

# REFUGEE STATUS DETERMINATION IN LATIN AMERICA: REGIONAL CHALLENGES & OPPORTUNITIES



*The national systems of Brazil, Colombia, Costa Rica,  
Ecuador, and Mexico*



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LA FACULTAD DE DERECHO Y EL  
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DE LOS ANDES, COLOMBIA



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## EXECUTIVE SUMMARY

There are 377,100 refugees currently living in Latin America, most are originally from Latin America, but a number hail from other continents.<sup>1</sup> This report is intended as a tool to strengthen due process in the region, through the analysis of the Refugee Status Determination (RSD) procedures in Brazil, Colombia, Costa Rica, Ecuador, and Mexico. Based on the analysis of domestic legislation and policies regarding RSD, this report focuses on due process, including forums and terms to access refugee status, access to information, access to appellate mechanisms, and accelerated or abbreviated RSD procedures.

The Convention relating to the Status of Refugees (the 1951 Convention) is included in the domestic RSD legislation of each of the countries that are part of this report.<sup>2</sup> Similarly, the five countries covered by this study have ratified the Cartagena Declaration on Refugees of 1984 (the Cartagena Declaration) and it is included in most of these countries' national systems. The Cartagena Declaration broadened the definition of 'refugee' contained in the 1951 Convention and includes persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, the massive violation of human rights or other circumstances which have seriously disturbed the public order.<sup>3</sup> Brazil, Colombia, and Mexico have implemented the definition set forth in the Cartagena Decla-

ration into their national regulatory framework for the treatment of refugees. Specifically, it is included in Brazil's Act 9474/97, Colombia's Decree 4503, and Mexico's *Ley Sobre Refugiados y Protección Complementaria* (Refugee and Complementary Protection Act) of 2011.

With respect to due process for asylum-seekers, RSD is a guarantee of the principle of *non-refoulement* and requires states to provide the conditions for the effective enforcement of the rights of individuals seeking asylum. Moreover, in Advisory Opinion OC-18 of September 17, 2003, the Inter-American Court stated:

*[...] it is a human right to obtain all the guarantees which make it possible to arrive at fair decisions, and the administration is not exempt from its duty to comply with this obligation. The minimum guarantees must be observed in administrative processes whose decision may affect the rights of persons.*<sup>4</sup>

The issues to be analyzed within this report relating to due process include:

### 1) FORUM AND TERM TO ACCESS THE RSD PROCESS

In all five countries, an executive branch commission is responsible for decisions regarding RSD (first instance). Usually, these are inter-ministerial committees. The different Ministries that comprise these commissions reach decisions on RSD by casting votes, with the exceptions of: Brazil where the civil society and the United High Commissioner for Refugees (UNHCR)

1. UNHCR (2012), *2012 Regional Operations Profile – Latin America - Statistical Snapshot*. Available at <http://www.unhcr.org/pages/49e45be46.html>. Retrieved on June 20, 2012.

2. *Ley N° 9474/97 (1997) in Brazil (hereinafter, "Act No. 9474/97"); el Decreto Ejecutivo N° 4503 (2009) in Colombia (hereinafter, "Executive Decree No. 4503"); la Ley General de Migración y Extranjería N° 8764 (2010) (hereinafter, "General Immigration and Alienship Act") and Decreto N° 36831-G - Reglamento de Personas Refugiadas (2011) (hereinafter, "Decree No. 36831-G - Regulations for Refugees") in Costa Rica; Decreto Ejecutivo N° 1182- Reglamento para la aplicación en el Ecuador del derecho de refugio (2012), (hereinafter "Executive Decree No. 1182 - Regulations for the application of the right to refuge in Ecuador") in Ecuador; and, Ley Sobre Refugiados y Protección Complementaria (2011), Ley de Migración (2011), (hereinafter, "Refugee and Complementary Protection Act") and Ley General de Población (1974), (hereinafter, "General Population Act") in México.*

3. UNHCR, Refugee Protection Section, *Cartagena Declaration, 2008*. Retrieved July 25, 2012, from [http://www.acnur.org/index.php?id\\_pag=2302](http://www.acnur.org/index.php?id_pag=2302).

4. Inter-American Court of Human Rights, *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, September 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003).

participate in the decision-making process, the latter, having speaking rights, but no voting rights; and in Colombia, the commission is comprised solely by the Foreign Ministry.

Of the countries in this report, only Brazil and Costa Rica did not set a deadline for asylum applications. Colombia, Mexico, and Ecuador each have established RSD application deadlines. In Colombia, an asylum seeker has a sixty calendar day window; in Mexico thirty days; and in Ecuador fifteen days. While the 1951 Convention does not set a specific standard in relation to terms and deadlines for RSD procedures, this report evaluates international standards, which indicate that in order to ensure fair and effective access, due process, and non-discrimination, these terms should be flexible.

## **2) THE RIGHT TO ACCESS INFORMATION**

As reported by organizations in Mexico, Costa Rica, Ecuador, and Brazil, asylum-seekers have access to their respective files, with the exception of Colombia, where documents remain confidential. In practice, however, organizations have found that the short deadline to file an appeal to an RSD decision presents a barrier to accessing records. The regulatory framework should therefore contemplate access to information, but it must also be a right that can be safeguarded in practice, which is inextricably linked to the time period for applicants to appeal negative decisions. The latter must be long enough to allow access to records.

## **3) THE RIGHT TO APPEAL A NEGATIVE DECISION**

The right to challenge a negative RSD decision is an integral part of due process. Therefore, each country's regulatory framework must allow a reasonable time for refugees to prepare a legal challenge to a negative decision. The preparation period should allow sufficient time for individuals to access records as well as to seek legal assistance, among other important factors.

While all countries in the report provide for avenues of appeal in administrative forum, there are complications related to the entity that resolves these appeals. In Ecuador, administrative appeals are decided by the Minister of Foreign Affairs, Trade and Integration. In Mexico and Colombia, organizations stated that there is no appeal process as such, since the recourse is filed before the same body that made the original decision, thereby making the process a request for revision, not a true appeal. In the case of Costa Rica, the regulatory framework allows both an appeal before the Commission and an appeal presented before the Administrative Immigration Tribunal, as a decentralized agency under the Ministry of Interior, which hears all matters relating to Alternative Administrative Appeals Recourses (*Recursos Administrativos de Apelación en Subsidio*) at the General Office of Immigration and Alienship (*Dirección General de Migración y Extranjería*).

The laws of each country covered by the report allow the use of a judicial avenue as a guarantee for rights; however, this is a seldom-used practice due to the tight time constraints demanded by this avenue.

## **4) ACCELERATED PROCEDURES FOR RSD**

In Colombia, Costa Rica, and Ecuador, the domestic refugee legislation provides for the use of accelerated procedures to determine refugee status in situations where applications are manifestly unfounded or abusive. Certain differences exist in the practice of these proceedings. In Colombia and Costa Rica, the asylum-seeker may undergo an eligibility interview to determine whether an application is manifestly unfounded or abusive. In contrast, Ecuador uses a preliminary "admissibility" process, which filters asylum applications presented within the territory through an expedited procedure. This process is conducted directly by the Refuge Office and not the Commission – which handles the standard RSD process – creating differences in due

process guarantees in this new system. During the expedited procedure in Colombia and Costa Rica, the applicant is considered an asylum-seeker. In Ecuador, the admissibility system has created a condition precedent for asylum-seeker status, which raises questions about applicants' safeguards against *refoulement* during the RSD process.

## 5) THE ROLE OF CIVIL SOCIETY

In its final section, this report provides a description of the role of civil society, building on the work of organizations involved in the report.<sup>5</sup> The section specifically highlights the role of Non-Governmental Organizations (NGOs) in the provision of support and services to refugees, including free legal advice for RSD, access to rights in the host country (e.g. for the right to work, housing, social security, etc.), and actions in support of integration and emergency assistance after arrival. This participation arises from a democratic rule of law, which allows the involvement of civil society actors in such actions and supports the governments in their efforts to respect, protect and fulfill the human rights of refugees.

## RECOMMENDATIONS

Finally, we propose recommendations seeking comprehensive refugee policies that ensure respect for due process in the refugee determination process in the region. Thus, we call on countries in the region to continue efforts toward the harmonization of legal frameworks to strengthen protection structures and integration of asylum-seekers and refugees. The recommendations, further developed in the conclusions of this report, include:

- **Ensuring due process in national systems.** Governments in the region must ensure that RSD procedures are transparent, fair, and provide expeditious and rea-

sonable terms. Similarly, the process should be aligned with obligations set forth within regional and international instruments, eliminating political considerations to the maximum extent.

- **Promoting the plurality of national commissions: towards the Brazilian tripartite model.** We recommend promoting a regional transition towards pluralistic commission models in order to break away from commissions exclusively comprised of diplomatic or executive members, and instead move towards technical, apolitical, and independent commissions. The Brazilian tripartite model should be taken into account. Countries in the region should consider moving towards a standardized model for the conformation of the Eligibility Commissions.
- **Ensuring access to adequate systems to appeal negative decisions.** We recommend reviewing appeal procedures in order to ensure due process. As part of the promotion of systems for appeal, we recommend: adopting the experience of the Costa Rican Administrative Immigration Tribunal—which is an impartial appellate body—and providing reasonable time limits as part of due process.
- **Accelerated procedures must comply with internationally established due process.** We recommend that governments that have introduced expedited proceedings adopt the necessary measures to ensure that the process complies with due process guarantees as set forth in the Inter-American System of Human Rights and the recommendations of UNHCR, to prevent risk of *refoulement*.

5. Asociación de Consultores y Asesores Internacionales de Costa Rica (ACAI), Instituto Migrações e Direitos Humanos de Brasil (IMDH), Fundación Asylum Access Ecuador (AAE), Sin Fronteras I. A. P. de México and Facultad de Derecho and the legal clinic at Universidad de los Andes de Colombia.

- **The refugee determination process in Ecuador and Colombia must be regulated by domestic laws.** In Ecuador and Colombia, rules relating to refugee status are regulated through executive decrees. We encourage replacing these decrees with laws passed by the legislature, as these decrees regulate a fundamental right that is recognized by both constitutions, such as the right to asylum.
- **Promoting comprehensive refugee policies at the regional and national levels.** We suggest that it is necessary to develop a comprehensive refugee policy that incorporates a regional approach into the national systems. We recommend that states advance comprehensive public policies regarding refugees, incorporating them into national development programs, susceptible to monitoring and control over management.
- **Foster dialogue between governments and civil society.** Coordinated work between governments and civil society benefits the rights of refugees and asylum-seekers and promotes increasing protection space. This report highlights the great effort made by NGOs in the region, to help persons in refugee situations who require assistance.<sup>6</sup>
- **Promote the harmonization of domestic laws and practices, ensuring commitments made at the regional and international levels.** We recommend continuing efforts towards harmonizing national laws to strengthen protection structures and integration of asylum-seekers and refugees.
- **Promote harmonization of domestic laws and practices, ensuring commitments made at regional and international levels.** We recommend that countries in the region continue efforts towards harmonization of national laws in the region to strengthen protection space and integration of asylum-seekers and refugees. It is necessary to promote tripartite dialogue to address regional and national refugee policy, and we encourage the use of tripartite meetings, as organized in the past (i.e.: CIREFCA, the Cartagena Declaration, Plan of Action of Mexico, and the Brasilia Declaration).

6. In 2008, the National Government of the Republic of Ecuador launched the Ecuadorian Policy on Refugee Matters.

## INTRODUCTION

Latin America has shown a willingness to seek joint and progressive solutions to meet its international obligations pursuant to treaties and international standards for the right to asylum. Additionally, the region has taken steps to be a leader in the field of refugee recognition and protection. The fact that the vast majority of Latin American countries have ratified the 1951 Convention and its 1967 Protocol are indications of leadership on the subject. In addition, broad consensus on the importance of refugee protection is evidenced by multiple regional efforts, including: the Cartagena Declaration; the International Conference on Central American Refugees (CIREFCA) in 1989; the Mexican Declaration and Action Plan to Strengthen the International Protection of Refugees in Latin America of 2004; as well as the Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas of 2010.

The Declaration of Principles of Mercosur on International Protection of Refugees of 2012,<sup>7</sup> signed by the member states (Argentina, Brazil, Uruguay, and Venezuela) and two partner countries (Bolivia and Chile), is another recent example of this tradition. It highlights the commitment of States to harmonizing country laws in order to strengthen the protection and integration structures for asylum-seekers and refugees, ensuring respect for the human rights of refugees and their families. Further, the expanded Mercosur has been declared a humanitarian space for the protection of refugees.

This report focuses on the issue of RSD procedures in Brazil, Colombia, Costa Rica, Ecuador, and Mexico. The work was carried out by Asylum Access Ecuador (AAE) and the U.S. Committee for Refugees and Immigrants (USCRI), with the assistance of the following four orga-

nizations that provide legal services and advocate for policy that favors of the population of refugees within their own countries:

- Asociación de Consultores y Asesores Internacionales de Costa Rica (ACAI);
- Instituto Migrações e Direitos Humanos de Brasil (IMDH);
- Sin Fronteras IAP de México; and
- The law school and clinic at Universidad de los Andes de Colombia.

It is important that we highlight the work of the participating organizations in each of these countries, which gives them the authority to analyze the issue and propose solutions. (See ANNEX I: Information about the organizations involved.)

After months of work, research, and collaboration between the organizations involved and their respective networks, this regional report has been prepared with great hopes of promoting channels of dialogue and collaboration between civil society and the governments of Latin American countries on the issue of access to refugee status in the region. Thus seeking to build a healthy, efficient and collaborative regional policy as stipulated within the regulatory framework of international and regional human rights. The report seeks to contribute to the advancement of progressive practices in the context of the right to asylum and promote change at the regional level to eliminate processes that violate human rights and the effective protection of refugees.

The report identifies and analyzes trends in asylum procedures in the following countries: Brazil, Colombia, Costa Rica, Ecuador, and Mexico. It begins with an analysis of the main regional and international instruments ratified by these countries so as to contextualize the development of

7. *Declaración de Principios del Mercosur sobre Protección Internacional a los Refugiados (Declaration of Principles of Mercosur on International Refugee Protection)* signed on 23 November 2012, in Fortaleza, Brazil.

national regulations. Subsequently, the report focuses on the following topics as part of the analysis of due process guarantees: the forum and term to access RSD proceedings, the right to access information, the right to challenge or appeal a negative decision, and the application of accelerated RSD proceedings.<sup>8</sup> Using the work conducted by organizations involved in the report as an example, we also describe the role of civil society, emphasizing the importance of cooperation between civil society and government to discuss issues related to the right to asylum and to strengthen protection for this population. Finally, we propose recommendations geared towards a harmonized refugee policy in the region.

This report takes into account national legislation and policies regulating RSD and includes analysis from local NGOs about how the legislation and policies are actually put into practice. The report looks into regulatory elements that have generated positive impacts and others that have created difficulties for effective access to refugee status. For example, among the positive aspects, the report highlights Costa Rica's General Act of Immigration and Refugee Regulations (2009), which represents significant progress in terms of incorporating human rights principles that excludes the previous immigration control perspective; the Refugee and Complementary Protection Act (2011), or Brazil's tripartite work in determining refugee status, which includes civil society, the government, and UNHCR.

The organizations that produced this report are convinced that civil society's experiences in the region are extremely valuable to the development of proposals geared towards improving internal processes in areas of refugee protection. These organizations have decades of experience working closely with refugees (providing legal and social services), governments (accept-

ing cases and working on advocacy issues), and communities (presenting information on rights and refuge). An emphasis on the role of civil society is necessary, as well as strengthening the collaboration between NGOs, both nationally and internationally, in addition to the relationship between civil society and governments to achieve fairer and more transparent processes.

The field research for this report has limited itself to the matters established by legislation within the geographic scope of five Latin American countries: Brazil, Colombia, Costa Rica, Ecuador, and Mexico. Further, given the nature of the report, the findings are based on information collected by one civil society organization in each of the countries. This report draws from the experience of these organizations in their daily application of domestic refugee law. The report serves as a first step on behalf of civil society. It highlights the need for further research regarding RSD in Latin America, based on an empirical analysis of the practices that take place within each country of study, through field research and analysis of specific refugee cases.

8. The term "accelerated or abbreviated procedures" is from EXCOM, Conclusion No. 30, UNHCR, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, October 20, 1983, No. 30 (XXXIV)—1983. Retrieved July 25, 2012, from <http://www.unhcr.org/refworld/docid/3ae68c6118.html>.

## I. NATIONAL LEGISLATION APPLYING REGIONAL AND INTERNATIONAL INSTRUMENTS ON REFUGEE AND HUMAN RIGHTS IN THE COUNTRIES OF STUDY

### **The Convention relating to the Status of Refugees (1951) and its Protocol relating to the Status of Refugees (1967)**

The Convention relating to the Status of Refugees (the 1951 Convention) and its Protocol relating to the Status of Refugees (the 1967 Protocol) are the central elements in the international protection of refugees. The 1951 Convention, which entered into force in 1954, includes the refugee definition and the various factors through which an asylum application may be considered legitimate.<sup>9</sup> The 1967 Protocol, also known as the New York Protocol, entered into force on October 4, 1967. The 1967 Protocol is an independent instrument and is not a revision pursuant to Article 45 of the Convention. The State Parties to the Protocol, as ratification or accession by a State does not make it a party to the Convention, simply agree to apply Articles 2-34 of the Convention with respect to refugees as defined in Article 1 thereof, thereby, omitting the term set by the Convention (Article 1 of the Protocol).<sup>10</sup>

The 1951 Convention and its 1967 Protocol have been ratified by the five countries in this report, most without imposing any reservation,<sup>11</sup> with the exception of Mexico, which issued an express reservation to Articles 26, 31, 32 and items a), b) and c) of Article 17, concerning the right to work and place of residence.<sup>12</sup>

Currently, the 1951 Convention is included in the domestic legislation of all five countries through: Act. No. 9474/97 (1997) in Brazil; Executive Decree No. 4503 (2009) in Colombia; the General Migration and Alienship Act, No. 8764 (2010) and Decree No. 36831 G Regulation of refugees (2011) in Costa Rica; Executive Decree No. 1182 Regulations for the application of the right to refuge in Ecuador (2012); and the Refugee and Complementary Protection Act (2011), the Migration Act (2011), and the General Population Act (1974) in Mexico.

Moreover, the right to seek asylum and refugee status is included in the Constitutions of Brazil (1988), Colombia (1991), Ecuador (2008), and

9. Goodwin - Gill, G (2008) *Convention Relating to the Status of Refugees Protocol Relating to the Status of Refugees*, United Nations Audiovisual Library of International Law. Available at [http://untreaty.un.org/cod/avl/pdf/ha/prsr/prsr\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/prsr/prsr_e.pdf). Retrieved June 20, 2012.

10. *Id.*

11. Brazil, when ratifying the convention, placed reservations, but these were eliminated in 1989. Ecuador issues a clarifying note in its adhesion, but does not specify reservations.

12. "The Government of Mexico is convinced of the importance of ensuring that all refugees can obtain wage earning employment as a means of subsistence and affirms that refugees will be treated, in accordance with the law, under the same conditions as aliens in general, including the laws and regulations which establish the proportion of alien workers that employers are authorized to employ in Mexico, and this will not affect the obligations of employers with regard to the employment of alien workers.

On the other hand, since the Government of Mexico is unable to guarantee refugees who meet any of the requirements referred to in article 17, paragraph 2 (a), (b) and (c), of the Convention, the automatic extension of the obligations for obtaining a work permit, it lodges an express reservation to these provisions.

The Government of Mexico reserves the right to assign, in accordance with its national legislation, the place or places of residence of refugees and to establish the conditions for moving within the national territory, for which reason it lodges an express reservation to articles 26 and 31 (2) of the Convention. The Government of Mexico lodges an express reservation to article 32 of the Convention and, therefore refers to the application of article 33 of the Political Constitution of the United Mexican States, without prejudice to observance of the principle of nonrefoulement set forth in article 33 of the Convention."

Mexico (1917 last amended published in September of 2012). Despite being constitutionally mandated and requiring regulation by statutory laws in Colombia and Ecuador, statutory laws relating to the right to seek asylum have not yet been developed in either country to date.

The legislation in Brazil, Mexico and Costa Rica recognizes the declarative nature of refugee status, i.e. a person is a refugee as soon as he or she meets the requirements set forth in the definition. Even if a person has not been identified as a refugee, he or she should be considered as such because of the declarative and not constitutive nature of the decision to grant refugee status.<sup>13</sup> In Colombia,<sup>14</sup> Costa Rica,<sup>15</sup> and Mexico,<sup>16</sup> gender is incorporated into the definition of a refugee as a basis for refugee status. It is good practice to enable domestic authorities to recognize gender as a basis for persecution and be institutionalized as an appropriate interpretation of the 1951 Convention.

### **The Cartagena Declaration of 1984: Regional Refugee Protection**

The Cartagena Declaration on Refugees (the Cartagena Declaration) is a regional instrument adopted by the Colloquium on the International Protection of Refugees in 1984. It is based on the 1951 Convention, the American Convention on Human Rights, the doctrine of the Inter-American Commission on Human Rights, and the Convention on Refugees adopted by the Organization of African Unity in five countries in 1969. The five countries covered by this study

have signed the Cartagena Declaration and it is included in most domestic systems.

The Cartagena Declaration broadens the definition of *refugee* contained in the 1951 Convention, to include people who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, the massive violation of human rights, or other circumstances that have seriously disturbed public order.<sup>17</sup> Brazil, Colombia, and Mexico have implemented the definition proposed by the Cartagena Declaration within their domestic rules for the treatment of refugees, which is specifically included within Act No. 9474/97 (Brazil), Decree 4503 (Colombia), and the Refugee and Complementary Protection Act (2011) (Mexico).

In Ecuador, Article 2 of Decree 3293 dated September 30, 1987 (status - repealed) recognized the refugee definition in the Cartagena Declaration. This definition was reiterated in Article 2 of Decree 3301 (status - repealed), issued on May 6, 1992, published in Official Gazette 933 of May 12, 1992. Despite the amendment of this decree, on March 25, 2009, the definition continued without alteration. Moreover, Ecuador applied the definition of the Cartagena Declaration during its Enhanced Registration process (*Registro Ampliado*), a governmental program implemented in 2009<sup>18</sup> and consisting of an eligibility system in situ at the northern border, with the direct presence of an Eligibility Commission. This process represented a very progressive and positive trend in the region. Ecuador's current Executive

13. Brazil: See Article 26 of Act n° 9.474, July 22, 1997; Costa Rica: See Articles 14 y 107 of the Regulations for Refugees of 2011; Mexico: See Articles 12 and 47 of the Refugee and Complementary Protection Act of 2011.

14. Article 19 of Decree No. 4503, Colombia

15. Article 106 of General Migration and Alienship Act No. 8.764, Costa Rica

16. Article 13 of the Refugee and Complementary Protection Act, Mexico

17. UNHCR, Refugee Protection Section, Cartagena Declaration, 2008. Retrieved July 25, 2012, from [http://www.acnur.org/index.php?id\\_pag=2302](http://www.acnur.org/index.php?id_pag=2302).

18. Policy of Ecuador on Refugees, (*Política del Ecuador en Materia de Refugio*), Quito, 2008. Ministry of Foreign Affairs, Trade and Integration – Government of Ecuador, at <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2009/7022>, last visited 10 September 2012

Decree 1182 does not include the Cartagena Declaration's definition of *refugee*, despite its inclusion in previous legislation and its broad application.

According to ACAI, the Cartagena Declaration was *de facto* applied in Costa Rica for the admission of refugees fleeing from the Central American conflict, however the expanded definition was never included in the legislation.

### **Other legal and regulatory developments relating to refuge in the countries of study**

In Brazil, IMDH reported a number of best practices by the Brazilian government on the issue of access to the right to work, health, legal representation, education and training, resettlement, permanent residence, housing, and other types of support for asylum seekers. For example, the government grants the applicant the right to legally work in the country, alongside all the other rights from the moment that he or she submits an application. Once recognized, the refugee has a right to request permanent residence in Brazil four years after his or her recognition as a refugee.

In Costa Rica, the Regulations on Refugee matters (Reglamento de Refugio) contain a differentiated approach when considering the needs of asylum seekers, stateless persons, unaccompanied minors, victims of trafficking, and women and men who are victims of gender-based violence. Other important aspects of the law are the inclusion of a gender perspective and the provision of a work permit for applicants, which is granted when the administration delays its decision by 3 months or more—a situation that applicants in Costa Rica had not enjoyed previously.

In Ecuador, we can highlight the following as positive aspects of Decree 1182 (2012): the confidentiality of personal eligibility interviews, the

ability to choose the gender of the interviewer, access to the services of an interpreter, issuance of a provisional certificate to the applicant which facilitates the exercise of the right to work, the validity of the refugee document for two years, thereby enabling the exercise of the right to work, and access to naturalization (or obtaining permanent residence) to refugees who have resided in the country, as refugees, for at least three consecutive years without having to return to the home country to present identity or marital status documents. Further, applicants and refugees are granted access to government programs for economic and social inclusion; the decree also ensures the principle of family unity to the fourth degree of consanguinity and second degree of affinity (including adult children or other dependents) and provides for expedited process for applications for people with special needs (groups requiring priority attention).

In Mexico, the following are additional best practices: issuance of permanent residence to refugees (approval of the condition of permanence as a permanent resident); the support of the Ministry of the Interior [through the Mexican Commission for Refugee Aid (*Comisión Mexicana de Ayuda al Refugiado*)] given to the refugee population in the processing of their regular permanence documents; the fact that refugees are not required to present identity documents (such as a passport) to further immigration proceedings; an exemption for the refugee population from the naturalization test examining Mexican cultural knowledge and history; as well as the inclusion of the refugee population as beneficiaries of health care.

The Mexico Action Plan (2004) is another relevant tool which arose from a proposal by the Brazilian government—and was discussed in meetings with UNHCR, IACHR, governments, the Inter-American Court on Human Rights, and civil society members—and was approved by the governments of twenty-two countries, to

provide protection to victims of forced displacement. Through the adoption of the Action Plan, the governments of Latin America have pledged to strengthen international refugee protection and use a comprehensive approach to durable solutions.<sup>19</sup>

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and its Protocol, the International Covenant on Economic, Social and Cultural Rights, the American Convention on Human Rights, the Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas (2010) are other instruments that guarantee and protect the rights of refugees and asylum-seekers. The countries in this report incorporate most of these human rights instruments into their constitutions and have established specific laws<sup>20</sup> in many cases.

19. UNHCR, *What's the Plan of Action in Mexico?*, 2008. Retrieved July 27, 2012, available at: <http://www.acnur.org/t3/pam/informacion-general>.

20. Brazil: The Brazilian Constitution of 1988 enshrines, at various times, the principle of respect for human rights and since its enactment, a great debate arose about the range of human rights treaties in the Brazilian legal system. To end this debate, a constitutional amendment in 2004, was added to the 3rd paragraph of Article 5 of the Constitution. After this amendment, human rights treaties approved by Congress with a quorum of three fifths of the votes, in two shifts, in each of the legislative houses (Senate and Chamber of Deputies), will have constitutional hierarchy. This is exactly the same procedure to vote on constitutional amendments. Information provided by IMDH Brazil. Colombia: Under the provisions of Article 93 of the Constitution, human rights treaties ratified by Colombia are part of the Constitution. This means that the rights recognized in these instruments have constitutional hierarchy. Furthermore, the interpretation of these provisions made by competent international bodies and courts (such as the Human Rights Committee and the Inter-American Court of Human Rights) are parameters for the interpretation and application into domestic law. -Information provided by the law school and the legal clinic at Universidad de los Andes, Colombia. Costa Rica: Article 7 of the Constitution states "Public treaties, international agreements and concordats duly approved by the Legislature, have superior authority from the time of their enactment or from the day that they designate." Unofficial translation, official text in Spanish: "Los tratados públicos, los convenios internacionales y los concordatos debidamente aprobados por la Asamblea Legislativa, tendrán desde su promulgación o desde el día que ellos designen, autoridad superior a las leyes". Ecuador: under Article 424, 425 and 426 of the Constitution of the Republic of Ecuador in 2008, treaties and conventions are of direct and immediate application in the national legal system. Therefore, no additional legislation is needed to implement the system, simply that Ecuador sign, ratify or accede to the instrument; Mexico: The amendment to article 1 of the Constitution of the United Mexican States was published on June 10, 2011. This reform recognizes that "everyone has" rights and guarantees mechanisms recognized by both the Constitution and international treaties. The Constitution clearly and forcefully opens itself to international human rights law, thereby demonstrating a highly cosmopolitan and noticeable vocation. The UN recognized the progress represented by the constitutional reform on human rights, which "responds positively to the international commitments made by Mexico." Information provided by Sin Fronteras I.A.P.

## II. DUE PROCESS GUARANTEES FOR ASYLUM-SEEKERS

Due process in RSD is a guarantee of the principle of *non-refoulement*, and requires states to provide the conditions for the effective enforcement of the rights of individuals under the right to seek asylum. Any person applying for refugee status is entitled to a decision regarding their status, with full respect for due process guarantees, taking into account the right to access information, the right to legal representation, and the right to bring administrative or judicial resources. In Advisory Opinion OC-18 of September 17, 2003, the Inter-American Court of Human Rights (IACHR) stated:

*“[i]t is a human right to obtain all the guarantees which make it possible to arrive at fair decisions, and the administration is not exempt from its duty to comply with this obligation. The minimum guarantees must be observed in administrative processes whose decision may affect the rights of persons...”*<sup>21</sup>

In this context, it is clear that the binding international case law considers due process a human right and, consequently, a distinction based on nationality or immigration status is clearly a violation of the right to non-discrimination. For example, due process guarantees are also enshrined in Article 8 of the American Convention on Human Rights in its article 2, paragraph

c): *“During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: ...adequate time and means for the preparation of his defense.”* This Article has been extensively covered by the IACHR in several cases that have been brought to its attention.

In *Baena Ricardo vs. Panama*, the IACHR points out that this right applies to all levels of adjudication, whether judicial or administrative, which affect the rights of individuals. That is, it covers both administrative and judicial processes.<sup>22</sup> Consequently, it should be understood that these guarantees must also be respected in RSD proceedings.<sup>23</sup> Further, advisory opinion OC-9/87 of the Inter-American Court of Human Rights, requested by the government of the Republic of Uruguay, states that “[...] the concept of ‘due process of law’ ... includes the prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination...”<sup>24</sup>

Moreover, the IACHR in its Report on the Merits 136/11 in case 12,474 FAMILIA PACHECO TINEO BOLIVIA, of October 31, 2011, stated:

*“[...] the Commission considers that under the American Convention all proceedings involving*

21. I/A Court H.R., *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and (8) American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 125.

22. In its judgment issued in *Case of Baena Ricardo et al. v. Panamá*, the Inter-American Court clearly established that the application of article 8 is not limited to judicial remedies in a strict sense, “but [to] all the requirements that must be observed in the procedural stages,” in order for all persons to be able to defend their rights adequately vis-à-vis any type of State action that could affect them. I/A Court H.R., *Case of Baena-Ricardo et al. v. Panama*. Merits, Reparations and Costs. Judgment of February 2, 2001. Series C No. 72, para. 124.

23. Mark Manley, *International Legal Protection for Refugees and Asylum-seekers Through the Inter-American Human Rights System*, University of Essex, 1999, p. 158.

24. I/A Court H.R., *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and (8) American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 28.

the determination of Rights should be granted due process. While States have the right to have different procedures for evaluating applications that are 'manifestly unfounded', such power cannot render minimum due process guarantees meaningless."<sup>25</sup>

## A. DOMESTIC MECHANISMS: FORUM AND TERMS TO APPLY FOR RSD

### Forum receiving an asylum application

With respect to the forum or state agency in charge of receiving and adjudicating RSDs, each country has established specific mechanisms to carry out RSD. These mechanisms allow each State to move towards fair and effective procedures, and therefore fulfill its obligations pursuant to international instruments. The creation of specialized commissions to study applications and grant refugee status in the region is a common element, which appears in several countries. Among the five countries studied, Mexico was the first to initiate the practice of using specialized commissions to address the issue of refugees in 1980. Colombia followed in 1984, Ecuador in 1987, and Brazil and Costa Rica in 1997 and 2011, respectively.

These commissions are administrative bodies responsible for examining asylum applications of its jurisdiction. They generally consist of representatives from various state agencies, although their composition and organization varies in different countries using this model in the region.

### Terms to access the RSD process

In regard to terms to access RSDs the 1951 Convention does not establish a specific standards or procedures for access to RSD. However, among the general context of due process, the 1951 Convention guarantees that all refugees shall have free access to the courts (Article 16) and that *refoulement* is prohibited (Article 33). Access to a fair and effective procedure, even with respect to terms to apply, constitutes a basic due process foundation, one of the most fundamental rights of the human condition. Therefore, a limitation of due process by restricting terms to apply is a violation of a human right, which therefore amounts to discrimination. In this regard, the Inter-American Court of Human Rights has ruled in cases strictly related to administrative procedures such as Case of *Yatama v. Nicaragua*,<sup>26</sup> Case of *López Mendoza v. Venezuela*,<sup>27</sup> Case of the *Xákmok Kásek Indigenous Community v. Paraguay*,<sup>28</sup> Case of the *Sawhoymaxa Indigenous Community v. Paraguay*,<sup>29</sup> *Vélez Loor v. Panamá*,<sup>30</sup> the matter of Haitians and

25. Unofficial translation, original text in Spanish: "[...] la Comisión considera que bajo la Convención Americana todo trámite de determinación de derechos debe contar con un debido proceso. Si bien los Estados tienen la facultad de disponer distintos procedimientos para evaluar solicitudes que sean "manifestamente infundadas", tal facultad no puede vaciar de contenido las garantías mínimas del debido proceso". See Comisión Interamericana de Derechos Humanos (CIDH) <http://www.oas.org/es/cidh/decisiones/corte/12.474Fondoesp.doc>, last visited on August 2, 2012.

26. I/A Court H.R., Case of *Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 23, 2005. Series C No. 127, ¶¶ 147-164.

27. I/A Court H.R., Case of *López Mendoza v. Venezuela*. Merits, Reparations, and Costs. Judgment of September 1, 2011. Series C No. 233, ¶¶ 110-149.

28. I/A Court H.R., Case of the *Xákmok Kásek Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, ¶¶ 132 – 138.

29. I/A Court H.R., Case of the *Sawhoymaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146, ¶ 82.

30. En this case, the Court reiterated that: "the provisions of Article 8(1) of the Convention apply also to the decisions of administrative bodies." I/A Court H.R., Case of *Vélez Loor v. Panamá*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, ¶ 108.

Dominicans of Haitian-origin in the Dominican Republic regarding Dominican Republic,<sup>31</sup> and OC-18 Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants.<sup>32</sup>

Also, while there is no specific reasonable term to file an asylum application, international jurisprudence indicates that these periods should be flexible. Under UNHCR criteria, the failure to file the application within a specified period should not lead per se to denying the application due consideration.<sup>33</sup>

Thus, the terms for access to the procedure should be, according to UNHCR, flexible and, while filing a tardy application may influence the credibility analysis in certain cases,<sup>34</sup> the application should not be rejected without prior consideration or a case-specific analysis.<sup>35</sup> This in light of the grave danger, torture, or inhuman or degrading treatment that a refugee could be exposed to if he or she were to be returned to the country of origin,<sup>36</sup> in violation of the non-refoulement obligation under Article 33 of the 1951 Convention, Article 3 of the Convention Against Torture, Cruel, Inhuman and Degrading Treatment, and Article 22 of the American Convention on Human Rights, among other instruments. Further, this principle has become a jus cogens rule of law.

## FINDINGS

Each country has established a structure for the commission responsible for RSDs and the terms that apply to the procedure:

### I. BRAZIL<sup>37</sup>

Name of Commission: Comité Nacional para los Refugiados (National Committee for Refugees) (CONARE)

Regulatory legislation: Act No. 9474 (1997)

Permanent members of the commission:

- o Government Ministries: A representative of each (with voting rights)
  - Ministry of Justice
  - Ministry of Foreign Affairs
  - Ministry of Labor
  - Ministry of Health
  - Ministry of Education
- o Federal Police Department (with voting rights)
- o Civil Society (with voting rights);
  - A representative of Caritas Arquidiócesis of Sao Paulo and Rio de Janeiro
- o United Nations (non-voting, only has speaking rights)
  - UNHCR

31. Resolution of the Inter-American Court of Human Rights dated August 18, 2000, "Matter of Haitians and Dominicans of Haitian-origin in the Dominican Republic regarding Dominican Republic," Considerandum, ¶4.

32. I/A Court H.R., Juridical Condition and Rights of Undocumented Migrants. Advisory Opinion OC-18 of September 17, 2003. Series A No. 18, cited in Section II: DUE PROCESS GUARANTEES FOR ASYLUM-SEEKERS.

33. UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), May 31, 2001, EC/GC/O1/12, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html> [accessed February 27, 2013], ¶ 20.

34. Id.

35. Id.

36. Jabari c. Turquie, Appl. No. 40035/98, Council of Europe: European Court of Human Rights, July 11, 2000, available at: <http://www.unhcr.org/refworld/docid/4a54bbf20.html> [accessed February 27, 2013], ¶ 38.

37. See Ministerio de Justicia de Brasil, Extranjeros – CONARE; República Federativa do Brasil, Lei nº 9.474, dated July 22, 1997. Available at: <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=biblioteca/pdf/O801>. Retrieved August 2, 2012; and information provided by IMDH.

CONARE is a collegial inter-ministerial body under the Ministry of Justice with representatives from government, civil society and the United Nations. It was created by Act No. 9474, approved on July 22, 1997. The powers of the CONARE under Article 12 of Act No. 9474 (1997), are: (a) analyze the request for declaration or recognition, in the first instance, of refugee status; (b) decide to cease refugee status, in first instance, *ex officio* or pursuant to a request from competent authorities; (c) determine the loss in the first instance, of refugee status; (d) guide and coordinate the necessary and effective actions for the protection, assistance, and legal support for refugees; and (e) approve normative instructions regarding this law.

CONARE may use any source or jurisprudential doctrine that seems useful, valid, or suitable. The recent case of Haitians requesting asylum in Brazil is one interesting example: after the earthquake in 2010 many Haitians arrived in Brazil and submitted asylum applications. After reviewing a number of applications, CONARE established that such requests were unfounded. Thus, based on ExCom Conclusion 30<sup>38</sup> and a resolution of the Conselho Nacional de Imigração (CNIg) (National Immigration Council) focusing on humanitarian cases, analysis and decision was transferred to CNIg for all cases. Thus, these Haitian asylum seekers benefited from access to permanent residency on humanitarian grounds. In addition to Act No. 9474/97, which is rela-

tively complete, there are resolutions issued by CONARE and CNIg with specific guidelines to be followed by the RSD process and to ensure due process.

Brazil stands out due to the tripartite participation in decision-making in the RSD procedure. At this time, the head organization at the commission meetings is Caritas Arquidiocese Rio de Janeiro. However, it is important to highlight that it acts on behalf of the Network of Organizations for Migrants and Refugees (*Red de Organizaciones para Migrantes y Refugiados*),<sup>39</sup> which specializes in refugee issues. Further, IMDH notes that a Study Group exists which meets prior to the plenary session, analyzes all applications, evaluates whether the process is well-implemented, and drafts an opinion which is then taken to the plenary. Importantly, although only one organization votes, there are several civil society actors who are directly involved with participation at CONARE meetings; providing guidance in processes, interviews, and opinion on eligibility; cooperating in all working groups, and providing public policy proposals or administrative actions in favor of refugees, as reported by IMDH.

**Term to apply for refugee status:** there is no deadline to file an application for asylum.

38. EXCOM, Conclusion No. 30, UNHCR, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, October 20, 1983, No. 30 (XXXIV)—1983. Retrieved July 25, 2012, from <http://www.unhcr.org/refworld/docid/3ae68c6118.html>.

39. The Solidarity Network for Migrants and Refugees, consists of about 45 institutions that maintain constant communication. The following are included among the functions of the Network: ... provide institutions with mutual support in actions on refuge, share experiences, training sessions, debates, draft proposals and reports, production reports and raise issues jointly, whether for the government or UNHCR, or before the organizations themselves, i.e. to civil society. [See the Network at [www.migrante.org.br](http://www.migrante.org.br)]. Some of the most representative organizations that deal with issues of refuge in Brazil, and closer to the government for the work that they do, according to IMDH are: Caritas Arquidiocesana de Rio de Janeiro, Caritas Arquidiocesana de Sao Paulo, Centro de Defesa de Derechos Humanos de Guarulhos, Associação Antonio Vieira, Instituto Migrações e Direitos Humanos, Caritas Arquidiocesana de Manaus, Pastoral da Mobilidade Humana da CNBB and Pastoral da Mobilidade Humana de Tabatinga

## 2. COLOMBIA<sup>40</sup>

Name of Commission: Comisión Asesora para la determinación de la Condición de Refugiado (*Advisory Commission for Refugee status determination*)

Regulatory legislation: Decree 4503 (2009)

Permanent members of the commission:

- o Comprised exclusively of officers from the Ministry of Foreign Affairs:
  - Chairman of the committee: Deputy Minister for Multilateral Affairs
  - Deputy Minister of Foreign Affairs
  - Director of International Legal Affairs
  - Director of Human Rights and International Humanitarian Law
  - Director of Immigrant, Consular Affairs and Citizen Service

The Ministry of Foreign Affairs receives applications for refugee status which are analyzed by the Advisory Commission for Refugee status determination. The Advisory Commission issues a recommendation on each case, which is not binding for the Minister of Foreign Affairs, who makes the decision on the case: “*The case file, together with the recommendation adopted by the Advisory Commission for Refugee status determination shall be sent to the Office of the Minister of Foreign Affairs, in order for the latter to issue a Resolution in the sense determined by this officer.*”<sup>41</sup>

All Committee members are part of the Ministry of Foreign Affairs. The law school and the legal clinic at Universidad de los Andes de Colombia reported that there has been a greater focus on national security at the Advisory Commission in recent years, due to competent immigration offices in the country being newly divided.<sup>42</sup> Beginning in 2011, the agency which previously oversaw all security and migration—Central de Inteligencia (Central Intelligence)—was split into two divisions and it became clear that the newly-established “Migration Colombia” focuses mostly on security and control. Despite the division of these offices, the officers remain the same. In Colombia, the Commission may invite “a member of a national or international institution, to participate with speaking rights but no vote.”<sup>43</sup>

**Term to apply for refugee status:** In accordance with Article 5 of Decree 4503 (2009) the deadline for requesting asylum is 60 calendar days from arrival.

## 3. COSTA RICA<sup>44</sup>

Name of Commission: Comisión de Visas Restrictivas y Refugio (*Commission for Restricted Visas and Refuge*)

Regulatory legislation: Ley General de Migración y Extranjería No. 8764 (2010) (*General Migration and Alienship Act No. 8764*)

40. Decreto No. 4503 dated November 19, 2009. Por el cual se modifica el procedimiento para el reconocimiento de la condición de refugiado, se dictan normas sobre la Comisión Asesora para la determinación de la condición de refugiado y se adoptan otras disposiciones [Colombia], available at: <http://www.unhcr.org/refworld/docid/4b20bb112.html> [accessed February 27, 2013], and information provided by the law school and legal clinic at Universidad de los Andes, Colombia.

41. Art. 15: Decree 4503, 2009, [Unofficial translation, original text in Spanish: “El expediente, junto con la recomendación adoptada por la Comisión Asesora para la determinación de la Condición de Refugiado, se enviará al Despacho del Ministro de Relaciones Exteriores, con el propósito de que se profiera la Resolución en el sentido que determine este funcionario.”]

42. See Decree 4062 of 2011

43. See Republic of Colombia, Decree 4503, article 30 (2009), [Unofficial translation, original text in Spanish: “un miembro de una institución nacional o internacional, que participará con voz y sin derecho a voto.”]

44. See [http://www.ocu.ucr.ac.cr/Leyes/Ley\\_Administracion\\_Publica.pdf](http://www.ocu.ucr.ac.cr/Leyes/Ley_Administracion_Publica.pdf) Ley General de la Administración Pública; <http://www.tse.go.cr/pdf/normativa/leygeneraldemigracion.pdf> Ley General de Migración y Extranjería; and <http://www.dhr.go.cr/foromig/documentos/Reglamento%20Refugio.pdf> Reglamento de Personas Refugiadas, retrieved on August 2, 2012 and information provided by ACAI, Costa Rica.

Permanent members of the committee:

- o Minister of Public Safety or its representative
- o Minister of Labor and Social Security or its representative
- o Minister of Foreign Affairs or its representative

The Commission for Restricted Visas and Refugee is in charge of determining the issuance of restricted visas and, through a properly reasoned decision, decide on the approval or denial of refugee status.

In Costa Rica, “in the opinion of the Commission, as may be deemed appropriate, the Commission may invite those instances when their technical legal opinion is necessary.”<sup>45</sup> While this participation is contemplated, our partner organization, ACAI, notes that no invitations have been reported, neither to NGOs nor UNHCR.

**Term to apply for refugee status:** there is no prescribed deadline to apply for refugee status.

#### 4. ECUADOR <sup>46</sup>

Name of Commission: Comisión para determinar la Condición de los/las Refugiados/as (*Commission to determine the condition of Refugees*)

Regulatory legislation: Decree 1182 (2012)

Permanent members of the Commission: A per-

son designated by the following Ministries:

- o Commission chair: Ministry of Foreign Affairs, Trade and Integration
- o Ministry of Interior
- o Ministry of Justice, Human Rights and Cults

Article 15 of Decree 1182, provides for the establishment of the Commission, which operates under the coordination of the Ministry of Foreign Affairs. It also notes that the Ministry of Foreign Affairs, Trade and Integration shall exercise the Technical Secretariat of the Commission to determine the status of refugees in Ecuador. The officers appointed by the Secretary of State represented on the Commission, and their alternates shall be appointed by Ministerial Agreement.

The Commission may invite other delegates from governmental or non-governmental institutions, ensuring the principle of confidentiality; though will not have voting rights. A representative from UNHCR may also be invited to the sessions of the Commission, as an observer without voting rights.<sup>47</sup>

Ecuador provides for the establishment, on an exceptional basis, of temporary Commissions to give consideration to situations that demand priority attention. These commissions would operate simultaneously, with the same powers and composition.

**Deadline to apply for refugee status:** refugees have a term of 15 days after entering the country to seek asylum.<sup>48</sup>

45. See Decree N° 36831-G, article 98 (2011).

46. See Republic of Ecuador, *Reglamento para la aplicación en Ecuador del Estatuto de Refugiados*; Republic of Ecuador, Decreto ejecutivo 1182; en <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2012/8604>, retrieved August 2, 2012.

47. See Republic of Ecuador, Decree 1182, article 15, ¶¶ 4, 5.

48. Term to apply for refugee status: the framework establishes 15 days to seek asylum after entering the country [1].

[1] Article 27, Executive Decree 1182, 2012. It should be noted that Article 118, paragraph 1 of the Statute of the Administrative Legal System of the Executive Function (*Estatuto del Régimen Jurídico Administrativo de la Función Ejecutiva*), provides that, in light of the fact that decree 1182 does not otherwise state, it is understood that the terms are counted in business days, i.e., the calculation excludes Saturdays, Sundays and holidays. Further, periods expressed in days shall be counted from the day after the date of notification or publication of the act in question, or from the day following acceptance pursuant to administrative silence. “

## 5. MEXICO<sup>49</sup>

Name of Commission: Comisión Mexicana de Ayuda a Refugiados (Mexican Commission for Aid to Refugees) (COMAR).

Regulating legislations: Ley sobre Refugiados y Protección Complementaria (Refugee and Complementary Protection Act) (2011).

To perform its role, COMAR depends on an independent agency under the Ministry of Interior, called Coordinación General de la Comisión Mexicana de Ayuda a Refugiados (General Coordination of the Mexican Commission for Aid to Refugees). Among other issues relating to the refugee, the Government Secretariat has competence over the recognition of refugee status. COMAR is an inter-ministerial body created by Presidential Agreement, comprised of the Ministries of Interior, Foreign Affairs, and Labor and Social Welfare.

UNHCR and civil society previously had greater involvement, however, since the publication of the Refugee and Complementary Protection Act (2011), they are no longer involved. The organization, Sin Fronteras IAP Mexico, is part of a group focused on eligibility issues in RSD proceedings, with the opportunity to provide an opinion on cases, but without the right to vote on the final decision.

**Term to apply for refugee status:** The asylum-seeker must apply within a period of 30 working days from the first working day after the entrance to the country.<sup>50</sup> However, Article 19 of the Regulations of the Act provides the possibility of allowing, on an exceptional basis,

the submission of applications after the deadline if the applicant can prove that he or she was not able to present a timely application for reasons beyond his or her control.

## B. RIGHT OF ACCESS TO INFORMATION (ACCESS TO THE CASE FILE)

Article 13 of the American Convention includes the obligation of the state to allow its citizens access to information that is in its power. This right of access to information is a threshold right allowing effective exercise of the right to prepare a defense and access judicial guarantees. In terms of the RSD process, the right to information should guarantee access to the asylum-seeker's case file since this contains the analysis and conclusions of the case and the reasoning underlying negative decisions. The case file is a source of information in the power of the authorities responsible for RSD, in all five countries administrative agencies. Without access to information in the case file, the applicant or their legal counsel cannot prepare a legal challenge as protected under his or her right to due process.

## FINDINGS

### I. BRAZIL

IMDH reported that the refugee or asylum seeker does have access to his or her case file, even though the refugee law 9474/97 does not

49. Federal Government of Mexico, COMAR. Available at: [http://www.comar.gob.mx/en/COMAR/La\\_creacion\\_de\\_la\\_COMAR](http://www.comar.gob.mx/en/COMAR/La_creacion_de_la_COMAR) Retrieved August 2, 2012, Spanish version only; Estados Unidos Mexicanos, Ley sobre Refugiados y Protección complementaria, (Refugee and Complementary Protection Act), Available at: <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2010/8150>, retrieved August 2, 2012, Spanish version only; and information provided by Sin Fronteras I.A.P, México

50. Art. 18, Ley sobre Refugiados y Protección Complementaria (Refugee and Complementary Protection Act), (2011).

specifically states this. In the case of Brazil, the authority responsible for the access of the case file is the General Coordinator and Secretary of CONARE.

## 2. COSTA RICA

ACAI reported that refugees and asylum seekers are entitled to access their entire administrative record, upon request, and that they can also issue a special power of attorney to those whom they authorize to access the record. The record is physically located at the Refugee Unit. Article 191 of the General Law of Migration and Aliens provides that administrative migration proceedings are public, however, in practice this right is restricted by the principle of confidentiality. Article 273 of the General Law of Public Administration states that there shall be no access to parts of the record if access could compromise confidential information or when access confers undue privilege or an opportunity to illegitimately harm the administration, the party or third parties, within or outside the record.

Bodies such as the Judicial Investigation Body (*Organismo de Investigación Judicial*) (OIJ) and the Direction of Intelligence (*Dirección de Inteligencia*) (DIS) have access to the record insofar as it may correspond to a person of interest for the Refugee Unit if any open investigation is underway. However, their access is restricted to the application form, interview notes, and documents that may be obtained only by judicial order. In this manner, it protects the principle of confidentiality.

## 3. COLOMBIA

As reported by the law school and legal clinic at Universidad de los Andes, Colombia's situation appears to be a bit more complicated as the legislation is "deeply confusing" on this issue. Asylum seekers have partial access to his or her record. Article 24 of Decree 4503, as amended by Article 1 of Decree 85 of 2010 states that "*the documents related to the processing of refuge, are confidential*,"<sup>51</sup> and refers to the rule governing this confidentiality. Article 4 of Decree 274 of 2000. This article, which sets out the guiding principles for Foreign Service and diplomatic and consular careers, articulates the duty of *confidentiality* at paragraph 9, and includes the information stored in the Ministry's files. A formal request to the authority, therefore, would not yield copies of the reserved documents.

Therefore, the entire case file, with the exception of the documents submitted by the applicant, the resolutions, and the minutes of the interview (if the applicant requests a copy at the time of the interview taking place) are treated as confidential documents by the Ministry, even with respect to the applicant him/herself. Thus, the applicant is not party to, among other matters, the minutes of the meeting of the Advisory Commission that analyzes, considers, and decides the case. This creates a serious problem for negative decisions and the possibility of revision or appeal without access to the reasons for the decision.

The resolution only provides partial information on the Ministry's considerations to deny refugee status and provides limited information about the reasoning behind the decision. Therefore, the final decision is based on a document (the minutes of the meeting of the Advisory Com-

51. [Unofficial translation, original text in Spanish: "los documentos relacionados con el trámite de refugio, tienen carácter reservado...".]

mission studying the case) that the applicant is unable to see, and therefore, cannot contest, causing a motion for reconsideration (*recurso de reposición*) to be limited recourse. This implies a serious breach of the principle requiring *reasoning underlying a decision and the right of contradiction* as part of due process.

Note that in practice, the only way for the applicant (partially) to access the contents of the meeting minutes is through the use of constitutional actions outside the regular procedure, through a judicial process known as an “*acción de tutela*” or *right to request information*. In such cases, the judge may order the Ministry to issue a copy of the minutes to be admitted as evidence. Even in that case, the applicant will only have access to the sections in the case file that are transcribed by the decision, and not the document itself. In turn, it is possible to request discovery of such evidence for all parties via a process of nullity and restoration of the right to the administrative jurisdiction. However, this procedure has an average duration of over five years. Thus, the procedure has never been attempted by an asylum-seeker given that it would be excessively difficult for a refugee to wait this long without state support and without the right to work.

The law school and the legal clinic at Universidad de los Andes de Colombia reported a conflict of laws on the issue of access to information. The habeas data law regulates the right of access to personal data (“*any piece of information related to one or more determined person or which can be determined or that may be associated*

*with a person or entity*”).<sup>52</sup> The exceptions to this rule (listed in Article 2) are national security records, chambers of commerce records, criminal records, and statistical records, as well as those that “*circulate internally and are not supplied to other natural or legal persons.*”<sup>53</sup> Although the minutes and the rest of the case file could, in principle, fit within this latter category, the proof that they are not subject to “*internal circulation*” lies in the fact that they can be arranged and displayed in the context of a judicial process, therefore, keeping these confidential from the applicant is unjustified.

#### 4. ECUADOR

AAE reported that Ecuador’s Constitution of 2008 establishes the right to access information in its articles 76 and 92, and that this constitutional standard applies throughout state institutions. In asylum cases, the competent authority for the right to access the case file is the Refugee Direction (under the Ministry of Foreign Affairs). Notably, the Constitution of Ecuador in Article 76, paragraph 7, letter (d.), guarantees access to information in all procedures by stakeholders. Similarly, Article 23 of Executive Decree 1182 of 2012 provides: “*Throughout all the development, the process will ensure that the asylum-seekers and recognized refugees have access to the procedure, the right to due process and access to their records at the request of the interested party.*”<sup>54</sup>

AAE found that, in many cases, applicants were unable to request or access their case files following the short period to appeal, which is

52. Republic of Colombia (2008), Statutory Law 1266 (Ley Estatutaria 1266), article 3, letter E, (Unofficial translation, original text in Spanish: “cualquier pieza de información vinculada a una o varias personas determinadas o determinables o que puedan asociarse con una persona natural o jurídica”).

53. Id., article 2 (Colombia), (Unofficial translation, original text in Spanish: “circulan internamente y no se suministran a otras personas jurídicas o naturales”).

54. Unofficial translation, original text in Spanish: “Durante todo el desarrollo del trámite, se garantizará a los/las solicitantes de refugio y a los/las refugiados/as reconocidos/as, el acceso al procedimiento, el derecho al debido proceso y el acceso a sus expedientes a pedido de la parte interesada.”

five business days for cases on the merits<sup>55</sup> and only three business days for the person whose application has been declared inadmissible (see: Section D: Accelerated or abbreviated proceedings). In limited cases, an individual was able to obtain an extension for filing a legal brief so as to provide said person with an opportunity to access the record. However, this is not a widespread or regular practice, and all extensions were obtained with the assistance of legal aid.

## 5. MEXICO

Sin Fronteras IAP reported that the refugee and the applicant have the right to access their case file under the regulations of the Refugee and Complementary Protection Act (2012), which states in Article 20 that the applicant and, as applicable, his or her legal representative, shall have access to the case file. Moreover, this right is also provided in the Mexican Constitution of the United Mexican States (*Constitución Mexicana de los Estados Unidos Mexicanos*), which states, in Article 6, that the right to information is guaranteed by the state.

Because the procedure for recognition of refugee status is performed before COMAR, this authority prepares and protects the case files. *Instituto Nacional de Migración* (INM) (National Migration Institute) keeps the migration records<sup>56</sup> for asylum-seekers who are in detention. Sin Fronteras IAP expressed concerns regarding the lack of clarity on this issue in relation to the two agencies involved, as INM keeps the migratory administrative records for asylum seekers in detention and the COMAR requires representation to take place in that body and not through

the other agency. This precludes asylum-seekers who are in detention from accessing their case file.

Although domestic and constitutional law guarantees the right of access to case files, Sin Fronteras IAP reported that the right is not always respected. In practice, if an asylum seeker applies without legal representation to access their case file, he or she could be denied access. Legal representatives also face difficulty directly accessing files when national security issues are invoked.<sup>57</sup>

## C. RIGHT TO APPEAL A NEGATIVE DECISION ISSUED IN A FIRST INSTANCE: RESOURCES TO CHALLENGE AND TERMS

It is worth noting that this section is about the right to appeal negative first instance decisions, i.e. during the regular RSD process. It is important to distinguish between the different resources used to challenge a negative decision available in the various countries reported herein: motion for reconsideration (*recurso de reposición*), revision recourse (*recurso de revisión*), or revocation recourse (*recurso de revocatoria*), a first instance recourse contemplated by the regulations in some countries, as well as an appellate recourse (*recurso de apelación*)—a second instance recourse to challenge a first instance decision.

Motions for reconsideration, revision or revocation, according to domestic legislation in each of the countries of the report, apply against administrative acts,<sup>57</sup> and are filed before the same

55. Executive Decree 1182, 2012, article 48.

56. The records that are opened to process an administrative immigration process to determine whether the person has a regular permanence in Mexican territory.

57. In Colombia: Art. 50. Recourses in the Government Route, Contentious Administrative Code (*Código Contencioso Administrativo*), 1984; in Ecuador: Art. 174, Statute of the Administrative Legal Regime of the Executive Function of Ecuador (*Estatuto del Régimen Jurídico Administrativo de la Función Ejecutiva de Ecuador*), 2002; in México: Art. 39, *Ley de Refugiados y Protección Complementary*, 2012; in Costa Rica, Art. 118, *Ley General de Migración y Extranjería*, 2009.



In accordance with domestic law, an appeal is not available against decisions issued by Ministers. The right to appeal represents the ability to challenge the decision before an authority that is superior in hierarchy to the one making the underlying decision;<sup>60</sup> notwithstanding this precept, as a result of the institutional design of Decree 4503(2009), the decision is issued by a Minister,<sup>61</sup> and according to Article 50 of the Administrative Code, Ministers lack a hierarchical superior. Domestic jurisprudence, disregarding international standards, has indicated that the lack of the possibility to appeal is not a due process violation, as it is consistent with domestic law.<sup>62</sup> Since there is no appeal in administrative forum and a motion for reconsideration is the only recourse. Colombian law determines that there is a possibility to “appeal” through the judicial system. However, these actions have been reported to be complex and last several years.<sup>63</sup> During this time, the applicant cannot work or receive state assistance. In this context, we must highlight a new development in Colombian jurisprudence. In February 2012, the State Council decided the first refugee case through the action of nullity and restoration of a right,<sup>64</sup> a judicial action designed to persuade judges to change the decisions made by administrative authorities, which in this case was the Ministry of Foreign Affairs. This was unprecedented because the action, a long-term ordinary proceeding, was not suitable for people who were denied refugee status given the fact that the applicable thirty days term to leave the country had expired, they lack legal status in the country once their

respective proceeding is completed. This 2012 precedent affirms previously concluded matters regarding the ineffectiveness of the action for annulment and reinstatement of the right for refugee cases. The ineffectiveness was evidenced by the delay processing the action; it was filed in December 2004 and a final judgment was issued almost eight years later. This judgment, despite denying the plaintiff’s claims, sets an important precedent by the matters discussed therein.

In Colombia, the term to file a motion for reconsideration (not an appeal) is five days after notice of the initial decision.<sup>65</sup> Once the action is brought within the statutory period of five days, the person continues to be covered under the immigration status of asylum-seeker, which legalizes his or her stay in the country and prohibits deportation or expulsion.

### 3. COSTA RICA

The Commission of Restricted Visas and Refugee (*Comisión de Visas Restringidas y Refugio*) will determine the approval or denial of refugee status by issuing a judgment at first instance. If an application is denied, in accordance with Article 118 of the General Immigration Act (LGME), Special Act No. 8764, persons seeking refugee status have regular administrative remedies: (1) Revocation (*Revocatoria*), brought before the Commission; and (2) Appeal in the alternative (*Apelación en Subsidio*). The General Direction is responsible for forwarding this recourse to the

60. See Republic of Colombia, Contentious Administrative Code, Article 50.

61. See *id.*, article 15.

62. See CONSEJO DE ESTADO, SALA DE LO CONTENCIOSO ADMINISTRATIVO, SECCION TERCERA. EXPEDIENTE 25000-23-25-000-2002-1893-0127, sentencia del 27 de marzo de 2003. C.P. María Elena Giraldo Gómez; y la Sentencia T-704/03. De la Corte Constitucional, M.P. Clara Inés Vargas Hernández, Spanish version only.

63. According to the observations of UA-BJ, typically, they last over five years.

64. See CONSEJO DE ESTADO, SALA DE LO CONTENCIOSO ADMINISTRATIVO, SECCION PRIMERA. Consejera ponente: MARIA CLAUDIA ROJAS LASSO. Bogotá, D.C., dos (2) de febrero de dos mil doce (2012). Radicación número: 11001-03-24-000-2004-00210-00, Spanish version only.

65. Art. 16 Decree 4503, 2009

Administrative Immigration Tribunal (*Tribunal Administrativo Migratorio*). According to Article 225 of the LGME, and Article 133 of the Rules of Refugees (*Reglamento de Personas Refugiadas*), a request for revocation or an appeal must be filed within three business days from notification.

Pursuant to Article 25, the LGME ordered the creation of the Administrative Immigration Tribunal as a decentralized agency under the Ministry of Interior. In particular, and in accordance with Article 29 of the LGME, the Administrative Immigration Tribunal is competent to hear and decide on the appeals filed against final decisions issued by the General Direction of Immigration, on migration, and against final decisions issued by the Commission of Restricted Visas and Refuge, on matters of refuge. ACAI perceived this as a very important instance in the RSD process, particularly because the judges who comprise it have demonstrated their respect for human rights.

Another important aspect incorporated in the General Immigration Act is the participation of two civil society organizations linked to migration matters, with speaking and voting rights, including the National Immigration Council (*Consejo Nacional de Migración*), an advisory body to the Executive Branch, and the General Direction of Immigration.

ACAI emphasizes certain complications related to the timeliness of the appellate process. The General Immigration Act requires issuance of a

resolution in each administrative recourse within three months.<sup>66</sup> However, the deadline for a decision on revocation recourse extends slightly over the term contemplated. Further, the deadline for a decision on an appeal well exceeds a year, although Article 226 states that appeals shall not require special drafting; in order to be properly formulated, it is enough that the text of a recourse leads to a clear inference of the petition to overturn or appeal the challenged act. However, the 3-day term for submission is, by all measures, an entirely inadequate term to conduct a thorough and reasoned analysis. Further, the resolutions to deny, in many cases, fail to contain adequate justification for the refusal. Thus, their analysis and defense becomes highly complex.

According to Article 25 of the LGME, the decision issued by the Administrative Immigration Tribunal exhausts administrative remedies.<sup>67</sup> Upon exhaustion of administrative remedies, there is a possibility of recourse before the judicial courts, via the Administrative Contentious route.

With respect to the judiciary, ACAI reports that the National Commission for the Improvement of Access to Justice (*Comisión Nacional para el Mejoramiento del Acceso a la Justicia*) (CONAMAJ)—a body responsible for complying with the Rules of Brasilia to ensure adequate attention to complex cases involving vulnerable populations and responding to the needs of this population within the Costa Rican judicial system—incorporates two civil society organi-

66. Republic of Costa Rica (2009), *La Ley General de Migración y Extranjería*, articles 227 and 228. Available at: <http://www.tse.go.cr/pdf/normativa/leygeneraldemigracion.pdf>. Retrieved August 3, 2012.

67. See also, Article 141 of the Regulations of Refugees, which states: "The resolution of the Administrative Migration Tribunal shall have *res judicata* effect, pursuant to the provisions of article 120 of the Contentious Administrative Procedural Code. By virtue of the above, readmission of the request into the proceeding, where it does not incorporate new elements, facts or circumstances to appraise, shall be inapplicable." (Unofficial translation, original text in Spanish: "*La resolución del Tribunal administrativo Migratorio tendrá carácter de cosa juzgada material según las disposiciones del artículo 120 del Código Procesal Contencioso Administrativo. En virtud de lo anterior será improcedente la readmisión a trámite de la solicitud que no incorpore nuevos elementos, hechos o circunstancias que valorar...*")

zations with experience in matters of Migration and Refuge, as members of the Subcommittee on Migrants and Refugees (*Subcomité de Migrantes y Refugiados*). These organizations participate with speaking and voting rights. This is an example of the democratization of justice and it is only possible when it is available to all persons without distinction of any kind. This body is responsible for developing and suggesting specific guidelines for reporting, training, outreach, and awareness processes in and out of the Judiciary, which is of great importance. In 2010, the Plenary Court approved the draft policy on access to justice for migrants and refugees.<sup>68</sup>

#### 4. ECUADOR

In Ecuador, the right to appeal is applied through the Constitution, the Statute of the Administrative Legal Regime of the Executive Function (*Estatuto del Régimen Jurídico Administrativo de la Función Ejecutiva*) (ERJAFE), and Executive Order 1182 (Regulations for the Implementation of the Right of Refuge in Ecuador) of 2012. In accordance with Article 17 of Decree 1182, an appeal may be filed, in an administrative forum, against decisions of the Refuge Direction and the Commission. The Minister of Foreign Affairs, Trade and Integration has competence over the resolution of these recourses, in the second and final instance. The Minister must decide within two months from the appeal's submission date. The resolution on asylum applications ends the administrative route and the applicant must be deported, as established in the Decree.<sup>69</sup> According to Article 48 of Executive Decree 1182 of 2012, the appeal must be filed within a period of five days starting on the day following the notification.

Moreover, in accordance with Article 174 of ERJAFE, administrative acts that do not end the administrative route may be challenged, at the option of the appellant, via a motion for reconsideration before the same administrative body. Notably, a motion for reconsideration may not be newly filed against the original motion for reconsideration; however, an appeal may be brought, or an action before the administrative contentious tribunal, at the option of the appellant. In particular, actions affecting direct subjective rights of the administrated party may be subject to this recourse.

Also, pursuant to the provisions of Article 50 of Executive Decree 1182, when the refugee claim has been definitively denied, the decision rendered may ultimately be subject to an extraordinary review (*recurso extraordinario de revisión*). The mere filing of a request for extraordinary review does not result in obtaining the asylum-seeker status and, therefore, the person is subject to deportation unless the Administration determines eligibility for processing as a result of the existence on the grounds specified in the Statute of the Administrative Legal Regime of the Executive Function.<sup>70</sup>

After the time limits to submit administrative appeals expire, the only remaining recourse is a contentious-administrative action, without prejudice, if any, to the applicability of the request for extraordinary review. In the context of due process rights and the right to a defense, Article 76, no. 7 literal m) of the Constitution states in that any process which entails the determination of rights and obligations of any order, the right to appeal a judgment or resolution in all procedures shall be ensured.<sup>71</sup> Furthermore, Article

68. See <http://www.conamaj.go.cr/images/libros/pdf/032.pdf>, last visited on August 2, 2012.

69. See Art. 47 of Decree 1182

70. See Arts. 50 and 51 of Decree 1182

71. en todo proceso en el que se determinen derechos y obligaciones de cualquier orden, se asegurará el derecho a recurrir el fallo o resolución en todos los procedimientos.

173 states: “Administrative acts of any State authority may be challenged, both administratively and before the corresponding organs of the judiciary.”<sup>72</sup>

## 5. MEXICO

According to Article 25 of the Refugee and Complementary Protection Act (LSRPC),<sup>73</sup> and Article 59 of its Rules of Procedure,<sup>74</sup> if a resolution on an application for recognition of refugee status is negative, the alien may file the petition for review to contest the resolution within fifteen business days from the date of his or her respective notification, directly with the authority that issued the contested measure. In other words, under the aforesaid law, a refusal of recognition of refugee status can be challenged through the use of the administrative review contained in the Federal Administrative Procedure Act. However, this procedure is not appropriate to appeal that decision, given that the review body is the same, COMAR, and it therefore does not perform an adequate review of the cases, which causes the remedy to be ineffective. The appeal should be reviewed by an authority other than the issuing authority. This does not presently occur with an appeal. If the appeal is affirmed, a writ of *amparo* may be requested (recourse to request protection of fundamental rights).

The regulations of LSRPC provide, in Article 60, that in matters of the conduct of the proceedings on the recognition of refugee status and the petition for review, the regulation is subject to the provisions of the Administrative Procedures Act.

However, Sin Fronteras IAP reported that one of the problems faced by asylum seekers in Mexico lies in that the law does not stipulate the time to resolve the appeal. Hence, it is not an effective remedy because it results in an excessively lengthy procedure. Therefore, during the appeal asylum seekers do not have a temporary work permit, making it difficult to obtain an adequate socioeconomic status in Mexico and preventing them from fully exercising their economic, social, and cultural rights. Further, if the asylum-seeker wishes to bring an appeal or a judicial remedy and is in detention, he or she is held indefinitely in prolonged detention until issuance of the resolution, which can last up to a year or more depending on the complexity of case.

Sin Fronteras IAP notes that asylum-seekers have the ability to file a lawsuit in a court that is dependent or belongs to the federal executive: the Federal Court of Fiscal and Administrative Justice, to the confirmation of the decision by the review. If the judgment issued by this court is not favorable, the appellant may also request review by the judiciary.

## D. ACCELERATED OR ABBREVIATED PROCEEDINGS

Accelerated and abbreviated proceedings have been subject to discussion since 1983, when UNHCR Executive Committee – EXCOM- published its Conclusion No. 30 on “*The problem of manifestly unfounded or abusive applications for asylum*.”<sup>75</sup> The Committee reached this conclu-

72. [Unofficial translation, original text in Spanish: “Los actos administrativos de cualquier autoridad del Estado podrán ser impugnados, tanto en la vía administrativa como ante los correspondientes órganos de la Función Judicial”.]

73. Ley sobre Refugiados y Protección Complementaria (2011) at <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2010/8150>, last visited August 12, 2012

74. Reglamento de La Ley Sobre Refugiados y Protección Complementaria (2012) at <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2012/8339>, last visited August 12, 2012

75. UNHCR, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, October 20, 1983, No. 30 (XXXIV)—1983. Retrieved July 25, 2012, from <http://www.unhcr.org/refworld/docid/3ae68c6118.html>.

sion because it recognized that “applications for refugee status by persons who clearly have no valid claim to be considered refugees under the relevant criteria constitute a serious problem in a number of States parties.”<sup>76</sup> Such applications “are burdensome to the affected countries and detrimental to the interests of those applicants who have good grounds for requesting recognition as refugees.”<sup>77</sup>

Subsequently, the Executive Committee proposed that domestic procedures for determining refugee status include a “special provision for dealing in an **expeditious** manner with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure.”<sup>78</sup> These requests are graded as “clearly abusive” or “manifestly unfounded” and “are to be defined as those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum.”<sup>79</sup>

While the Executive Committee recommended the use of expedited procedures in the RSD process in these special cases, it also recognized that the erroneous classification of an application as manifestly unfounded or abusive could have “grave consequences” for the applicant and that there is a “need for such a decision to be accompanied by **appropriate procedural guarantees**.”<sup>80</sup> Therefore, it recommended a series of safeguards in the same document to protect applicants and prevent abuse and poor decisions:

- (i) as in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given **a complete personal interview by a fully qualified official** and, whenever possible, **by an official of the authority competent to determine refugee status**;
- (ii) the manifestly unfounded or abusive character of an application should be established by the **authority normally competent** to determine refugee status;
- (iii) an unsuccessful applicant should be enabled to have a negative decision reviewed **before** rejection at the frontier or forcible removal from the territory. Where arrangements for such a review do not exist, governments should give favorable consideration to their establishment. This review possibility can be more simplified than that available in the case of rejected applications which are not considered manifestly unfounded or abusive.<sup>81</sup> (Emphasis added).

In Latin America, the use of accelerated procedures in the RSD process began in 1998 in Panama, which published, for the first time in the region, a domestic law detailing procedures for handling various “abusive or unfounded recognition applications.”<sup>82</sup> Similarly, in 2009, countries such as Ecuador and Colombia, included similar figures in their refugee legislation by presidential decree.<sup>83</sup> The inclusion of rapid, expedited, or abbreviated proceedings in the RSD process in the Latin American region is a recent addition.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Unofficial translation, original text in Spanish: “solicitudes de reconocimiento abusivas o infundadas.”

83. Republic of Ecuador (2009), Executive Decree No. 1635 - currently repealed and replaced by Decree to 1182 (2012)

- Available at: [http://www.derechoecuador.com/index.php?option=com\\_content&view=article&id=4913:registro-oficial-no-565-martes-7-de-abril-de-2009&catid=298:abril&Itemid=530#No1635](http://www.derechoecuador.com/index.php?option=com_content&view=article&id=4913:registro-oficial-no-565-martes-7-de-abril-de-2009&catid=298:abril&Itemid=530#No1635). Spanish version only, Retrieved on August 2, 2012; Republic of Colombia (2009) Executive Decree No. 4503.

It is essential to note that these measures are taken pursuant to internal arguments in each country and many have alleged national security as a justification for increasingly restrictive refugee recognition processes.

In any case, accelerated or abbreviated proceedings must ensure due process, the IACHR states that “while States have the right to have different procedures for evaluating applications that are” manifestly unfounded, such power cannot eviscerate minimal due process safeguards.”<sup>84</sup>

There are currently at least six countries in Latin America that have implemented accelerated or expedited procedures for RSD: Colombia, Costa Rica, Ecuador, El Salvador,<sup>85</sup> Panama,<sup>86</sup> and Venezuela.<sup>87</sup> The details regarding such expedited proceedings vary by country. This report analyzes expedited proceedings in Colombia, Costa Rica, and Ecuador.

## CURRENT STATUS OF ABBREVIATED OR ACCELERATED PROCEDURES: COLOMBIA, COSTA RICA, AND ECUADOR

### I. COLOMBIA

Article 11 of Decree 4503 (2009) provides for an expedited procedure for manifestly unfounded or clearly abusive applications, making express reference to “the guidelines set by the Executive Committee of the High Commissioner for Refugees.” The paragraphs of Article 11 explain why an application is considered manifestly unfounded or clearly abusive:

*When a case is identified, for the receipt of the request or once the process of recognition of refugee status has commenced, which can be regarded as **manifestly unfounded or clearly abusive**, treatment of the case is subject to the provisions of Article 12 of this decree [...]*<sup>88</sup> (Emphasis added).

84. “si bien los Estados tienen la facultad de disponer distintos procedimientos para evaluar solicitudes que sean “manifestamente infundadas”, tal facultad no puede vaciar de contenido las garantías mínimas del debido proceso”

85. In El Salvador, in accordance with Decree No. 918, published in Official Gazette No. 148, Volume 356, on August 14, 2002, the Secretary of the Commission will open an individual or collective record, in the event of dependent minors, and it will be immediately forwarded to the Deputy Commission pursuant to the procedure noted in the previous article. The Deputy Commission will call on the interested party to carry out a confidential interview which will confirm the matters related to his or her application, and an eligibility interview will be performed with each woman or man who is overage in the family group, in order to determine whether the request is admissible.

86. In Panama, Article 41 of Executive Decree No. 23 dated February 10, 1998 ensures that, in the event of study and analysis of the sworn oath, interviews and documents filed by the asylum-seeker, the application is deemed manifestly unfounded or clearly abusive, the National Office for the Attention of Refugees (Oficina Nacional para la Atención de Refugiados) (ONPAR) will immediately dismiss the request. IF the asylum-seeker argues that he or she can submit or if he submits additional witness statements or documents in his or her favor, ONPAR shall call on the applicant, if it deems appropriate, so that he or she supports his request for refuge, in order to give the person an opportunity to prove whether sufficient elements exist to admit the petition to the proceeding.

87. In Venezuela, Article 17 of the Organic Law for Refugees (Ley Orgánica Sobre Refugiados o Refugiadas y Asilados o Asiladas) establishes that the National Commission, within a ninety (90) continuous day term, shall decide on the request. If it is denied, such denial must be reasoned, and it will inform the applicant in writing and inform the UN High Commissioner for Refugees. In accordance with Article 18, if the request is approved, the Commission shall inform the Ministry of Interior and Justice to issue the respective identity document.

88. Unofficial translation, original text in Spanish: Cuando se identifique un caso, durante la recepción de la solicitud o una vez iniciado el trámite de reconocimiento de la condición de refugiado, que pueda ser considerado como manifestamente infundado o claramente abusivo, el tratamiento del caso quedará sujeto a lo previsto en el artículo 12 del presente decreto [...]

Decree 4503, in the same article 11, defines the applications that are manifestly unfounded or clearly abusive in Article 11 of the same applications that are:

*PARAGRAPH ONE. A petition is considered manifestly unfounded when it has nothing to do with the criteria for recognition of refugee status. These are applications that do not manifest the existence of a well-founded fear of persecution or, those in which the reasons for leaving the country of origin or habitual residence, are clearly beyond the conventional reasons.*

*PARAGRAPH TWO. A petition is considered clearly abusive when the main motivation consists of inducing to error or deceiving the authorities responsible for recognition of refugee status.*

*The following shall be considered clearly abusive petitions:*

- a) When the applicant has been intercepted by immigration authorities in the process of leaving the country;*
- b) When the Secretariat of the Advisory Commission confirms the submission of many applications by the same person without identifying new elements to justify them;*
- c) Cases where the destruction of documents with intent to deceive the authorities regarding per-*

*sonal data or identity have been confirmed;*

- d) Cases in which false identification or adulterated documents are presented and the applicant insists on their authenticity;<sup>89</sup>*

In these proceedings (Article 12), the interview is conducted, and the decision of whether the case should be accelerated falls on the President of the Advisory Committee for Determining Refugee Status (the Deputy Minister for Multilateral Affairs, Decree 3355 of 2009, Article 12), who can support the decision, sending the recommendation to the Minister for resolving this issue, or rejecting the application of the accelerated procedure, returning said application to the regular procedure. If the resolution is issued regarding the underlying case, the term for a motion for reconsideration is only two (2) business days after notification.

**Article 12. The accelerated procedure** shall include the following steps:

- 1) As in the case of all applications for recognition of refugee status, the applicant shall have the opportunity to undergo a **personal and complete** interview with a member of the Secretariat of the Advisory Commission. Once the interview has been assigned, the Secretary of the Advisory Commission may categorize a request as **clearly abusive or manifestly unfounded**. This concept does not consist of*

89. Unofficial translation, original text in Spanish:

*PARÁGRAFO UNO. Se considerará una petición como manifiestamente infundada aquella que no guarda relación alguna con los criterios establecidos para el reconocimiento de la condición de refugiado. Se trata de solicitudes en las cuales no se manifiesta la existencia de un temor fundado de persecución o bien, aquellas en las que las razones para abandonar el país de origen o residencia habitual, sean claramente ajenas a los motivos convencionales.*

*PARÁGRAFO DOS. Se considerará una petición como claramente abusiva aquella cuya motivación principal consista en inducir a error o engaño a las autoridades encargadas del reconocimiento de la condición de refugiado.*

*Se considerarán claramente abusivas aquellas peticiones en las que:*

- a) El solicitante haya sido interceptado por las autoridades migratorias en el proceso de abandonar el territorio nacional;*
- b) Se verifique por la Secretaría de la Comisión Asesora la presentación reiterada de solicitudes por la misma persona sin que se identifiquen nuevos elementos que la justifiquen;*
- c) Se compruebe la destrucción de documentación con la intención de engañar a las autoridades sobre sus datos personales o de identidad;*
- d) Se presente documentación de identidad falsa o adulterada y se insista sobre su autenticidad;*

*a full legal analysis as the one performed for the normal procedure but rather, a brief description of the reasons considered for this qualification in light of the definitions established above.*

*2) The President of the Advisory Commission for determining Refugee Status, shall ratify or rectify the opinion issued by the Secretariat. In the event of ratification, it shall issue the recommendation to the Minister of Foreign Affairs to issue the corresponding resolution. In the event that the Secretariat's decision is rectified, the case shall be forwarded to the regular procedure.*

*3) A motion for reconsideration shall apply against the decision referred to in paragraph 2 of this Article, which must be filed within two (2) business days of notification of the decision in question.<sup>90</sup>*

In the regular procedure, analysis of the case to recommend the decision to the Minister comes from the Advisory Commission, a collegial body which meets several times a year for this purpose. It should be noted that the law does not establish this period or the frequency of commission meetings per year; thus, the duration of the procedure is uncertain. By contrast, in the accelerated procedure, the recommendation comes from the Deputy Minister for Multilateral Affairs. Thus, at least in theory, this is a more expeditious decision, because it is not necessary for the asylum-seeker to wait for a Commission

meeting.

The legal clinic of Universidad de los Andes highlights that given the small number of asylum applications received by the Colombian government, expedited procedures for determining refugee status, although they are contemplated by the legislation, are not cause for concern. Under the accelerated procedure, the recommendation is issued by the Deputy Minister for Multilateral Affairs, without the need to wait for the Commission to meet. However, since the Minister of Foreign Affairs is usually responsible for both the accelerated procedure and the final decision, there is a particularly sensitive difference between the two procedures.

## **2. COSTA RICA**

The Regulation of refugees (Decree 3683 I-G) (*Reglamento de personas Refugiadas, Decreto 3683 I-G*), establishes, in Article 139, summary or expedited procedure for applications for Refugee status designated manifestly unfounded, clearly abusive or fraudulent:

*“In the event of detecting an application for refugee status designated manifestly unfounded or clearly abusive with a fraudulent nature, these shall be accepted to carry out the summary procedure provided for in Article 144 of these Regulations, under the respect for the right to petition which must be guaranteed to users; however this*

<sup>90</sup> See Republic of Colombia, Decree 4503. Unofficial translation, original text in Spanish:

Art. 12. El procedimiento acelerado constará de los siguientes pasos:

1) Al igual que en el caso de todas las solicitudes de reconocimiento de la condición de refugiado, el solicitante tendrá la oportunidad de tener una entrevista personal completa con un funcionario de la Secretaría de la Comisión Asesora. Surtido el trámite de la entrevista, la Secretaría de la Comisión Asesora podrá conceptuar una petición como claramente abusiva o manifestamente infundada. Dicho concepto no consistirá de un análisis legal completo como el realizado para el procedimiento ordinario sino de una breve descripción sobre las razones tenidas en cuenta para esta calificación a la luz de las definiciones establecidas anteriormente.

2) El Presidente de la Comisión Asesora para la determinación de la Condición de Refugiado, ratificará o rectificará el concepto emitido por la Secretaría. En caso de ser ratificado emitirá la recomendación al Ministro de Relaciones Exteriores para que expida la correspondiente resolución. De ser rectificado el concepto de la Secretaría, el caso pasará al procedimiento ordinario.

3) Contra la resolución señalada en el numeral 2 del presente artículo, procede el recurso de reposición en el efecto suspensivo, el cual deberá interponerse dentro de los dos (2) días hábiles siguientes a la notificación de la resolución en mención.

*procedure shall be conducted expeditiously and in response to the recommendations set out in international standards of refugee.”<sup>91</sup>*

Article 4 of Presidential Decree 3683 I-G defines “**manifestly unfounded or abusive**” as “requests for refugee status which contravene the criteria that fall under the definition of refugee under the Immigration Act and the Convention on the Status of Refugees of 1951 and its Protocol of 1967”<sup>92</sup> (emphasis added). In addition, Article 140 of the regulations adds that “[...] to process such requests, there shall be a first meeting of the alien with a officer of the subprocess on the matter; in the event that the inappropriateness of the request is confirmed in accordance with due process and international law rules, the officer shall refer the alien to an eligibility officer who is fully competent to interview the alien and, using technical and professional ability, shall precisely determine the nature of the abusive or fraudulent application[...].”<sup>93</sup>

Decree 3683 I-G provides, in Article 140, that the decision regarding the abusive or fraudulent application may be subject for revocation recourse (*recurso de revocatoria*) before the Commission and an appeal before the Administrative Immigration Tribunal (*Tribunal Administrativo Migratorio*). Moreover, Article 144 of the process guarantees the free nature of the process and procedural guarantees and the rights of the

asylum seeker.

Regarding accelerated procedures, ACAI expressed some concerns and expresses the need for clarification on the criteria established by the figure of Manifestly Unfounded, Abusive or Fraudulent Application. The determination of a case under this category must be cautiously performed pursuant to the framework of the recommendations set out in international standards on refuge, as stated in the regulation itself. ACAI makes this recommendation given that this figure has been applied to certain asylum cases that should’ve been qualify as such.

### 3. ECUADOR

In Ecuador, the expedited summary proceeding or process to handle manifestly unfounded or abusive applications is known as an “admissibility” process. Currently, this process is regulated by Presidential Decree 1182, of May 30, 2012.

Article 19 describes that “Every application for Refugee status shall undergo the registration and **admissibility** process and shall be evaluated by the competent administrative unit of the Ministry of Foreign Affairs, Trade and Integration.”<sup>94</sup> This administrative unit is the Refuge Direction (*Dirección de Refugio*).

91. Republic of Costa Rica, Decree 36831-G, at <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2011/8171>, last visited August 2, 2012. Unofficial translation, original text in Spanish: “En el caso de que se detecten solicitudes de la condición de persona refugiada denominadas manifiestamente infundadas o claramente abusivas con carácter fraudulento, estas serán aceptadas para llevar a cabo el trámite sumario establecido en el artículo 144 de este Reglamento, en virtud del respeto por el derecho de petición que se debe garantizar a las personas usuarias, no obstante dicho procedimiento será realizado de forma expedita y en atención a las recomendaciones estipuladas en la normativa internacional en materia de refugio.”

92. Decree 36831-G, article 4. (Unofficial translation, original text in Spanish: “solicitudes de la condición de refugio que contravienen los criterios que se enmarcan en la definición de persona refugiada según la Ley de Migración y Extranjería y la Convención sobre el Estatuto de los Refugiados de 1951 y su respectivo Protocolo de 1967”.)

93. Unofficial translation, original text in Spanish: “[...]para el procesamiento de este tipo de solicitudes, se realizará un primer acercamiento de la persona extranjera con un funcionario del Subproceso técnico en la materia, que de corroborar la improcedencia de la solicitud en apego al debido proceso y a las normas de derecho internacional, remitirá a la persona extranjera para ser entrevistada por un oficial de elegibilidad plenamente competente con la capacidad técnica y profesional para determinar precisamente el carácter abusivo o fraudulento de la solicitud[...].”

94. Republic of Ecuador, Decree 1182 dated May 30, 2012. (Unofficial translation, original text in Spanish: “Toda solicitud de la condición de Refugiado pasará por el proceso de registro y admisibilidad y será calificada por la unidad administrativa competente del Ministerio de Relaciones Exteriores, Comercio e Integración”.)

According to Executive Decree 1182, the processing of an application shall be allowed or rejected via the admissibility phase. If the application is found inadmissible, the term to regularize the immigration status or file a legal remedy on behalf of the individual shall only be three days, as expressed by Article 33 of the decree:

*“In the event that the application is assessed as **inadmissible**, due to being **manifestly unfounded or abusive**, the Refuge Direction, shall declare its reasoned inadmissibility, **without the need for a resolution by the Commission**.*

*Once the application has been qualified as inadmissible due to being manifestly unfounded or abusive, the notice of inadmissibility will establish a **term of up to three days** to file administrative appeals, regularize their immigration status or leave the country.*

*When the refugee application were declared inadmissible due to being illegitimate, the applicant must immediately leave the country.”<sup>95</sup> (Emphasis added.)*

Executive Order 1182 provides that applications can be considered: manifestly unfounded, abusive or illegitimate:

**Article 24.** The request is **manifestly unfounded** in its formulation when it presents elements that are completely unrelated to the definitions of refugee in force in Ecuador.

**Article 25. Abusive applications** are those that may have fraudulent elements involving deception or manipulation of the process for personal gain, gain of third parties, or groups, as well as those in which the applicant, without the need of international protection, invokes the institution of refuge to evade justice or law enforcement.

**Article 26. Illegitimate applications** are filed by people where there are serious reasons for considering that they have committed crimes, in Ecuador, of the characteristics which warrant the exclusion provided for in Article 10; they shall not be admissible on the grounds that they violate public security or order.<sup>96</sup>

During the admissibility process, which does not provide a specific timeframe, the individual receives a certification of submission of the application which allows the individual to remain in the country, but does not grant the same level of protection granted to asylum seekers admitted to the proceeding. Importantly, Executive Decree 1182 provides, in Article 27, that the application for recognition of refugee

95. Id. Unofficial translation, original text in Spanish:

*“En caso de calificar la solicitud como inadmisibile, por ser manifiestamente infundada o abusiva, la Dirección de Refugio, declarará su inadmisión motivada, sin que para ello sea necesaria resolución por parte de la Comisión.*

*Una vez calificada la solicitud como inadmisibile por ser manifiestamente infundada o abusiva, en la notificación de inadmisión se establecerá un plazo de hasta 3 días para interponer recursos administrativos, regularizar su calidad migratoria o para abandonar el país.*

*Cuando la solicitud de refugio hubiera sido inadmitida a trámite por ilegítima, el solicitante deberá abandonar inmediatamente el país.”*

96. Id. Unofficial translation, original text in Spanish:

*Artículo 24. La solicitud manifiestamente infundada es aquella que en su formulación presenta elementos completamente desvinculados con las definiciones de refugiado/a vigentes en el Ecuador.*

*Artículo 25. Las solicitudes abusivas son aquellas que pueden presentar elementos fraudulentos que involucran engaños o que evidencian manipulación del proceso para obtener beneficios personales, de terceros, o colectivos, al igual que aquellas en las que la persona solicitante, sin necesidad de protección internacional, invoca la institución del refugio para evadir la acción de la justicia o el cumplimiento de las leyes.*

*Artículo 26. Las solicitudes ilegítimas son las presentadas por personas de las cuales existan motivos fundados para considerar que han cometido delitos, en territorio ecuatoriano, de las características de las que ameritan la exclusión establecida en el artículo 10, no se admitirán a trámite por considerarse atentatorias a la seguridad o al orden público.*

*status* may be filed with the Ministry of Foreign Affairs, Trade and Integration (MRECI) or the competent authorities of the Ministry of the Interior, National Police and Armed Forces, in places where there are no MRECI offices.

In the case of Ecuador, AAE reported concerns regarding the admissibility process in establishing a procedure that is separate from the regular determination procedure and where decisions are made directly by the Refuge Direction without a review by the Commission for Refugee Status Determination (*Comisión de Determinación de la Condición de Refugiado*). Moreover, the eligibility process becomes an initial filter in which the applicant is not yet considered an asylum-seeker.<sup>97</sup> Although the individual is given a certificate, the person is at risk of *refoulement*, which constitutes a violation of the 1951 Convention. Moreover, AAE reported concerns regarding the figure of illegitimate applications, which automatically precludes access to any procedure whatsoever to people who are considered to have committed a serious crime in Ecuador, as defined by Article 26 of Decree 1182 and deemed to threaten the security and public order. This provision fails to refer to other obligations of the Ecuadorian state, particularly the obligation to safeguard the lives and safety of these individuals, thus fulfilling the guarantees contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and the principle of *non-refoulement*.

97. Artículo 32 República del Ecuador, Decreto Ejecutivo 1182.

### III. THE ROLE OF CIVIL SOCIETY AND ACCESS TO LEGAL SERVICES FOR ASYLUM-SEEKERS

It is important to highlight the role and efforts made by NGOs in the region to assist and support asylum seekers with various types of services, such as free legal advice on RSD, access to rights in the host country (e.g. the right to work, housing, social security, etc.), and the provision of humanitarian assistance after arrival. This participation is part of the framework of a democratic rule of law, which allows involvement of civil society actors in such actions in support of governments in their efforts to ensure the human rights of refugees.

In the specific case of RSD proceedings, the organizations involved in this report, provide a number of free services aimed at facilitating refugees and asylum-seekers to effectively exercise their rights under the 1951 Convention.

In the case of Brazil, civil society plays an important role in the RSD process, and it is directly involved in the National Committee for Refugees (CONARE). In this case, IMDH as well as Cáritas Arquidiocesanas de Río de Janeiro y de São Paulo, conduct interviews with applicants and prepare an opinion which provides a legal basis for the civil society position that is presented to

all members of the commission, CONARE, so it can be considered within the adjudication process. In the same way, it provides assistance to clients in administrative recourses, even though does not provide formal representation.

Based on information submitted by the organizations that participated in the report, we have identified several areas where these NGOs are providing assistance and support during the RSD process:

- 1) Legal orientation on RSD procedures and refugee rights,
- 2) Support during the filing of the application,
- 3) Legal advice for the first instance,
- 4) Development of administrative appeals and motions for reconsideration, and
- 5) Judicial recourses. Some organizations conduct other activities related to access to rights and integration in general. (See Annex I: Information on the organizations involved).

	IMDH Brasil	Law School & Legal Clinic at Universidad de los Andes, Colombia	ACAI Costa Rica	AAE Ecuador	Sin Fronteras I.A.P México
Legal Orientation	✓	✓	✓	✓	✓
Support during the filing of the applica- tion	✓	✓	✓	✓	✓
Legal advice for the first instance	✓	✓	✓	✓	✓
Appeals/Adminis- trative Recourses	✓	✓	✓	✓	✓
Judicial recourses regarding the pro- cedure		✓	✓	✓	✓
Other actions geared towards access to rights, strategic litigation, integration among others	✓	✓	✓	✓	✓

In order to strengthen the work of civil society, these organizations aspire to develop channels for dialogue to benefit the articulation of strategies and improve RSD proceedings— particularly with respect to access to proceedings, the right to a defense, and other due process matters in a democratic context. In this sense, civil society organizations that participated in the report have expressed that the relationship with the respective countries' governments, are characterized by existing channels of collaboration and dialogue; although these could be strengthened. In Brazil, the tripartite model fosters collaboration. Similarly, ACAI states that there is a real dialogue in Costa Rica with the government, understanding that certain issues must be subject to a process and that in the short-term,

recommended results could be unrealistic. The law school and legal practice at Universidad de los Andes, Colombia, noted that civil society is not actively involved in the issue of refuge.

AAE expressed that it had attempted to keep open channels of communication with the Refugee Direction, in order to perform its mission - to provide free legal assistance. However, this is still a work in progress, which requires strengthening. Sin Fronteras IAP states that while there are opportunities for participation, the dialogue between civil society and the Mexican government must be strengthened.

## IV. CONCLUSIONS

### WITH REGARD TO THE FORUM AND THE DEADLINES FOR THE DETERMINATION OF REFUGEE STATUS

1. Of the countries in this report, only two have not set a deadline for individuals to apply for asylum: Brazil and Costa Rica. The deadlines established in the remaining countries are: Colombia (sixty calendar days), Mexico (thirty days), and Ecuador (fifteen days). Although the 1951 Convention does not establish a specific standard timeframe to access the procedure, international standards indicate that in order to guarantee fair and effective access and ensure due process and non-discrimination, these deadlines must be flexible.

2. In all five countries, a commission belonging to the Executive Branch is responsible for decisions on RSD (first instance). Usually, these commissions are inter-ministerial bodies; the different ministries that comprise these commissions reach decisions on RSD by vote, one vote per ministry representative, with the exception of Brazil and Colombia. In Brazil the commission includes representation of the civil society in the proceeding with vote rights, and a representative of UNHCR, with speaking rights but no vote. In Colombia, the Commission is composed solely of members of the Ministry of Foreign Affairs.

3. The composition of each commission varies among the five countries, but a constant member is the Ministry of Foreign Affairs. Officers representing the Ministries in the Commissions are not necessarily permanent officials, and may be subject to changes of their roles within their ministries.

4. As for other non-state members, the respective legislation of Ecuador, Colombia, and Costa

Rica provide the possibility of participation of either UNHCR or civil society as observers or providers of technical input, with speaking rights but no right to vote. In the case of Mexico, the Commission seems to have moved away from the tradition of inviting representatives of UNHCR and civil society, as was previously practiced prior to the publication of the Refugee and Complementary Protection Act (2011). In comparison to the other four countries in this report, Brazil would be considered to have the most progressive practices for the formation of eligibility commissions, as its permanent membership contemplates the participation of civil society (with the right to vote), UNHCR (speaking rights only), and involves a variety of government institutions (ministries) working directly with issues relating to the fundamental rights of refugees (work, health, education, etc.).

5. With regard to the membership of the commissions, certain partners have reported a concern regarding bias of the Commission operating in their country. The case in point is Colombia, where the eligibility commission consists exclusively of officers from the Ministry of Foreign Affairs. As highlighted by Universidad de Los Andes, the impartiality of RSD in Colombia is severely affected by this institutional design. The decision is made entirely within the Ministry of Foreign Affairs and its main task is to maintain international relations. For this reason, it is not strictly apolitical and impartial in deciding the filed claims. It is therefore evident that the decision rests largely on one person, the Minister, thereby violating the guarantee of impartiality. It is likely that the problem of bias is occurring in other countries in the region as well, since the Ministry of Foreign Affairs plays an important role in all commissions corresponding to the countries of this study.

## WITH REGARD TO ACCESS TO INFORMATION AND THE RIGHT TO APPEAL

1. Based on reports by organizations in Mexico, Costa Rica, Ecuador, and Brazil, asylum-seekers have access to their case files, with the exception of Colombia where these documents are confidential. However, organizations have found that the brevity of deadlines for filing a legal challenge pose a barrier to access in practice. It should be noted that access to public information should be featured not only in the regulations, but must also be a right which is inextricably linked to the time period for applicants to appeal negative decisions and must be safeguarded in practice. This time period should be long enough to allow access to the records. In the case of Mexico, there is a limitation with respect to unauthorized access to information for people who have been detained because of immigration status.

2. While all countries in the report provide avenues of appeal in an administrative forum, complications exist related to the entity resolving appeals. In the case of Ecuador, administrative appeals are evaluated by the Minister of Foreign Affairs, Trade and Integration. In Mexico and Colombia, partner organizations stated that there is no appeal as such, since the “appeal” is filed before the same body that makes the underlying decision, therefore, this is effectively reconsideration recourse. Costa Rica contemplates both an appeal before the Commission and an appeal before the Administrative Immigration Tribunal, as a decentralized agency under the Ministry of Government, which hears all matters relating to Administrative Appeals in the Alternative corresponding to the General Migration Direction.

3. The term to present a legal appeal is a common challenge in all countries. In the case of Costa Rica and Ecuador, three to five days

(respectively) is not sufficient time. Governments must carefully consider the time that the population of asylum-seekers needs to receive notice of the decision, secure legal representation or assistance for the appeal, obtain their record, and prepare the appeal. In this calculation, states must take into account all the special obstacles faced by this population: high illiteracy rates, geographic isolation, lack of administrative systems, location, poverty, etc., and make necessary adjustments to prevent the asylum system from being detrimental to vulnerable applicants. The right to appeal is covered by due process guarantees, hence, the regulations of each country must contemplate a reasonable time to enable refugees to prepare a legal challenge to a negative decision. Thus, the period must allow sufficient time to access the record and obtain legal assistance, among other important factors.

4. While the laws of all countries in the report allow the use of the courts as due process rights, this is a seldom used practice, due to the time it takes a process in this route.

## V. GENERAL RECOMMENDATIONS

- **ENSURING DUE PROCESS IN NATIONAL SYSTEMS.**

Governments of the region must ensure that RSD proceedings are transparent, unbiased, and have expeditious and reasonable terms, in accordance with regional and international human rights and refugee rights instruments ratified by the states, eliminating political considerations to the maximum extent. We propose the development of a case registration system for the purposes of setting precedent; the system will enable the gathering of information in national systems and facilitate a move towards fairer and more efficient decisions.

- **PROMOTE THE PLURALITY OF NATIONAL COMMISSIONS: TOWARDS THE BRAZILIAN TRIPARTITE MODEL.**

We recommend promoting, on a regional level, a transition to a pluralistic commission model that breaks away from diplomatic authorities (as in the case of Colombia) or the creation of commissions that are exclusively executive and migrate towards being technical, apolitical, and independent in nature. Brazil stands out among the countries in this report, for its contribution of a new approach by developing a tripartite commission with the active participation of civil society, UNHCR, and the Government. The region could move towards a standardized model for the formation of eligibility commissions, which would turn the region into a pioneer in this subject.

- **ENSURE ACCESS TO ADEQUATE APPEAL MECHANISMS.**

We recommend evaluating challenge procedures, in order for such procedures to ensure due process. As part of the promotion of ad-

equated appeal mechanisms, we recommend:

- o Adopting the experience of the Administrative Immigration Tribunal of Costa Rica, this, constitutes an impartial appellate body. The development of similar challenge systems in countries in the region would be a positive step. Similarly, the countries should ensure that the asylum seeker has an opportunity to appeal negative RSD decisions using the administrative route through independent bodies, thereby breaking away from the barriers faced by organizations with respect to the motion for reconsideration.

- o Providing a reasonable period as part of due process guarantees. Countries in the region are shortening the term contemplated for unsuccessful applicants to appeal RSD decisions. In the case of Costa Rica and Ecuador, three and five days (respectively) do not represent sufficient time frames.

- **ACCELERATED PROCEDURES MUST COMPLY WITH INTERNATIONALLY ESTABLISHED DUE PROCESS GUARANTEES.**

We recommend that governments with expedited proceedings adopt the necessary measures to ensure that the accelerated procedures comply with due process guarantees in the terms described by the Inter-American Human Rights System and the pertinent recommendations issued by UNHCR, and avoid conditions that risk *refoulement*. In this line, we also recommend establishment of specialized centers for the reception and care of asylum seekers, especially in border areas and areas subject to a greater influx of migrants.

- **THE REFUGEE DETERMINATION PROCESS IN ECUADOR AND COLOMBIA MUST BE REGULATED THROUGH DOMESTIC LAWS.**

In the case of Ecuador and Colombia, where regulations relating to refugee determination are governed by executive decree, we recommend that these decrees be replaced by a law approved by the legislature, as these decrees purport to regulate the right to asylum-- a fundamental right contemplated by both Constitutions. The new legislation should establish a procedure that respects due process, implying the guarantee of legal aid for all asylum seekers from the beginning of the procedure, the possibility of filing an appeal in administrative proceedings to challenge a decision denying asylum, and the real possibility of resorting to the judicial branch to challenge a decision of the Administration.

- **PROMOTING COMPREHENSIVE REFUGEE POLICIES AT THE REGIONAL AND NATIONAL LEVELS.**

The organizations that participated in this report believe that it is necessary to develop a comprehensive refugee policy that incorporates a regional approach into the national systems. We recommend that states advance comprehensive public policies regarding refugees, incorporating them into national development programs, susceptible to monitoring and control over management. A policy for refugees cannot be designed in isolation, but rather, must be in conjunction with an immigration policy, considering mixed flows and the social vulnerability of refugees who are at high risk of being targeted by organized crime, particularly human trafficking. Currently, Costa Rica is in the process of developing an articulated participatory process involving

civil society, in consultation with the refugee population. This experience could serve as precedent to define a regional policy on RSD issues.

- **FOSTER DIALOGUE BETWEEN GOVERNMENTS AND CIVIL SOCIETY.**

Coordinated work between governments and civil society benefits the rights of refugees and asylum-seekers and promotes increasing protection space. This report highlights the great effort made by NGOs in the region to help persons in refugee situations who require assistance.<sup>98</sup>

- **PROMOTE HARMONIZATION OF DOMESTIC LAWS AND PRACTICES, ENSURING COMMITMENTS MADE AT REGIONAL AND INTERNATIONAL LEVELS.**

We recommend that countries in the region continue efforts towards harmonization of national laws in the region to strengthen protection space and integration of asylum seekers and refugees. It is necessary to promote tripartite dialogue to address regional and national refugee policy, and we encourage the use of tripartite meetings, as organized in the past (i.e.: CIREFCA, the Cartagena Declaration, Plan of Action of Mexico and the Brasilia Declaration).

98. In 2008, the National Government of the Republic of Ecuador launched the Ecuadorian Policy on Refugee Matters.

## ANNEX 1: INFORMATION ABOUT THE ORGANIZATIONS INVOLVED

### Asociación de Consultores y Asesores Internacionales (ACAI) - Costa Rica

Since 1991, ACAI has been one of the partner organizations implementing UNHCR programs of in Costa Rica.

ACAI performs interdisciplinary activities in order to ensure the protection of the asylum-seeking and refugee population, facilitating their local integration. It also promotes the development of projects to satisfy the needs felt and expressed by this population and identified by ACAI. The organization works under a comprehensive methodology that addresses individual cases and socio-educational groups, focusing on the joint search for solutions to various issues that arise in the integration process for refugees in Costa Rica.

ACAI develops programs in different areas of focus: legal, social work, psychological, resettlement, training, housing, micro credit, job opportunities and free information hotline as well as contact with the population.

Since 1995, ACAI has been a founding member of the Forum of Migrant and Refugee Population (*Foro sobre Población Migrante y Refugiada*), under the Ombudsman's technical secretariat. It is characterized as an inter-sectoral and multidisciplinary integrated interaction space by state and government institutions, civil society organizations, international organizations and academic institutions, pursuant to their mandate, expertise and interest and related to immigration issues. It presents regular monthly and special announcements when necessary.

Since 1996, ACAI has also been a founding member of the National Network of Civil Organizations for Migration (*Red Nacional*

*de Organizaciones Civiles para las Migraciones*) (**REDNAM**), which is composed of various civil society organizations concerned with the welfare of migrants and refugees. It is a space for discussion and advocacy, which seeks to create comprehensive proposals through the joint and organized work of the members.

The general objectives of REDNAM are as follows:

- a) Promote the creation and exchange of information on migration and its discussion, analysis and dissemination;
- b) Contribute to the formulation of public policies to incorporate, as a central focus, a comprehensive approach to migration and its impact on national development; and
- c) Promote respect for the human rights of migrants and refugees, as well as the performance of their duties.

Internationally, REDNAM is part of the Regional Network of Civil Organizations for Migration (*Red Regional de Organizaciones Civiles para las Migraciones*) (**RROCM**). RROCM creates spaces for dialogue and coordination in Central America, also participating in the Regional Conference on Migration (*Conferencia Regional de Migraciones*) (**RCM**). Moreover, from October 2011, ACAI is part of the International Detention Coalition.

### Asylum Access Ecuador (AAE):

AAE involved itself in this report through coordination with NGO partners, analysis of information, secondary sources, and the development and management of the report.

AAE is an Ecuadorian foundation, non-profit, founded in 2008, with voluntary and independent action. It aims to realize the rights of refugees, in laws, policies and practices. Through

a methodology based on empowerment and social participation, AAE encourages refugees to demand their own rights.

AAE works through legal strategies to defend and promote the rights of persons in need of international protection through a comprehensive approach to justice, human rights and gender.

The strategies of the Foundation are:

- *Legal Services*: Providing information, guidance and counseling in the refugee determination process and access to rights (labor and social security, education, housing, etc.);
- *Community Outreach*: Working with refugees, social organizations and institutions through rights education, promoting meeting spaces among women that allow for their empowerment and performing several activities that facilitate integration;
- *Strategic Litigation*: Reducing the need for legal assistance through case law that strengthens the rights of refugees;
- *Political Advocacy*: promoting advocacy strategies focused on due process in legal proceedings and participating in several local networks and movements, both domestic and international, to promote the rights of refugees; and
- *Movement building*: Working in coordination with protection bodies and through networks and human rights fora.

AAE is committed to a local movement, both nationally and internationally, for the rights of refugees. The non-profit is part of an international network, Asylum Access Global, the Southern Refugee Legal Advocacy Network (**SRLAN**), the International Detention Coalition (**IDC**) and the Andean Migration Network (*Red Andina de Migraciones*). At the domestic level, AAE is a member of the Anti-Trafficking

Network (*Red Anti-trata*) and Human Mobility Roundtable (*Mesas de Movilidad Humana*). At the provincial level, it is also part of several platforms such as the network against infringement of rights in Carchi, the Permanent Assembly of Human Rights Network (*Red Asociación Permanente de DDHH*) and the Board of Education of Tulcán (*Mesa de Educación de Tulcán*).

AAE actively participates in working groups promoted by UNHCR in all provinces subject to its intervention (Committee for durable solutions, legal services and strategic litigation, community involvement, etc.).

### **Instituto Migrações e Direitos Humanos (IMDH) – Brasil**

Instituto Migrações e Direitos Humanos (IMDH) was founded in 1999. IMDH is a social, non-profit, philanthropic organization--its mission is to promote the recognition of full citizenship for migrants and refugees, acting in defense of their rights, legal and socio-humanitarian assistance, public policy covering social integration and inclusion, with particular attention to the most vulnerable situations.

IMDH acts on the reception of asylum-seekers and search of public policies for their protection and integration. Of particular note are the following:

It articulates and coordinates the Solidarity Network for Migrants and Refugees, which has 50 institutions working with refugees in the country, and serve the vast majority of asylum-seekers and refugees in the country. IMDH also assists and provides training to staff of all entities of the network, which is critical, especially considering the continental size of Brazil and the difficulties of access to remote border areas.

IMDH participates as permanent consultant in 100% of the meetings of the National Committee for Refugees (CONARE), collaborating with the discussion, analysis and decision of all applications for refuge in Brazil..

The organization conducts research, prepares and publishes materials and articles on the subject of refuge, for the dissemination of knowledge and awareness in society, including the “Notebook of Debates” (*Cuaderno de Debates*), an annual publication of national circulation, which is already in its 7th edition.

In 2012, IMDH, attended and provided assistance to 462 new asylum-seekers and refugees.

### Sin Fronteras IAP (SF) México

Sin Fronteras is a civil organization founded in December 1995 by a group of social activists and academics, and its legal figure is that of a Private Assistance Institution (IAP). Its work is based on the belief that migration is a complex phenomenon that needs to be addressed through comprehensive and multidisciplinary policies. Sin Fronteras is convinced that civil society should play a central role in the treatment of migration issues: first, providing services to migrant populations, and secondly, actively participating in the creation of the most suitable migration policies and programs.

Sin Fronteras is part of the International Detention Coalition (**IDC**), the Immigration Forum / (*Foro Migraciones*), Regional Parliamentary Council on Migration (*Consejo Parlamentario Regional sobre las Migraciones*) (**COPAREM**), Working Group on Migration Policy (*Grupo de Trabajo sobre Política Migratoria*), Mexican Alliance for the Rights of Children and Adolescents (*Alianza Mexicana Por los Derechos de Niñas, Niños y Adolescentes*), Regional Network Civil Organizations for Migration (*Red Regional de Organizaciones Civiles para las Migraciones*) (RROCM, participates

as Migration Forum), Strategic Dialogue Space (*Espacio de Diálogo Estratégico*), Movement for Peace with Justice and Dignity (*Movimiento por la Paz con Justicia y Dignidad*). Further, Sin Fronteras created the Pro Bono Lawyers Network (*Red de Abogados Pro Bono*), in order to contribute to effective access to justice for migrants, asylum-seekers and refugees, providing free quality legal services to this population.

The Parliamentary Council Regional Migration (*Consejo Parlamentario Regional sobre las Migraciones*) (COPAREM), is a regional space created for the development and monitoring of a regional shared agenda in international migration. COPAREM consists of El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Dominican Republic and the Central American Parliament, PARLACEN, which aim to contribute to the development, review, approval and enforcement of legal frameworks that regulate and institutionalize public policies on migration, with a holistic perspective, i.e. focusing on human rights and development.

### Universidad de los Andes, Facultad de Derecho y Consultorio Jurídico. Colombia

Universidad de los Andes, through its Legal Clinic and the Law School, provides free legal assistance to asylum-seekers. This program was implemented through an agreement signed with the National Secretariat of Social Pastoral (*Secretariado Nacional de Pastoral Social*) (Cáritas Colombia) and a letter of intent with UNHCR.

The final year law students, practitioners recognized by the Higher Council of the Judiciary (with the right to practice under the supervision of qualified lawyers at the Clinic), receive an eight-week training course by UNHCR, after which they advise applicants and further their proceedings before the Advisory Commission for RSD (*Comisión asesora para la determinación*

de condición de refugiado) and present the applicable judicial remedies. The legal assistance is provided on the premises of Social Pastoral and under its direction.

The Faculty of Law of Universidad de los Andes is a founding member of the Latin American Network of Migration (*Red Latinoamericana de Migraciones*). It was formed in 2010 by a group of academic and civil society entities so as to analyze migration and refuge policies of the states of the region and propose alternatives for the management of migration flows based on respect for human rights standards. The network consists of the Colombian universities Los Andes and Javeriana, the Canadian university of York, the Spanish university Pontifica de Comillas, the National Secretariat of Social Pastoral of Colombia (*Secretariado Nacional de Pastoral Social de Colombia*), the Jesuit Refugee Service, the Institute for Migration Research and Outreach of Mexico (*Instituto de Estudios y Divulgación sobre Migración de México*), the Scalabrini Migration Network, the Latin American Council of Social Sciences (*Consejo Latinoamericano de Ciencias Sociales*) (**CLACSO**), the Ecuador-Colombia Hope Foundation (*Fundación Esperanza Ecuador-Colombia*) and the Consultancy for Human Rights and Displacement (*Consultoría para los Derechos Humanos y el Desplazamiento*) (**CODHES**) de Colombia

The network has organized several seminars in Colombia and Canada, although these have been focused more on aspects of internal displacement than refuge. It has also promoted the development of research and the book “Public policies on migration and civil society in Latin America,” (*“Las políticas públicas sobre migraciones y la sociedad civil en América Latina”*), published by Scalabrini Migration Network in 2011, which analyzes state responses against forced and voluntary migration in Argentina, Brazil, Mexico and Colombia.

The network, in essence, being flexible and informal in nature, does not have a defined structure, beyond being co-directed by Roberto Vidal, professor at Universidad Javeriana and Beatriz Sanchez, professor at Universidad de los Andes.

Moreover the free legal assistance program for asylum-seekers can be considered a network in itself, which also involves the Legal Clinic of Universidad Javeriana. In this case, the text of the agreement and the letter of intent establish the responsibilities of the parties. Communication between these is ongoing and biannual meetings are held to evaluate the progress of the program.

### **U.S. Committee for Refugees and Immigrants (USCRI):**

USCRI provided support for this report through the compilation of secondary sources, report coordination, and editing.

USCRI's mission is to protect the rights and meet the needs of persons in forced or voluntary migration worldwide by advancing fair and humane public policy, facilitating and providing direct professional services, and promoting the full participation of immigrants in community life. USCRI partners with civil society groups around the world to defend the rights of displaced persons. Together, we can defend, protect, and provide direct services to persons in forced or voluntary migration worldwide.

<sup>92</sup> Sin Fronteras, sitio web, <http://www.sinfronteras.org.mx/index.php/es/>. Información extraída el 25 de julio del 2012.

## ANNEX 2: METHODOLOGICAL DEVELOPMENT PROCESS:

AAE and USCRI fulfilled the role of creating study methodologies, managing relationships with partner organizations and the information provided by them, finding and organizing secondary sources, analyzing information provided by partner organizations, and drafting this report. Partner organizations Asociación de Consultores y Asesores Internacionales (**ACAI**), Asylum Access Ecuador (**AAE**), Instituto Migrações e Direitos Humanos (**IMDH**), Sin Fronteras (**SF**) and Universidad de los Andes, Facultad de Derecho y Consultorio Jurídico (**UA**) played a role in providing information on the international regulatory framework, domestic legislation, the issues regarding RSD addressed by the report, and the role and experiences of civil society organizations in their respective countries.

The contributors initially identified nine organizations in nine countries of focus for the report (Argentina, Brazil, Colombia, Costa Rica, Ecuador, Mexico, Panama, and Venezuela). Inclusion of Argentina, Panama, and Venezuela, was not possible because, despite their interest in the project, participants could not agree on a schedule with interested organizations. For these reasons, a preliminary report was prepared, with the collaboration of five partner organizations, to collect information about their respective countries. Each organization specializes in refugee law issues and works on both direct legal services as well as advocacy projects. The organizations also collaborate as part of domestic and international networks and academic publications. The five organizations were selected for their vast experience assisting refugees, legal and academic work, and their availability to cooperate actively with the project.

Importantly, countries that are part of the report represent important Latin American sub-regions and are countries with significant rates of flow of refugees and resettlement.

It was decided to limit the scope of the report to the standards of each country, rather than include empirical information regarding practice, given the limited time and funds. In addition, AAE and USCRI felt it was the most feasible option at the time to encourage dialogue at the regional level.

The information presented in this report is mainly extracted from the data provided by the five partner organizations, in addition to domestic laws and secondary sources. AAE and USCRI developed a methodology through the use of surveys and interviews via Skype to capture data from each partner organization on their respective countries. This methodology was developed based on the research questions, approved by AAE team members prior to sending them to the contact points in the four partner organizations. After receiving the responses from each organization on the situation in the respective country, the information was analyzed and lists were prepared of issues to be addressed in order to clarify confusing or deficient information with each participating organization. All these information exchanges were performed electronically, using communication technologies such as email communications, Skype conferencing, shared Google documents and Google forms. USCRI and AAE were responsible for analyzing and organizing information tables and secondary sources. AAE was responsible for managing the exchanges and communications between the NGO partners, preparing the first drafts of the report and the final version.

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