNGA Res 3497 (XXX) (15 December 1975), in Galindo Vélez (n 38). On the topic of the rejection of diplomatic asylum by most States see Guy S. Goodwin-Gill, *The refugee in international law* (Clarendon Press 1983), 102.
[50] Jaime Esponda, *'La tradición Latinoamericana de asilo y la protección internacional de los refugiados'* in UNHCR, *El asilo y la protección internacional de los refugiados en América Latina* (Siglo XXI 2003). Other authors have highlighted the roots of this institution in Spanish and European practice, which then continued to evolve in a different direction in Latin America. Leonardo Franco (ed.), *El asilo y la protección internacional de los refugiados en América Latina: Análisis crítico del dualismo 'asilo-refugio' a la luz del Derecho Internacional de los Derechos Humanos* (ACNUR 2004).
[51] See, for example, the confusion in the Colombian submission noted by the ICJ in *Colombian-Peruvian Asylum Case* (*Colombia v Peru*) (Judgment) [1950] ICJ Rep 1950 12.
[52] Leonardo Franco and Jorge Santistevan de Noriega, 'La contribución del proceso de Cartagena al desarrollo del Derecho Internacional de Refugiados en America Latina' in ACNUR, *La protección internacional de refugiados en las Américas* (n 38) 107.
[53] Eduardo Arboleda, 'El ACNUR, las migraciones internacionales y el derecho de asilo y refugio', [1994]1 Revista Mexicana de Política Exterior 144.
[54] See the 1954 Convention (n 46).

asylum.[55] This has been the source of great confusion in the region and has debilitated international protection, leading even to cases where States deny protection to refugees alleging that regional human rights instruments only regulate 'diplomatic asylum' instead of asylum as a *genus* that covers different forms of protection.[56]

The second, and most important consequence, is that territorial asylum was largely integrated into the existing structure for adjudicating diplomatic asylum. Of course, a central characteristic of this form of protection is that it is granted through the authority of the MOFA, giving diplomatic authorities a central role in the process. This would very clearly explain why Latin American States hold on to the authority of their Ministries for all forms of asylum, and also shows how international protection in the region has maintained its correspondence with diplomatic interests. This particular topic will be explored in section *iii* of this Chapter.

This junction was noted by the International Court of Justice (ICJ) in the *Colombian-Peruvian Asylum Case*[57] and in its Interpretation of that judgment, known as the *Haya de la Torre Case*[58]. In its decisions, the Court was highly critical of the practice, noting that the regime governing it was unstable and permeated by political interests:

> The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some States and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases (…).[59]

The Court's comments clearly underline the political – as opposed to juridical – nature of a decision to grant diplomatic asylum. It further noted that 'considerations of convenience or simple political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation', and that 'asylum as practised in Latin America is an institution which, to a very great extent, owes its development to extra-legal factors'[60].

Current commentators have also maintained their criticism of this institution, going so far as to say that it has long been proven to be ineffective for international protection[61] and that in practice it is applied with no consideration to regional human rights standards[62].

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[55] César Walter San Juan and Mark Manly, 'El asilo y la protección internacional de los refugiados en América Latina: análisis crítico del dualismo "asilo-refugio" a la luz del Derecho Internacional de los Derechos Humanos', in Franco (ed.), *El asilo y la protección internacional de los refugiados en América Latina: Análisis crítico del dualismo 'asilo-refugio' a la luz del Derecho Internacional de los Derechos Humanos* (n 50) 36-44.

[56] Ibid. The authors refer to Venezuela's claim before the Inter-American Commission on Human Rights in the *Jesús Pinilla Camacho y Otros vs. Venezuela* case. Inter-American Commission on Human Rights, 'Annual report 2001' (16 April 2002) OEA/Ser./L/V/II.114 doc. 5 rev., para. 61.

[57] *Colombian-Peruvian Asylum Case* (n 51).

[58] *Haya de la Torre Case* (*Colombia v Peru*) (Judgment) [1951] ICJ Rep 1951.

[59] *Colombian-Peruvian Asylum Case* (n 51).

[60] Ibid, 24.

[61] San Juan and Manly (n 55).

[62] Mark Manly, 'La consagración del asilo como un derecho humano: Análisis comparativo de la Declaración Universal, la Declaración Americana y la Convención Americana sobre Derechos Humanos' in Franco (ed.), *El asilo y la protección internacional de los refugiados en América Latina: Análisis crítico del dualismo 'asilo-refugio' a la luz del Derecho Internacional de los Derechos Humanos*, 158-159.

Therefore, when the decision-maker in diplomatic asylum is the same as in territorial asylum the mind-set behind this extra-legal process is maintained and its flaws are readily transmitted and reproduced.

Overall, although some authors have considered that the coexistence of both forms of protection in Latin America is a positive factor in expanding the margins of international protection[63], it is difficult to see how they are compatible, at least when both have the same adjudicator, for two main reasons.

First, the two institutions have very different objectives that render them incompatible. Diplomatic asylum is an exceptional measure that seeks to protect select individuals in positions of power in their country[64], while territorial asylum can potentially cover any individual. Therefore, while the mind-set behind diplomatic asylum might serve to protect a handful of high-profile individuals each year, it cannot properly address the needs of a region where displacement is massive[65] and disproportionately affects those in the most vulnerable circumstances[66].

Secondly, treating all asylum-seekers as if they were applying for *diplomatic* asylum is extremely prejudicial to their cases, as there is a considerable difference in the availability of evidence. While individuals who opt for diplomatic asylum are by definition in prominent positions in society, making their accounts more easily verifiable, refugees often escape with very little and are usually from less privileged backgrounds, which makes access to evidence much more difficult[67]. Therefore, asking the majority of claimants (who are presumptive refugees) to reach the standard of proof expected of an 'asylee' (the minority) exposes them to unfair treatment. However, even this is a minor issue compared to concerns regarding partiality, which will be explored in the next section.

This does not mean that there is no place for diplomatic asylum in Latin America, as both institutions have different purposes that may ultimately serve to give protection to different groups and overlap only in few cases. However, they do not operate under the same logic, and therefore cannot operate under the same adjudicator, as this strips territorial asylum of its juridical and apolitical nature.

ii. The impact of the decision-maker in the outcome of the case

As noted earlier, Group A and Group B States in Latin America either determine all territorial asylum claims within their Ministries of Foreign Affairs or in *ad hoc* committees that include them in a prominent role. This section will set out to demonstrate that since the identity of the decision-maker plays a large role in the outcome of a case, having a diplomatic authority adjudicating asylum claims will directly impact the outcome of individual cases.

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[63] Esponda (n 50).

[64] Comisión Interamericana de Derechos Humanos, 'Informe anual 1981-1982' (20 September 1982) OEA/Ser.L/V/II.57 doc. 6 rev.1, Cap. VI B. 9.

[65] Ibid. See also UNHCR, Global trends 2012 (2013). Another clear indicator is the adoption of the Cartagena Declaration, which purports to offer guidance on events causing mass displacement. Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (adopted 2 November 1984).

[66] Ibid.

[67] UNHCR Handbook (n 19).

Indeed, the influence of the decision-maker on the outcome of like cases is a prominent research area in the general issue of consistency in adjudication in the field of forced migration studies.[68] Reviews have found that in many jurisdictions the question of whether two individuals with an identical claim receive the same decision is largely up to *who* makes that decision.

Empirical studies in consistency in Latin America are extremely difficult, as States, unlike those in Europe and North America, don't publish detailed figures on asylum claims[69], and do not have systems in place to publish statistically significant quantities of anonymized decisions from first instance decision-makers[70] or tribunals[71]. Additionally, since these issues are within the competence of diplomatic authorities, oversight from UNHCR[72] is constrained by having to communicate with a diplomatic – as opposed to a technical – counterpart. Since UNHCR engages in a diplomatic relation with the decision-maker it has to avoid actions that could provide more information on the subject but might jeopardize this relationship, such as supporting calls for public disclosure of asylum figures, as they might be construed as criticism[73]. All of this leads to a vast lack of information that makes studying this subject extremely complicated.

In any case, even if no studies of this sort have been conducted in Latin America due to these reasons, studies in other regions have shown that the impact of the decision-maker in the decision is undeniable. If this occurs in independent systems with high level of technical capacity, it can also be said to occur in systems where the adjudicator is not independent[74] and where officials show very little technical proficiency[75].

For instance, comparing similar cases of a same country of origin in 2010 (China) in the New York, Newark and Los Angeles asylum offices, grant rates span the whole range between almost 0% to 99% between offices and among caseworkers within a same office. Similar data is available for Albanian claimants before New York Immigration Court judges (5 to 96%) and Colombian claimants before Miami Immigration Court judges (5-88%)[76],

[68] See, for example, Jaya Ramji-Nogales, Andrew I. Schoenholtz and Philip G. Schrag, *Refugee roulette: Disparities in asylum adjudication and proposals for reform* (NYU Press 2011).

[69] For example, without data detailing grant rates according to country of origin it is impossible to formulate a hypothesis that recognition rates are being affected by possible diplomatic fallout between the host country and the country of origin.

[70] Such as the one used by the Immigration and Refugee Board of Canada.

[71] Such as, for example, the decisions by the Circuit courts in the United States, the UK Upper Tribunal and the Australian Refugee Review Tribunal.

[72] The 1951 Convention established oversight from UNHCR in article 35.

[73] The issue of UNHCR's diplomatic approach to issues and crises throughout its history has been eloquently described by Loescher (Gil Loescher, *The UNHCR and world politics: A perilous path* (OUP 2001)). Rebecca Stern has also described UNHCR's position between refugees and their advocates on one hand, and States on the other, as a 'balancing act' (Rebecca Stern, '"Our refugee policy is generous": Reflections on the importance of a State's self-image' [2014] 33 (1) RSQ 25).

[74] See section *iii*, infra.

[75] David J. Cantor and Diana Trimiño, 'A simple solution to war refugees? The Latin American expanded definition and its relationship to IHL' (2013) in David J. Cantor and Jean-François Durieux (eds.), *Refuge from inhumanity? War refugees in International Humanitarian Law* (Brill/Nijhoff 2014); Michael Reed-Hurtado, 'The Cartagena Declaration on Refugees and the protection of people fleeing armed conflict and other situations of violence in Latin America' [2013] UNHCR, Geneva, 23-24.

[76] Jaya Ramji-Nogales, Andrew Schoenholtz and Philip G. Schrag, 'Disparities in asylum adjudication in the United States' [2013] in *Treating like cases alike in refugee law adjudication - international joint public seminar*, Refugee Law Initiative, University of London, 25 April 2013. Presentation available at <http://rli.sas.ac.uk/tlal/>. Accessed 4 July 2013.

with other evidence of adjudicator bias having been compiled since at least 1990[77]. Different jurisdictions among Swiss cantons also exhibit the same variance in grant rates[78].

Even in supranational systems with common substantive and procedural criteria for decision-making there are very notable differences in grant rates in similar cases. The obvious example is the Common European Asylum System[79] (CEAS), under which recognition rates vary widely, and similar cases from a specific country are alternatively accepted or rejected in variations of extreme statistical significance. For example, data for 2010 indicates that in deciding like cases from Afghanistan the grant rate for subsidiary protection under Article 15C of the European Qualification Directive[80] (indiscriminate violence) ranges from 51% in Sweden and 24.5% in the Netherlands to 1.1% in France, 0.3% in Germany and 0.2% in the United Kingdom[81]. Similar examples concerning applicants from Iraq, Somalia and Libya have also been offered by other authors[82].

Evidently, pinpointing the exact reason for variation among like cases is extremely complicated, as it can be attributed to a plethora of different factors related to the applicant[83], including age and gender[84], and to other factors such access to adequate legal counsel or lack thereof[85], the expertise of the decision-maker on a particular region[86] or the quality of available Country of Origin Information (COI)[87], among many others[88]. However, research is consistent in indicating that when controlling for other factors, large degrees of variation can be attributed to who makes the decision.[89]

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[77] Deborah E. Anker, 'Determining asylum claims in the United States: summary report of an empirical study of the adjudication of asylum claims before the Immigration Court' [1990] 2(2) IJRL 252; Deborah E. Anker, 'Determining asylum claims in the United States: A case study on the implementation of legal norms in an unstructured adjudicatory environment' [1992] 19 N.Y.U. Rev. L. & Soc. Change 1991-1992 433;

[78] Thomas Holzer, Gerald Schneider and Thomas Widner, 'Discriminating decentralization: Federalism and the handling of asylum applications in Switzerland, 1988-1996' [2000] 44 (2) Journal of Conflict Resolution 250.

[79] *See,* inter alia, Commission (EC), 'Green paper on the future Common European Asylum System' COM (2007) 301 final.

[80] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12.

[81] Madeline Garlick, 'Treating like cases unlike? Achievements and challenges in harmonization of European asylum law' [2013] in *Treating like cases alike in refugee law adjudication - international joint public seminar*, Refugee Law Initiative, University of London, 25 April 2013. Presentation available at <http://rli.sas.ac.uk/tlal/>. Accessed 4 July 2013.

[82] Gorlick (n 15) 3.

[83] Mary-Anne Kate, 'The provision of protection to asylum-seekers in destination countries' [2005] New Issues in Refugee Research Working Paper No. 114, UNHCR/EPAU, Geneva, 35.

[84] Holzer, Schneider and Widner (n 78).

[85] Sean Rehaag, 'The role of counsel in Canada's refugee determination system: an empirical assessment' [2011] 49 Osgood Hall Law Journal, 71.

[86] International Centre for Policy Migration Development, 'The structure and functioning of country of origin information systems, comparative overview of six countries, commissioned by the Advisory Panel on Country Information' (APCI.3.1) [2004].

[87] Natasha Tsangarides - Immigration Advisory Service (IAS), *The refugee roulette: The role of country information in refugee status determination* (2010). This can also be present in the form of Country Guidance documents; see Robert Thomas, *Administrative justice and asylum appeals* (Hart 2011), 235.

[88] Barbara M. Yarnold, 'Federal Court outcomes in asylum-related appeals 1980-1987: A highly 'politicized' process' [1990] 23 (4) Policy Sciences 291. Eric Newmayer, 'Asylum recognition rates in Western Europe: Their determinants, variation and lack of convergence' [2005] 49 (1) The Journal of Conflict Resolution 43; Linda Camp Keith and Jennifer S. Holmes, 'A rare examination of typically unobservable factors in US asylum decisions' [2009] 22(2) Journal of Refugee Studies 224.

[89] Ramji-Nogales, Schoenholtz and Schrag (n 76).

The existence of unfair procedures in other countries does not excuse maintaining the current situation in Latin America. As the next section demonstrates, even if partiality is evident in many systems, the situation in Group A and B States is particularly grave, as asylum-seekers before a diplomatic authority face an especially partial procedure that is significantly more imbalanced and that further undermines individual rights. While partiality may never be completely eliminated from asylum adjudication, it is clear that States have a positive obligation to reduce it as much as possible, as discussed in Chapter V.

Having established that *who* the decision-maker is plays a role in the outcome of a case, it is clear that the fact that adjudication is carried out by diplomatic authorities has a direct impact on the decision. Indeed, it is absolutely evident that due to their position these individuals direct their actions towards the promotion of the object of the office, which is to be 'responsible for the conduct of his or her State's relations with all other States'[90]. This duty is not compatible with protecting individuals who have fled their homes either because their State has violated their basic rights or because it has failed to prevent others from doing so. The ensuing conflict of interest is necessarily solved against the asylum-seeker, resulting in unfair decision-making.

iii. The role of foreign policy in the outcome of individual cases

The analysis has shown that a decision-maker like that in Groups A and B States unsurprisingly prioritises foreign policy considerations over protection concerns, as it is in the nature of a MOFA and its delegates to consider the diplomatic impact of decisions. However, foreign policy itself also plays a role in determining State responses to asylum requests even in countries with independent decision-makers. In the case of the States studied, the effects of both situations are compounded to the detriment of asylum-seekers, creating a state of partiality that is far worse than that faced by asylum-seekers in other regions.

In theory, the act of granting territorial asylum should not be a cause for diplomatic frictions between the host State and the State of origin. The 1951 Convention expressed 'the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States'[91]. In that sense, the General Assembly also stressed that the granting of asylum could not be regarded as unfriendly[92], as a finding that persecution is occurring in another State does not constitute interference or censure upon it[93], a conclusion echoed by Latin American States in the - nonbinding - Cartagena Declaration[94]. Indeed, one

[90] *Arrest warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium) (Judgment) ICJ Rep 2002, 22.
[91] Preamble.
[92] UNGA, 'Declaration on territorial asylum' UN GAOR 22nd session UN Doc A/RES/2312 (1967).
[93] Atle Grahl-Madsen, *The Status of Refugees in International Law: asylum, entry and sojourn Vol. 2* (Sijthoff 1972), 27.
[94] Cartagena Declaration on Refugees (n 66). These conclusions were supported by the IACmHR (Inter-American Commission on Human Rights, 'Annual report 1984-1985' (10 October 1985) OEA/Ser.L/V/II.66 Doc. 10 rev. 1, Chapter V, Conclusion 4). See further Comisión Interamericana de Derechos Humanos, 'Informe annual 1981-1982' (20 September 1982) OEA/Ser.L/V/II.57 doc. 6 rev.1, Cap. VI B. 9.

of the main reasons behind having a unified international refugee definition was avoiding foreign policy concerns in national systems.[95]

However, this seems to be little more than a legal fiction. As other authors have noted, States 'do not formulate their asylum policies in a political vacuum', and asylum decisions are sometimes part of a 'broader political calculus'[96]. Some authors have gone as far as to stress that 'the pursuit by States of their own well-being has been the greatest factor shaping the international legal response to refugees since World War II'[97].

The fact that foreign policy interests generally guide State decisions is self-evident. In the specific case of asylum adjudication, however, a larger degree of insulation from outside influence should be expected in order to protect the nature of asylum as a non-political act, but this is rarely the case. Indeed, a look at the major trends in asylum in both industrialised and developing States evidences a clear link between foreign policy goals and asylum adjudication, but Latin America faces issues of partiality that are above and beyond those in other regions due to the fact that its diplomatic bodies are in charge of adjudicating asylum claims.

This correlation generally operates in a predictable manner: regardless of the merits of their individual cases, asylum-seekers from rival States have a better chance of receiving asylum, while asylum-seekers from friendly States have a smaller chance of receiving protection.[98] In this scenario, foreign policy 'overwhelm(s) humanitarian concerns'[99] in violation of the non-discrimination clause of the 1951 Convention[100].

In the first case, asylum-seekers benefit from poor relations between their State of origin and their host State regardless of the merits of their individual case, a trend that saw its peak during the Cold War. In the case of the United States, this policy began after World War II[101] and was later enshrined in the Immigration and Nationality Act from 1952 to 1980, which defined a refugee as an individual 'from a Communist dominated country or area, or from any country within the general area of the Middle East'[102]. It was later continued, with some changes, by the 1980 reforms.[103] Most notably, this policy benefited individuals from China, the Soviet Union[104] and Cubans, for whom very favourable rules for being granted

[95] Gregg A. Beyer, 'Reforming affirmative asylum processing in the United States: Challenges and opportunities [1994] 9 (4) Am. U. Int'l L. Rev. 43, 59.
[96] James H. S. Milner, *Refugees, the State and the politics of asylum in Africa* (Palgrave Macmillan 2009), 161.
[97] Hathaway, 'A reconsideration of the underlying premise of refugee law' (n 21) 133. See also B. Martin Tsamenyi, 'The "boat people": are they refugees?' [1983] 5 (3) HRQ 348.
[98] Atle Grahl-Madsen, 'International refugee law today and tomorrow' [1982] 20 Archiv des Völkerrechts 411, 421; Gorlick (n 15) 5.
[99] Tahl Tyson, 'The Refugee Act of 1980: Suggested reforms in the Overseas Refugee Program to safeguard humanitarian concerns from competing interests' [1990] 65 Wash. L. Rev. 921 in Musalo, Moore and Boswell (n 125) 82. See also Stephen H. Legomsky, 'An asylum seeker's bill of rights in a non-utopian world' [2000] 14 Geo. Immigr. L. J. 619.
[100] Article 3 outlines the obligation to apply the content of the Convention 'without discrimination as to race, religion or country of origin'.
[101] Kathryn M. Bockley, 'A historical overview of refugee legislation: The deception of foreign policy in the land of promise' [1995] 21 N.C. J. Int'l L. & Com. Reg. 253.
[102] 1952 Immigration and Nationality Act (Pub. L. 82–414, 66 Stat. 163), Section 203(a)(7).
[103] Tyson (n 98) 81. See also Gil Loescher and John A. Scanlan, *Calculated kindness: Refugees and America's half-open door, 1945 to the present* (The Free Press 1986).
[104] Julie Mertus, 'The State and the post-Cold War refugee regime: New models, new questions' [1998] 20 Mich. J. Int'l L. 59.

asylum were enacted with the interest of weakening or discrediting communist regimes[105], an objective also pursued by authorities in Europe and Australia[106].

As a result, Cubans enjoyed higher recognition rates than individuals with similar cases from non-communist States[107] and easily accessed US territory, a fact that Castro took advantage of to get rid of 'undesirables' during the Mariel boatlift[108]. Likewise, Iranian[109] and Nicaraguan[110] nationals also enjoyed a high probability of being protected independently of the strength of their individual claims. Granting territorial asylum in an unjustified manner to satisfy political whims is undesirable, as it drains political and financial resources that could be better used to protect legitimate claimants from grave risks to their well-being.

At the same time, individuals who flee friendly States are systematically denied asylum[111], as 'this could undermine relations by constituting public criticism of the regime'[112] or implicating it in committing human rights violations[113], a situation which has also been noted by UNHCR[114]. This was the case of Chileans fleeing the Pinochet dictatorship to the United Kingdom, who had their claims rejected due to the good relationship between both countries[115]. The same occurred in the United States during the Cold War, when it rejected asylum-seekers persecuted by repressive regimes[116] that it did not wish to criticize[117]. For example, ninety eight percent of applicants from Guatemala, Haiti and El Salvador[118] were rejected by the U.S. asylum system despite many of them having strong claims[119]. The fact

[105] Hathaway has further argued that the Convention's protection of what is now understood as civil and political rights, as opposed to economic and social rights, evidences the influence of Western ideology in the foundations of International Refugee Law (Hathaway, 'A reconsideration of the underlying premise of refugee law' (n 21)). See also Matthew J. Gibney, *The ethics and politics of asylum: Liberal democracy and the response to refugees* (CUP 2004); Stephen H. Legomsky, 'The making of the United States refugee policy: Separation of powers in the post-Cold War era' [1995] 70 Wash. L. Rev. 675, 677; Guy S. Goodwin-Gill, 'The politics of refugee protection' [2008] 27 (1) RSQ 8; and Andrea Freiberger, 'The United States' response to humanitarian refugee obligations: Inconsistent application of legal standards and its consequences' [2010] 33 Wash. U. J. L. & Pol'y 297, 318.

[106] Joly (n 16) 30 in Liza Schuster, *The use and abuse of political asylum in Britain and* Germany (Frank Cass 2003), 26; Gibney (n 105); Michael S. Teitelbaum, 'Immigration, refugees and foreign policy' [1984] 38 (3) International Organization 429, 439.

[107] Gibney (n 105).

[108] Tyson (n 99) 83.

[109] Although post-revolutionary Iran was obviously not a communist State, its tensions with the United States led it to be treated as a rival. Tyson (n 99) 81.

[110] Depending on the status of relations between both countries at the time, grant rates for Nicaraguan claimants varied from almost complete rejection to considerably above average. Jorge I. Domínguez, 'Immigration as foreign policy in U.S.-Latin American relations' in Robert W. Tucker, Charles B. Keely and Linda Wrigley (eds.), *Immigration and U.S. foreign policy* (Westview 1990), 157-158.

[111] Jame Silk, *Despite a generous spirit: denying asylum in the United States* (U.S. Committee for Refugees 1986) in 921 in Musalo et al (n 126) 87.

[112] Joly (n 16) 28. See Hathaway, 'A reconsideration of the underlying premise of refugee law' (n 21) 169.

[113] Idean Salehyan, 'The externalities of civil strife: refugees as a source of international conflict [2008] 52 (4) AJPS in Marc R. Rosenblaum and Idean Salehyan, 'Norms and interests in US asylum enforcement' [2004] 41 (6) Journal of Peace Research 677.

[114] UNHCR 'Note on international protection' (1984).

[115] Liza Schuster, *The use and abuse of political asylum in Britain and Germany* (Frank Cass 2003).

[116] Philip G. Schrag, *A well-founded fear: The congressional battle to save political asylum in America* (Routledge 2000) 30.

[117] Matthew E. Price, *Rethinking asylum: History, purpose and limits* (CUP 2009), 87.

[118] For the specific case of El Salvador, see Thomas D. Hoffman, 'Memorandum on "Salvadoran refugees 'Second Chance' (sponsorship) Program" (Central American Refugee Center, 1982) in Teitelbaum (n 106) 439, and Gil Loescher, *The UNHCR and world politics: A perilous path* (OUP 2001), 29-31.

[119] Joly (n 16).

that this was the result of an official policy[120] has been confirmed by former officials of the Immigration and Nationalization Service[121], and led to litigation where the courts noted the conflict between diplomatic and humanitarian interests[122].

A third minor trend sees States pursue asylum policies that are not necessarily in favour or against a specific State, but rather seek to promote a particular foreign interest. One such example is the United States' admission of large numbers of refugees from Hungary in the 1950s and post-war Vietnam as a way to repair the damaged it had caused through its interventions in both territories.[123]

Some more recent studies in industrialised States have noted the scarcity of empirical evidence linking foreign policy and asylum[124] and have not focused on the nature of the diplomatic relation between two States, but only on its formal existence[125]. It is indeed true that the end of the Cold War also brought the end of the main reason for politicizing asylum. However, the issue has not disappeared, as other studies have found that it persists in other sophisticated forms[126], noting, among others, the case of Afghan and Iraqi applicants in the U.S. after the 9/11 attacks in 2001 and the Iraq War in 2003[127].

In this scenario, the foreign policy goal has been to prove that the security situation in these countries has improved due to the American intervention, which is demonstrated by showing that their nationals have no need for international protection.[128] In the same manner, the promotion of economic ties with trade partners has also played an important role in asylum adjudication in the United States in recent years.[129] Other similarly sophisticated trends have been evidenced in the Caribbean[130] and Africa[131].

Does this mean that granting asylum is an unavoidably political act? Some writers think this may be so. Price, for instance, has characterised asylum as inherently "expressive",

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[120] See also Arthur C. Helton, 'Political asylum under the 1980 Refugee Act: An unfulfilled promise' [1984] 17 U. Mich. J.L. Reform 243 264 in Price (n 117) 90.

[121] Doris Meissner, 'Reflections on the U.S. Refugee Act of 1980' in David A. Martin (ed.), *The New Asylum Seekers: Refugee Law in the 1980s* (Kluwer Academic 1988), 63.

[122] Among others, *Kasravi v. INS*, 400 F.2d 675, 67 6 n.1 (9th Cir. 1968) and *American Baptist Churches v. Richard Thornburgh*, 760 F. Supp. 796 (N.D. Ca. 1991) in Musalo et al (n 126).

[123] Meital Waibsnaider, 'How national self-interest and foreign policy continue to influence the U.S. Refugee Admissions Program' [2006] 75 Fordham L. Rev. 391, 403. See also Teitelbaum (106) 430.

[124] Joly (n 16) in Kate, at 2.

[125] Kate (n 83) 35.

[126] For the immediate era after the Cold War, see Legomsky (n 105) 677. For more recent studies, see Karen Musalo, Jennifer Moore and Richard A. Boswell (eds.), *Refugee law and policy: A comparative and international approach* (3rd edition, Carolina Academic Press 2007); Price (n 116) 97; Babha (n 14) 166; Waibsnaider (n 123) 91; and Idean Salehyan and Marc R. Rosenblum, 'International relations, domestic politics, and asylum admissions in the United States [2008] 61 (1) PRQ 104.

[127] Waibsnaider (n 123) 422. See also Amnesty International, 'The backlash: Human rights at risk throughout the world (3 October 2001) <http://www.amnesty.org/en/library/info/ACT30/027/2001/en> accessed 5 July 2013; Amnesty International, Refugee protection is human rights protection: Amnesty International statement to the Ministerial Meeting of States Parties to the 1951 Refugee Convention and/or its 1967 Protocol (December 2001) <http://www.amnesty.org/en/library/info/IOR51/011/2001> accessed 5 July 2013.

[128] Waibsnaider (n 123) 422.

[129] Rosenblaum and Salehyan (n 113) 677; Salehyan and Rosenblum (n 126).

[130] Elizabeth Thomas-Hope, 'The nature and pattern of irregular migration in the Caribbean' in George J. Borjas and Jeff Crisp (eds.), *Poverty, international migration and asylum* (Palgrave Macmillan 2005), 296.

[131] Goals include providing support to armed opposition forces, obtaining foreign aid and creating buffer zones with rival States (Teitelbaum (106)).

in the sense that by granting or denying it a State expresses its approval or disapproval towards the State of origin.[132] While he recognises the dangers of this character – no protection for nationals from friendly States, undue protection for nationals of hostile States, and smaller States fearing protecting those who flee stronger States – he considers that this carries advantages in letting the State of origin know that its actions are not welcome by the international community and that stronger sanctions may follow[133], which would be a soft form of international oversight on human rights.

Although in reality this expressive character does seem to exist, and there is indeed a tension between well-meaning efforts to provide protection and comply with international agreements and 'the sometimes narrow self-interest calculations of sovereign nation states'[134], this theory does not account for other more specific foreign policy goals that may also be promoted through asylum[135]. But, most of all, this excessive *realpolitik* seems to forget that the purpose and object of asylum is to provide protection to individuals, so using it to send a message to other States is not only 'a fruitless task'[136], but also objectifies the asylum-seeker and exposes him to national and international interests he or she is not responsible of and cannot control.

This analysis clearly shows that even in jurisdictions with strong and independent authorities adjudicating asylum claims there is a chance that foreign policy influences decisions[137]. It is also undeniable that, to a large degree, political interests have permeated refugee protection throughout its history.[138] Therefore, asylum adjudication can probably never be completely apolitical, but it is possible to insulate the process and reduce political influence to a minimum.

The reforms to the asylum system in the United States to eliminate the role of the Department of State and reform the role of the Department of Justice[139] and strengthen independent and well-informed decision-making[140] are, to a degree, good models to follow. If some degree of political influence in adjudication is unavoidable, then States have a duty to control other factors in order to reduce it as much as possible. In Latin America, however, they have done precisely the opposite.

Foreign policy in Latin America

In the particular case of Latin America, illustrating the link between foreign policy and asylum adjudication is a more complicated task due to the aforementioned difficulties in conducting research into asylum adjudication trends in the region[141]. In order to corroborate

[132] Price (n 117).
[133] Price (n 117) 76-87.
[134] Gil Loescher and Laila Monahan, *Refugees and international relations* (OUP 1989), 8.
[135] See, for instance, the examples of African States and the reception of nationals from Vietnam, Hungary, Afghanistan and Iraq noted earlier in this chapter.
[136] Daniel J. Steinbock, 'The qualities of mercy: Maximizing the impact of U.S. refugee resettlement' [2003] 36 U. Mich. J. L. Reform 951, 997.
[137] Gorlick (n 15) 7.
[138] Hathaway, for instance, considers that refugee law is inherently political, as it is based not on the degree of harm that may come to an individual, but on the *motivation* behind that risk (Hathaway, 'A reconsideration of the underlying premise of refugee law' (n 21)). See also Goodwin-Gill, 'The politics of refugee protection' (n 104).
[139] Beyer (n 95) 60.
[140] Susan Benesch, 'Due process and decision-making in U.S. immigration adjudication' [2007] 59 (3) Admin. L. Rev. 557.
[141] See Chapters II and III; Reed-Hurtado (n 75) 23-24.

existing evidence and produce original research, during the course of this investigation the most prominent NGOs and academic centres working with asylum-seekers in these countries were contacted and asked for their observations on the subject. Several institutions declined to participate, with some of them noting the need to avoid antagonizing the adjudicator. Those in Ecuador, Brazil, Mexico and Costa Rica replied, providing a representative sample, as they include all of the countries that receive the highest proportion of asylum-seekers in the region with the exception of Argentina[142].

All of them confirmed the hypothesis that asylum adjudication in these States takes into account foreign policy concerns, and further noted that the issue might be more prevalent than they are able to note, as poorly motivated decisions make it difficult to know what the reasons behind a decision really are. The findings from this research are included in this section along with the literature review for these and other countries.

Although information on a regional level is scarce, the Inter-American Commission for Human Rights was already reporting in 1982 that 'many' States were not receiving refugees for political or ideological reasons[143]. More recently, UNHCR officials from the Regional Legal Unit have noted – in a personal capacity – that the adjudication of diplomatic asylum by MOFAs is not adequate in the light of universal and regional human rights standards[144]. Considering that in these States MOFAs are also responsible for the adjudication of refugee status and complementary protection claims, the same conclusion can be reached in this case.

Furthermore, Non-Governmental Organizations (NGOs) working in the field have recently documented this practice in the region, and noted that diplomatic involvement in decision-making is contrary to due process in general and impartiality in particular, raising the issue in collaborative regional studies[145] and before UNHCR's Executive Committee (EXCOM)[146].

As in other regions, foreign policy considerations follow two major trends and one minor one. The first trend is rejecting asylum-seekers to avoid antagonising friendly States, and is the prevailing trend in the countries studied. Much less prevalent is using asylum to antagonize rival States, but it has a very clear example in the Snowden case, which has been described earlier in this article[147]. A third interesting trend is to use protection to promote very specific foreign policy objectives, which go beyond causing an effect in a particular State and generally seek to promote the country's standing in the international arena.

[142] Reed-Hurtado (n 75) 5.
[143] Comisión Interamericana de Derechos Humanos, 'Informe anual 1981-1982' (20 September 1982) OEA/Ser.L/V/II.57 doc. 6 rev.1, Cap. VI B. 9.
[144] Manly (n 62) 158-159.
[145] United States Committee for Refugees and Immigrants and Asylum Access, *Refugee Status Determination in Latin America: Regional Challenges & Opportunities* [2013].
[146] UNHCR EXCOM, 'NGO Statement on the Americas – Extended Version' (5-7 March 2013). The author of this paper contributed to the drafting of this statement.
[147] See Introduction, *supra*.

Safeguarding relations with other states

Avoiding antagonising friendly States is the most common case of diplomatic interference in asylum adjudication in the region. In the case of Ecuador, along the MOFA's comments on how his office would take into account its relation with the US in the Snowden case – described at the beginning of this paper –, research conducted with the collaboration of the local branch of a global NGO reveals that its relationship with Cuba leads the Ecuadorean State to consider it a safe country, which in turn causes a systematic rejection of Cuban asylum-seekers[148]. In fact, prejudice and even open hostility against Cuban asylum-seekers is now widespread among Ecuadoreans and is largely tolerated or ignored by the authorities, who diminish their needs for protection, believing most Cubans are only economic migrants.[149] A similar situation is also observable in Nicaragua. Due to a strong common history and ideological affinity, diplomatic ties between Cuba and Nicaragua have prompted the latter to take a politicized approach towards Cuban asylum-seekers, causing their claims to be systematically rejected.[150]

In Colombia, regional studies have noted that conducting adjudication through its MOFA violates the guarantee of impartiality[151], a finding that has been confirmed by rulings by the country's High Courts. The judgments have repeatedly chastised the MOFA for claiming that asylum adjudication is discretionary and for issuing poorly motivated decisions[152], which reveals that the adjudicator does indeed believe that it can decide in line with its political goals rather than having an obligation to uphold international and national regulations. A recent case of an Iranian national before the State Council[153] also revealed that foreign policy concerns are taken into account when Colombia's ambassadors in the claimant's country of origin are consulted. The discovery of evidence exposed that the Colombian Ambassador in Tehran had pressed for the rejection of the case to avoid disturbing relations with the Persian State.

Although in Mexico the adjudicatory system relies on less input from the MOFA than in other States, its concerns still affect decision-making to a degree. One particular case has been recently brought to light with regard to the application of the Cartagena expanded refugee definition. An officer noted that 'the definition requires us to qualify a particular

[148] Statement by Adriana Blanco (Legal Officer) and Karina Sarmiento (Director) on behalf of Asylum Access Ecuador (Email correspondence 16 April 2013).
[149] Defensoría del Pueblo, 'Informe temático No. 2 - Dirección Nacional de Promoción de los Derechos Humanos y la Naturaleza - Migración cubana: Recomendaciones de política pública para Ecuador' (2011).
[150] José Luis Rocha, 'Ambiguities and contradictions in Nicaraguan and Costa Rican migration policy' [2013] in *A Liberal tide: Towards a paradigm shift in Latin American migration and asylum policy-making?* (Conference) Refugee Law Initiative, University of London, 18 March 2013.
[151] United States Committee for Refugees and Immigrants and Asylum Access (n 145) 38. The author of this paper co-authored the Colombia chapter of this report.
[152] See Corte Suprema de Justicia, Sala de Casación Civil, Sentencia STC2042-2014, Radicación N° 76001-22-10-000-2013-00239-01 (2014). See further Corte Constitucional, Sentencia T-704/03 (2003); Consejo de Estado, Sala de lo Contencioso Administrativo, Sección Quinta. Expediente 25000-23-24-000-2005-20392-01, sentencia del 20 de abril de 2006 (2006); Consejo de Estado, Sala de lo Contencioso Administrativo, Sección Quinta, Radicado 25000-23-24-000-2005-20392-01 (2006); Consejo de Estado, Sala de lo Contencioso Administrativo, Sección Segunda, Rad. 25000-23-15-000-2011-02542-01, Sentencia del 26 de enero de 2012 (2012); Consejo de Estado, Sala de lo Contencioso Administrativo, Radicación número 11001-03-24-000-2004-00210-00, Sentencia de dos de febrero de dos mil doce (2012).
[153] The State Council (Consejo de Estado) is the supreme administrative tribunal in the country. Consejo de Estado, Sala de lo Contencioso Administrativo, Radicación número: 11001-03-24-000-2004-00210-00, Sentencia de dos de febrero de dos mil doce (2012).

situation as one of generalised violence or manifest that a particular country is a gross human-rights violator. There are some political considerations. The Ministry of Foreign Affairs is vigilant'[154].

According to a prominent NGO in Mexico, the RSD authority unjustifiably denies asylum to individuals of several countries of origin, especially from neighbouring countries in Central America[155]. Its comments coincide with those in Reed-Hurtado's study[156], and further note that decision-making is affected by the expectations on migratory reform in the U.S. and its impact on migrants who are in Mexico en route to that country[157].

The particular case of Mexico appears to share similarities with the pre-reform system in the United States, where Country of Origin Information played a central role in adjusting decision-making to foreign policy[158]. In this case, the Department of State promoted its interests indirectly by issuing country guidance notes that were strictly followed by decision-makers. Similar situations occur in Argentina and Brazil, and this interference leads to arbitrary application of the law and politicizes international protection.[159] It seems clear, however, that as the Mexican RSD authority strengthens its institutional mandate and internal procedures, especially those regarding its own Country of Origin Information system, it will be able to be more independent from the Ministry of Foreign Affairs and thereby become considerably more impartial.

Extreme caution towards issues that might affect the country's standing with the United States is also observable in Costa Rica. In particular, a local NGO noted that decisions are exceedingly political, and in cases of U.S. victims of gender-based violence the authorities have proceeded with caution, considering them to be highly controversial.[160] This has led to instances where it has been necessary for the claimants and their supporters to ask for the intervention of State agencies for the defence of human and women's rights to fight the adjudicator's reluctance to grant asylum.[161]

Harming rival governments

There is very little data on the use of asylum in the region to harm rival States. The evidence suggests that there is not enough information to note whether this is a recurring practice, but the actions of Bolivia and Venezuela in the Snowden case, described at the beginning of this article[162], clearly show at least one instance where this has occurred. This does not mean that this particular claim would not be accepted before an impartial tribunal; instead, that the States concerned have recognised that their objective is to affect U.S. interests rather than deciding on the merits of the case itself.

Promoting specific foreign policy goals

[154] Reed-Hurtado (n 75) 20.
[155] Statement by Alejandra Macías on behalf of Sin Fronteras IAP (Email correspondence 16, 17 and 19 July 2013).
[156] Supra at (n 75).
[157] Ibid.
[158] See the beginning of Chapter III, Section *iii*.
[159] Reed-Hurtado (n 75) 20-25.
[160] Statement by Gloria Maklouf Weiss on behalf of the Asociación de Consultores y Asesores Internacionales (ACAI) (Email correspondence 21 July 2013).
[161] Ibid.
[162] See Introduction.

There are at least two specific instances in which asylum policy has been used to promote regional or global goals instead of country-specific goals. The specific objective behind this practice is to boost the country's image abroad, which is in line with the more nuanced approach that is also present in other regions in recent years[163].

The first case relates to the protection of Colombians in Ecuador, where NGOs report that the improvement of relations between both countries helped the Colombian Government further its goals of demonstrating its status as a safe country[164] and highlighting the advances in its peace process[165]. Discussions between both countries prompted legal reforms in Ecuador that excluded victims of internal conflict from the expanded refugee definition and made temporal restrictions on access to procedures stricter. As a result, recognition rates plummeted.[166] This leaves most Colombians displaced to Ecuador with no resort to international protection, and seeks to push them to return to their country even though security conditions are still extremely lacking[167].

The systematic rejection of Colombian asylum-seekers appears to be a strategy to promote the image of Colombia as a safe territory, and shows similarities with the case of Afghan and Iraqi asylum-seekers in the United States, which was discussed earlier in this chapter. Although to this day there has been no official response to this regressive policy, UNHCR officials indirectly referred to it the 2013 meeting of the agency's Standing Committee when discussing which protection laws have been made more stringent[168]. This is a particularly worrisome development given that Colombian forced migrants in Ecuador are one of the biggest populations of concern to UNHCR in the world[169].

The Brazilian case also appears to show the use of international protection to promote its image abroad. Towards this end, the country has granted voluntary protection to Haitians that abandoned their homes after the 2010 earthquake. The objective is to promote Brazil's standing in the international community as a force for stability and peace, thereby strengthening its case for a permanent seat in the United Nations Security Council.[170] In correspondence, the authors of this study reconfirmed the findings of their research, and noted that this decision complements other actions, such as exceptionally active participation

[163] See the examples of Afghan, Iraqi, Hungarian and Vietnamese claimants in the United States, and State practice in Africa of the preceding section of this Chapter.
[164] This is also evidenced by a push to close down the UN missions in Colombia. For example, after criticism from OHCHR in a case regarding the use of force against protesters, the President noted that the country could take care of its own affairs, cutting back its mandate to only one year (Elespectador.com, '"No necesitamos oficinas de DD.HH. de la ONU en nuestro país": Gobierno' *El Espectador* (Bogotá, 16 July 2013) <http://www.elespectador.com/noticias/politica/no-necesitamos-oficinas-de-ddhh-de-onu-nuestro-pais-gob-articulo-434005> accessed 1 August 2013).
[165] Statement by Adriana Blanco (Legal Officer) and Karina Sarmiento (Director) on behalf of Asylum Access Ecuador (Institutional email correspondence 16 April 2013).
[166] Ibid.
[167] UNHCR EXCOM 'NGO Statement on the Americas – Extended Version' (n 146).
[168] UNHCR, '57th Meeting of the Standing Committee, Agenda item 3: International Protection, Introductory statement by Volker Türk, Director of International Protection' (27 June 2013).
[169] UNHCR, Global trends 2012 (2013).
[170] Andrea Pacheco Pacífico and Érika Pires Ramos, 'The migration of Haitians within Latin America: Significance for Brazilian law and policy on asylum and migration' [2013] in *A Liberal tide: Towards a paradigm shift in Latin American migration and asylum policy-making?* (Conference) Refugee Law Initiative, University of London, 18 March 2013.

in UN peacekeeping missions, as part of a wider strategy to demonstrate Brazil's importance in maintaining international peace and security.[171]

Although it is clear that in this case the foreign policy goal is seemingly serving to widen the scope of protection, this development is still undesirable If States wish to widen the scope of their protection they should adopt generous legal standards, instead of doing so only when there are political benefits to reap. Using forced migrants for political gain leaves them exposed to the whims of foreign policy that might welcome them one day and reject them the next, further eroding consistent and principled decision-making.

It is clear that asylum adjudication and policy in Groups A and B States are directly linked to their foreign policy goals. This specific issue is added to other regional characteristics that affect impartiality in decision-making, which have been discussed earlier in this Chapter. The end result is that individuals face unfair procedures that are much worse than those present in other regions, leaving them in a particularly desperate situation.

IV. International Refugee Law and a human rights perspective

As this paper has established up to this point, the procedure for asylum adjudication in Latin America creates a heightened risk of biased decision-making. Taking into account the fact that neither the 1951 Convention nor its Protocol provide explicit guidance on procedural matters, does this mean that individuals are abandoned to drown in a particularly vicious *lacuna* of international law? The answer, obviously, is no. International protection has evolved on its own and through the influence of other areas of international law, and as a result upholding only substantive standards without reference to procedural safeguards is insufficient, and the obligation of having an *impartial* decision-maker is well established.

Indeed, authors have noted that a central characteristic of any protection system is to have a qualified, independent and impartial decision-maker.[172] As a matter of fact, accession to the Convention and its Protocol constitute an international commitment to 'grant asylum with impartiality'[173], which requires not only impartiality itself but also the appearance of impartiality in adjudicators[174]. In the words of Goodwin-Gill, the very definition of refugee 'supposes a dispassionate case-by-case examination'[175].

As the organisation charged with overseeing the implementation of the universal instruments[176], UNHCR's interpretation, although nonbinding, holds a privileged role in determining their content[177]. In this context, the Agency has been especially active in pushing

[171] Statement by Andrea Pacheco Pacífico and Érika Pires Ramos (Email correspondence 16 July 2013).
[172] David Matas, 'Stars and mud: the participation of refugee workers in refugee policy' in Anne F. Bayefsky (ed.), *Human rights and refugees, internally displaced persons and migrant workers: Essays in memory of Joan Fitzpatrick and Arthur Helton* (Nijhoff 2006) 443; Chaloka Beyani, *Protection of the right to seek and obtain asylum under the African human rights system* (Nijhoff 2013), 51-53; Anker, 'Determining asylum claims in the United States: A case study on the implementation of legal norms in an unstructured adjudicatory environment' (n 76) 433; Gorlick (n 15) 7.
[173] Christopher T. Hanson, 'Behind the paper curtain: Asylum policy versus asylum practice [1978] 7 N.Y.U. Rev. L. & Soc. Change 107, 138.
[174] Linda Kelly Hill, 'Holding the due process line for asylum [2008] 36 Hofstra L. Rev. 85
[175] Goodwin-Gill and McAdam (n 19) 529.
[176] Article 35 of the 1951 Convention.
[177] James C. Hathaway, *The rights of refugees under international law* (CUP 2005), 114-118.

the development of international standards by promoting fair asylum procedures[178], having branded impartial protection a central tenet of human dignity[179]. More importantly, its own Executive Committee, composed of States Parties to the universal instruments, has reiterated throughout decades of work that asylum procedures should be 'fair'[180]. In this context, as it hasn't been given a distinct meaning, the term 'fair' can only be understood in its common use, that is, 'treating people equally without favouritism or discrimination' in a way that is 'just or appropriate in the circumstances'[181].

Therefore, it is evident at this point that the Convention itself offers basic guarantees against partial decision-making. But beyond that, Article 5 establishes that 'nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention'. Therefore, the rights of refugees are also guaranteed by other instruments, and where their content is different, the most beneficial provision and interpretation should apply under the *pro homine* principle[182], and can serve to fill the *lacunae* in the refugee instruments[183]. UNHCR itself has promoted this view, underscoring 'the obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards as set out in relevant international instruments'[184].

The basis of applying human rights law to refugees is the fact that most basic rights are guaranteed to everyone regardless of their nationality.[185] Indeed, the general rule is that a State has to respect the rights of all *individuals* within its jurisdiction.[186] Consequently, as foreigners asylum-seekers are recognized basic rights[187], including the right to a fair trial as contained in Article 14[188] of the International Covenant on Civil and Political Rights[189].

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[178] See especially UNHCR, 'Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)' (2001).

[179] UNHCR EXCOM 'Summary record of the 536th meeting' (1999).

[180] See *inter alia* UNHCR EXCOM Conclusions No 29 (XXXIV) 'General conclusion on international protection' (1983); No 44 (XXXVII) 'Detention of refugees and asylum-Seekers' (1986); No 65 (XLII) 'General conclusion on international protection' (1991); No 71 (XLIV) 'General conclusion on international protection' (1993); No 74 (XLV) 'General conclusion on international protection' (1994); No 77 (XLVI) 'General conclusion on international protection' (1995); No 81 (XLVIII) 'General conclusion on international protection' (1997); No 82 (XLVIII) 'Conclusion on safeguarding asylum' (1997); No 85 (XLIX) 'General conclusion on international protection' (1998); No 93 (LIII) 'Reception of asylum-seekers in the context of individual asylum systems' (2002); No 96 (LIV) 'Conclusion on the return of persons found not to be in need of international protection' (2003) No 99 (LV) 'General conclusion on international protection' (2004); No 103 (LVI) 'Conclusion on the provision on international protection including through complementary forms of protection' (2005); No 110 (LXI) 'Refugees with disabilities and other persons with disabilities' (2010) and the EXCOM 'Note on international protection' (2013).

[181] Oxford Dictionary, 'Fair' (OUP) <http://oxforddictionaries.com/definition/english/fair?q=fair> accessed 11 July 2013.

[182] Pablo Ceriani Cernadas, 'La Directiva de Retorno de la Unión Europea: Apuntes críticos desde una perspectiva de derechos humanos' [2009] Anuario de Derechos Humanos 2009 85.

[183] Hathaway, *The Rights of Refugees under International Law* (n 177) 906.

[184] UNHCR EXCOM Conclusion No 82 (XLVIII) 'Safeguarding asylum' (1997). See also, *inter alia*, UNHCR documents in (n 180).

[185] Hathaway (n 177).

[186] *Legal consequences of the construction of a wall in the Occupied Palestinian Territory (Advisory opinion)* [2004] ICJ Rep 136. The European Court of Human Rights also has extensive jurisprudence in this matter.

[187] This extends also to individuals unlawfully present in a country. Goodwin-Gill and McAdam (n 19) 448.

[188] Hathaway notes especially the impact of the UN Human Rights Committee in applying the Covenant to refugees and asylum-seekers: (UN Human Rights Committee, 'General Comment No. 31: The nature of the general legal obligations of States Parties to the Covenant' (2004) UN Doc. HRI/GEN/1/Rev.7 in Hathaway (n 177) 120). Regarding the legal basis for this application, it is of interest to note how the Human Rights Committee's position has evolved towards progressively acknowledging the applicability of Article 14 to RSD

Despite its name, the right to a fair trial is not limited to judicial procedures, but is in reality a right to *due process*, as it also applies to adjudicatory proceedings of a non-judicial nature[190], including refugee status determination procedures[191].

Within this general right there is a specific duty to maintain impartiality in adjudicatory procedures. When applied to asylum adjudication, impartiality is both a central requirement of due process[192] and the principal means to assess how just the system is[193]. Additionally, as asylum claims often occur in the context of expulsion or deportation processes, they are also covered by their specific requirement of having and independent and impartial adjudicator[194].

Overall, the impartiality requirement mandates that in every case 'the body before which refugees are entitled to present their claims must be… independent and impartial'[195]. In that sense, Legomsky's observation on the application of International Human Rights law to this issue acutely notes the relevant issues:

> It seems an elementary principle of justice that the adjudicator should base the findings of fact on his or her honest reading of the evidence and the legal conclusions on his or her honest interpretation of the law… No one is free of all biases, but a fair adjudication system takes steps to minimize them. One long settled principle, therefore, is that the adjudicator must not have a stake in the outcome of the case.[196]

The universal human rights regime, which is fully applicable in Latin American States, establishes a clear obligation to have an impartial asylum adjudicator. Therefore, by subordinating decision-making to foreign policy interests, Group A and B States are plainly in breach of this obligation, and should reform their systems in order to correct this situation. This duty is also strengthened by regional human rights commitments that point in the same direction.

Due process and impartiality in Latin America

Latin American States are also bound by regional instruments that further stress their obligation to provide impartial decision-makers in asylum claims. The Inter-American Human Rights system has a long tradition of dealing with this subject and has developed a strong background on the protection of forced migrants. The premise behind this system is

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procedures. See UN Human Rights Committee, 'General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial' (2007) UN Doc. CCPR/C/GC/32; *VMRB. v. Canada*, Communication No. 236/1987, UN Doc Supp No. 40 (A/43/40) at 258 (1988) and especially *Olga Dranichnikov v. Australia* (2004) CCPR/C/88/D/1291/2004.

[189] International Covenant on Civil and Political Rights (adopted 16 December 1996, entered into force 23 March 1976) 999 UNTS 171.

[190] Stephen H. Legomsky, 'Refugees, administrative tribunals and real independence: Dangers ahead for Australia' [1998] 76 Wash. U. L. Q. 243, 244.

[191] See footnote 188.

[192] Legomsky (n 190) 244.

[193] Peter W. Billings, 'A comparative analysis of administrative and adjudicative systems for determining asylum claims' [2000] 52 (1) Admin. L. Rev. 253, 256.

[194] Tom Clark, 'Human rights and expulsion: Giving content to the concept of asylum' [1992] 4 (2) IJRL 189, 192. The issue of guarantees on related immigration procedures is studied by the United Nations Sub-Commission on Human Rights (Resolution 1993/26 Chap. I, Sect. B, draft decision 3. E/CN.4/Sub.2/1993/45).

[195] Hathaway (n 177) 906.

[196] Legomsky, 'An asylum seeker's bill of rights in a non-utopian world' (n 99) 635

that equality under the law has reached *jus cogens* status[197], and as a result basic rights are afforded to every individual under a State Party's 'authority and control' regardless of their nationality[198] or migratory status[199].

These guarantees include the right to a fair trial contained in Article 8 of the Inter-American Convention on Human Rights[200], which, like its universal counterpart, is more accurately described as a right to due process, and is likewise not limited to judicial procedures, but applies to any matter of a 'materially jurisdictional nature' – including administrative procedures – that determines individual rights and obligations[201]. The obligation to respect it during asylum adjudication is well established[202] and has been recognized by States themselves[203].

The guarantee of fairness includes specific provisions regarding the right to an independent and impartial decision-maker.[204] The Inter-American system has expanded the scope of this element by stating that the adjudicator not only has to be strictly impartial, but 'must (also) appear to act without being subject to influences, incentives, pressures, threats, or interference'[205], and 'offer sufficient objective guarantees to exclude any doubt the parties or the community might entertain as to his or her lack of impartiality'[206].

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[197] *Juridical condition and rights of undocumented migrants*, Advisory Opinion OC-18, Inter-American Court of Human Rights Series A No 18 (17 September 2003).

[198] Ibid. See also *Rafael Ferrer-Mazorra et al v United States*, Inter-American Commission on Human Rights, Report Nº 51/01 Case 9903 (4 April 2001).

[199] *Juridical Condition and Rights of the Undocumented Migrants* (n 197). See also *Rafael Ferrer-Mazorra et al v United States* (n 199); Antônio Augusto Cançado Trindade, 'Aproximaciones y convergencias revisitadas: diez años de interacción entre el derecho internacional de los derechos humanos, el derecho internacional de los refugiados, y el derecho internacional humanitario (De Cartagena/1984 a San José/1994 y México/2004)' in ACNUR, *La protección internacional de refugiados en las Américas* (n 38) 272.

[200] American Convention on Human Rights (adopted 21 November 1969, entered into force 18 July 1978) 36 OASTS; 1144 UNTS 123; 9 ILM 99 (1969).

[201] *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87, Inter-American Court of Human Rights Series A No. 9 (6 October 1987); *Case of the Constitutional Court v. Peru* (Merits, Reparations and Costs), Inter-American Court of Human Rights Series C No. 55 (31 January 2001); *Baena Ricardo et al v. Panama* (Merits, Reparations and Costs), Inter-American Court of Human Rights Series C No. 72 (2 February 2001); *Ivcher Bronstein v. Peru* (Merits, Reparations and Costs), Inter-American Court of Human Rights Series C No. 74 (6 February 2001); *Juridical Condition and Rights of the Undocumented Migrants* (n 197)*; Rafael Ferrer-Mazorra et al v United* (n 199); *Case of Yatama v. Nicaragua* (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights Series C No. 127 (23 June 2005); *Claude Reyes et al. v. Chile* (Merits, Reparations, and Costs), Inter-American Court of Human Rights Series C No. 151 (19 September 2006); *Escher et al. v. Brazil.* (Preliminary Objections, Merits, Reparations, and Costs); Inter-American Court of Human Rights Series C No. 200 (6 July 2009); *Case of Vélez Loor v. Panama* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 218 (23 November 2010).

[202] Manly (n 62); Juan Carlos Murillo González, 'El derecho de asilo y la protección de refugiados en el continente americano', in ACNUR (ed.), *La protección internacional de refugiados en las Américas* (n 38) 70-71; Franco and Santistevan (n 52).

[203] *Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America* (16 November 2004).

[204] *Case of Castillo Petruzzi et al v. Peru* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C. No. 41 (30 May 1999); *Case of the Constitutional Court v. Peru* (n 201); *Claude Reyes et al. v. Chile* (n 201); *Escher et al. v. Brazil* (n 202). See also San Juan and Manly (n 55).

[205] *Case of Atala Riffo and Daughters v. Chile* (Merits, Reparations and Costs) Inter-American Court of Human Series C No. 239 (24 February 2012).

[206] *Case of Apitz Barbera et al v. Venezuela* (Preliminary objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 182 (5 August 2008).

When applying this guarantee to asylum procedures, the Commission has noted that 'safeguards include the right to have one's eligibility to enter the process decided by a competent, independent and impartial decision-maker, through a process which is fair and transparent'[207]. It has also highlighted the special importance of procedural safeguards in the context of asylum due to the difficulties that are inherent to it and the pre-eminence of the obligation of non-refoulement[208], and stated that the duty of impartiality is directly linked to consistency in decision-making, as 'the basic principles of equal protection and due process reflected in the American Declaration require predictable procedures and consistency in decision-making at each stage of the process'[209].

The Inter-American Court itself recently decided its first case regarding asylum-seekers, *Pacheco Tineo v. Bolivia*[210]. The Court largely reiterated its jurisprudence on due process and followed the Commission's arguments in previous asylum cases, reiterating that, as asylum-seekers are under the State's jurisdiction, it must safeguard their right to due process in resolving asylum claims and other procedures that might entail their removal from its territory[211]. This includes interviewing the asylum-seeker and making a fair and unbiased decision on the merits of the case as per EXCOM Conclusion 8(2) on minimum standards[212]. Due to this precedent, decision-making is especially important, as the Court recognized that under regional instruments applicants have an individual right to receive asylum when they fulfil the requirements of the refugee definition[213]. As such, granting asylum is not discretionary, so States have a duty to make sure that all procedures are foreseeable, coherent, and objective, in order to avoid arbitrary decisions.[214]

In conclusion, the international human rights regime applicable in Latin America very clearly indicates that asylum processes should follow strict requirements of impartiality. Findings in previous chapters, however, have shown that foreign policy plays a central role in the provision of asylum, eliminating any possibility of fairness. In that sense, these countries have failed in their stated commitment to strengthen refugee protection through other branches of International Law, especially human rights law[215].

V. Conclusions

The overview of this situation is grim. Asylum-seekers, who are already one of the most vulnerable populations anywhere, are subject to extreme conditions of partiality in Latin America that are above and beyond those present in other regions. This preliminary study, which can only ever be completed in the framework of full cooperation and disclosure from

[207] Inter-American Commission on Human Rights, 'Report on the situation of human rights of asylum seekers within the Canadian refugee determination system' (28 February 2000) OEA/Ser.L/V/II.106 Doc. 40 rev.; Inter-American Commission on Human Rights, 'Report on terrorism and human rights' (22 October 2002) OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr.

[208] *Familia Pacheco Tineo v. Bolivia*, Inter-American Commission on Human Rights, Report Nº 136/11 Case 12.474 (31 October 2011).

[209] Inter-American Commission on Human Rights, 'Report on the situation of human rights of asylum seekers within the Canadian refugee determination system' (n 207); Inter-American Commission on Human Rights, 'Report on terrorism and human rights' (22 October 2002) OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr.

[210] *Caso Familia Pacheco Tineo v. Estado Plurinacional de Bolivia* (Excepciones Preliminares, Fondo, Reparaciones y Costas), Corte Interamericana de Derechos Humanos (25 de Noviembre de 2013).

[211] Ibid, 129-133.

[212] Ibid, 136.

[213] Ibid, 137-138.

[214] Ibid, 157.

[215] Mexico Declaration (n 203).

the States involved, strives to provide the legal and factual basis for understanding that the current status is unacceptable and point the way towards a solution.

The answer to this issue is political will, but adherence to international law can provide a sound starting point. Indeed, as this situation clearly indicates a violation of individual rights in breach of international commitments, the basic rules of international responsibility apply. In this sense, this breach creates a new obligation: the responsibility to put an end to it[216].

The process through which this can be achieved is fairly straightforward. States must transfer asylum adjudication to technical, independent and impartial authorities that are free from interference from their Ministries of Foreign Affairs. Evidently, this is easier said than done, as the very fact that States have insisted in using asylum as a foreign policy tool for so long clearly indicates that they have an interest in maintaining the status quo.

However, they might be encouraged to consider reform. If they are interested in promoting their image as humanitarian nations[217], they may do so by promoting generous, transparent, fair and consistent standards that do not risk unfair adjudication in individual cases. Likewise, if their goal is fostering stable and harmonious relations with other States, having truly independent adjudicatory bodies can shield them from diplomatic repercussions stemming from individual decisions[218], something they cannot do with the current regime.

In this process frank feedback from UNHCR is crucial, as its experience in decision-making and in supporting the establishment of national systems can help reach successful outcomes. As an added benefit, if adjudication is transferred to an independent body the Agency and its partners can engage national authorities on a technical - rather than political - level, helping them build a system that is not only fair but also efficient, which is also in the interest of States themselves.

Alternatively, civil society and academia could and should rise to the challenge if change does not come from within governments. They should not be afraid to denounce the arbitrariness of this system and question it before national and international organisms and courts. Latin American lawyers are increasingly becoming more skilled in using international law to solve local issues and this is a prime example of a situation where smart legal work can make a huge difference for vulnerable communities across the Americas.

Evidently, establishing independent decision-makers cannot guarantee perfect outcomes, especially if it is not followed by further reforms, such as promoting real access to truly independent judicial review[219] and setting high standards for motivation in decisions[220].

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[216] *Haya de la Torre Case* (n 58); *United States diplomatic and consular staff in Tehran* (Judgment) ICJ Rep 1980, para 95; *Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)* (Judgment) ICJ Rep 1986; *Legal consequences of the construction of a wall in the Occupied Palestinian Territory (Advisory opinion)* (n 186).

[217] See, for example, the case of Sweden in Stern (n 73).

[218] Price (n 117) 92; Audrey Macklin, 'Asylum and the rule of law in Canada: Hearing the other (side)', in Susan Kneebone (ed.), *Refugees, asylum seekers and the rule of law* (CUP 2009) 78, 112.

[219] Stephen Reinhardt, 'Judicial independence and asylum law' [2002] IARLJ Conference 2002 328; Jill E. Family, 'Beyond decisional independence: Uncovering contributors to the immigration adjudication crisis' [2011] 59 U. Kan. L. Rev. 541.

[220] Reed-Hurtado (n 75).

Projects such as the Quality Assurance Initiative[221] can play an important role in improving adjudication and can make structural changes more effective. However, as it is clear that the role of MOFAs in decision-making is a central factor in preventing fair access to asylum in the region, providing access to an adjudicator that is properly insulated from foreign policy considerations will go a long way towards promoting the rights of asylum-seekers.

[221] UNHCR, 'Overview of UNHCR's operational strategies in the Americas' (21 February 2013).