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The Fiction of Non-Entry in South American Airports: Evidence from Brazil, Chile, and Ecuador

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Abstract [En]: This article analyses the "non-entry fiction" in Brazilian, Chilean, and Ecuadorian airports, revealing a stark contrast between generous legal frameworks and restrictive border practices. It shows how transit zones become legal exceptions designed to bypass *non-refoulement* obligations. Ultimately, the study warns that normalizing this differentiated legality strips the right to international protection of its core meaning.

Titolo: La finzione di non-ingresso negli aeroporti sudamericani: evidenze dal Brasile, dal Cile e dall'Ecuador
Abstract [It]: L'articolo analizza la "finzione di non ingresso" negli aeroporti brasiliani, cileni ed ecuadoriani, rivelando un forte contrasto tra quadri normativi generosi e pratiche di frontiera restrittive. Lo studio mostra come le zone di transito diventino eccezioni giuridiche progettate per eludere gli obblighi di non-refoulement. In definitiva, l'analisi avverte che la normalizzazione di questa legalità differenziata svuota il diritto alla protezione internazionale del suo significato essenziale.

Keywords: Fiction of non-entry, Airport transit zones, Asylum, South America, *Non-refoulement*
Parole chiave: Finzione di non-ingresso, Zone di transito aeroportuale, Asilo, Sud America, Non respingimento

1. Introduction

The contemporary governance of migration in South America is characterized by a marked normative dissonance between the region's progressive legal framework—firmly anchored in the expanded definition of refugee protection enshrined in the Cartagena Declaration on Refugees (1984)[1]— and the

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[1] The expanded definition considers as refugees not only those who fall under the five grounds of the 1951 Convention and the 1967 Protocol (race, religion, nationality, political reasons or membership of a particular social group), but also those who have fled their countries because their life, safety, or freedom has been threatened by widespread violence,

increasingly restrictive administrative practices implemented at its borders. This divergence exemplifies what has been described as a condition of symbolic protection, whereby formally generous legal guarantees coexist with practices of exclusion that prevent rights from being effectively exercised. [2]

Although South American jurisdictions, including Brazil, Chile, and Ecuador, formally recognize the right to seek asylum, administrative practice at international airports reveals a systematic restriction of access to international protection. In particular, the regulation of airport transit zones frequently renders the right to asylum ineffective, notwithstanding the physical presence of applicants under the effective control of state authorities.[3] Against this background, the present article investigates the legal dynamics governing access to asylum in the transit zones of major international airports in these jurisdictions, to broaden the scope of research on the fiction of non-entry, a field of inquiry still largely dominated by Global North perspectives.

Through doctrinal analysis and the examination of relevant jurisprudence, this study highlights the discrepancy between the region's humanitarian rhetoric and the concrete realities of border enforcement. By examining three emblematic cases—one from each jurisdiction—the analysis reveals a pronounced divergence between lower court decisions and appellate rulings. These judicial splits demonstrate that access to asylum in airport transit zones is not treated as a guaranteed administrative practice, but rather as a contested right whose effectiveness frequently depends on judicial intervention. Within the South American context, the enduring tension between fundamental human rights obligations and sovereign border control is increasingly mediated through non-admission policies. By precluding territorial entry, these measures effectively obstruct access to the asylum procedure, compelling potential refugees to resort to litigation merely to assert a fundamental right.

The article further argues that South American states are not merely passive recipients of border control strategies developed elsewhere. Rather, they act as active agents in the adoption and adaptation of

foreign aggression, internal conflicts, massive violations of human rights, or other circumstances that have seriously disturbed public order. See the third conclusion of the Cartagena Declaration (original text in Spanish).

[2] O. HAMMOUD-GALLEGO and L.F. FREIER, Symbolic Refugee Protection: Explaining Latin America's Liberal Refugee Laws, in *American Political Science Review*, n. 117/2, 2023, p. 455.

[3] Transit zones have also been identified as sterile zones, waiting zone, rejection zone, rejected or inadmissible area, and international zones. Cfr. A. DEL VALLE GÁLVEZ, Las Zonas Internacionales o Zonas de Tránsito de los Aeropuertos, Ficción Liminar Fronteriza, in *Revista Electrónica de Estudios Internacionales*, n. 9, 2005, pp. 2, 3; likewise, "no man's lands" J.A. DEL VALLE GÁLVEZ, La fragilidad de los derechos humanos en las fronteras exteriores europeas, y la externalización/extraterritorialidad de los controlores migratorios, in J. SOROETA LICERAS and N.A. MOREDA (Ed) *Anuario de los cursos de derechos humanos de Donostia*-San Sebastián, n. XVIII, 2019, p. 36. Regarding "waiting zone" see also C. MAKAREMI, Border Policies. From Denizens to Legal Ghosts. Spaces of difference. Mediating difference in transcultural spaces, WAXMAN, 2015, pp. 203, 204; P. MAILLET, A. MOUNTZ and K. WILLIAMS, Exclusion Through Imperio: Entanglements of Law and Geography in the Waiting Zone, Excised Territory and Search and Rescue Region, in *Social & Legal Studies*, n. 27/2, 2018, pp. 148- 150.

exclusionary practices aimed at filtering unwanted migration before it reaches sovereign territory.[4] Central to this strategy is the use of the fiction of non-entry, a juridical construct according to which an individual, despite being physically present within the territory and under the effective control of the state, is deemed legally absent for immigration purposes.[5] This mechanism allows states to uncouple the duty to respect fundamental rights from the factual presence of migrants, thereby disentangling the legal notion of the border from its physical reality.

These practices rely on a *non-entrée* regime, understood as a paradigm through which states systematically act to prevent asylum seekers from accessing their territory in order to avoid the activation of protection obligations.[6] By employing this fiction, South American executives create a liminal legal space[7] where access to asylum is curtailed. From a doctrinal perspective, this severance of physical presence from legal entitlement presents a fundamental challenge to international refugee law, under which primary protection rights should follow automatically from the simple fact of being a refugee within the effective jurisdiction of a state party.[8] However, certain South American states utilize this fiction to exercise effective control, thereby triggering the *non-refoulement* obligation,[9] while simultaneously disclaiming territorial jurisdiction to avoid processing asylum claims. Consequently, this engenders a juridical limbo wherein constitutional guarantees are superseded by security-driven administrative protocols, effectively reducing the airport to a space of exception, where the ordinary application of domestic law is suspended.[10]

The article is structured as follows. Section 2 examines the fiction of non-entry as applied to airport transit zones, outlining its theoretical and juridical foundations. Section 3 assesses the compatibility of this construct with Inter-American human rights standards, situating the analysis within the region's

[4] N. CINTRA, Visa Policies as Externalisation Practices in the Global South, in *E-International Relations*, 2021; N. CINTRA and P.N. MARTUSCELLI, Wall of visas: how race impacts the externalization of (forced) migration control in south-south migration corridors, in *Ethnic and Racial Studies*, 2025, pp. 2, 3.

[5] C. MOLINARE, The Borders of the Law: Legal Fictions, Elusive Borders, Migrants' Rights, in *Politics and Governance*, n. 10/2, 2022, p. 239.

[6] P. ORCHARD, The non-entrée regime, in *A Right to Flee: Refugees, States, and the Construction of International Cooperation*. Cambridge: Cambridge University Press, 2014, p. 206.

[7] Regarding transit zones as liminal legal spaces, see K. SODERSTROM, Flexible Borders: The Fiction of Non-Entry and Asylum Seekers in Germany, *CONREP Blog*, University of Melbourne, 2019; A. DEL VALLE GÁLVEZ, *Las Zonas Internacionales*, *supra*, pp. 4 et seq.; G. ALONSO MARTÍNEZ, La Regulación Jurídica del Visado de Tránsito Aeroportuario en el Código de Visados, in *Anuario Hispano–Luso–Americano de Derecho Internacional*, Vol. 24 (2019–2020), 2020, pp. 328 et seq.; ECRE (European Council on Refugees and Exiles), An Analysis of the Fiction of Non-Entry as Appears in the Screening Regulation. Commentary, 2022; A. ORAV and N. BARLAOURA, Legal fiction of non-entry in EU asylum policy, Briefing, European Parliamentary Research Service (EPRS), 2024, p. 3.

[8] J. HATHAWAY, *The Rights of Refugees under International Law*. 2nd ed. Cambridge: Cambridge University Press, 2021, p. 193.

[9] T. GAMMELTOFT-HANSEN, Access to Asylum: International Refugee Law and the Globalisation of Migration Control, Cambridge: Cambridge University Press, 2011, p. 64.

[10] T. BELL, Special International Zones in Practice and Theory, in *Chapman Law Review*, n. 21/2, 2018, p. 288.

binding legal obligations. Sections 4, 5, and 6 provide a comparative examination of domestic jurisprudence in Chile, Ecuador, and Brazil, respectively, tracing divergent judicial responses to administrative exclusion. Section 7 synthesizes the comparative findings, identifying the consolidation of a regime of differential legality at airport borders. Section 8 concludes by assessing the implications of the fiction of non-entry for the integrity of the regional asylum regime.

2. The "Fiction of Non-Entry" in Airport Transit Zones

To comprehend the juridical architecture of the airport transit zone, it is necessary to transcend traditional conceptions of the border as a static geographical line and reconceptualize it as a functional locus of control. The boundary has evolved from a simple limit of jurisdiction into a functional space where state powers are exercised selectively.[11] Within this malleable spatial arrangement, the fiction of non-entry emerges as the primary juridical instrument of exclusion. This fiction allows states to assert that a third-country national physically present in a transit zone has not legally entered the territory.[12]

By maintaining this distinction, states deny these individuals the procedural rights that typically accompany territorial presence, thereby significantly increasing the risk of *refoulement*. This legal manoeuvre produces a "legal margin",[13] which is not an absence of law but a distinct legal space[14] with a specific regime characterized by indeterminacy and the maintenance of a fiction of a-territoriality. This places migrants outside the protective dimension of the law, even when they are under the effective custodial control of the state. Consequently, the airport transit zone functions as a site of juridical excision, where the state exercises total physical power—including detention and screening—while disclaiming constitutional responsibility.

This spatial manipulation parallels the proliferation of migration containment zones observed within the European context,[15] marking a shift where the administrative focus moves from substantive refugee

[11] J.A. DEL VALLE GÁLVEZ, Las fronteras de la Unión: el modelo europeo de fronteras, in *Revista de Derecho Comunitario Europeo*, n. 6/12, 2002, p. 326; A. DEL VALLE GÁLVEZ, *Las Zonas Internacionales*, op. cit., p. 6.

[12] T. BASARAN, *Legal borders: the Waiting zones*, in J.P. BURGRESS, S. GUTWIRTH (Ed.), *A Threat against Europe? Security, Migration, Integration*, Brussels, 2011, p. 64; K. SODERSTROM, An Analysis of the Fiction of Non-Entry as Appears in the Screening Regulation, in *ECRE Commentary*, 2022, p. 2. See also, A. DEL VALLE GÁLVEZ, Inmigración, derechos humanos y modelo europeo de fronteras: Propuestas conceptuales sobre "extraterritorialidad", "desterritorialidad" y "externalización" de controles y flujos migratorios, in *Revista de Estudios Jurídicos y Criminológicos*, n. 2, 2020, p. 178; H. SOMMER, Denials of Existence. Discursive Strategies Legitimising the ›Fiction of Non-Entry‹, in *Movements,* n. 8/1, 2025, p. 96; V. APATZIDOU, Bordering Asylum: Examining the EU's Border Procedures under the Asylum Procedures Regulation (EU) 2024/1348, in *International Journal of Refugee Law*, n. 37/2, 2025, p. 213.

[13] B. CHARAUDEAU SANTOMAURO, The Legal Production of the Margin: Migrants Between Border and Territory, in *Cahiers de l'EDEM* (Special Issue), August 2022, p. 34.

[14] T. BASARAN, *Legal borders*, *op. cit.*, p. 63.

[15] See C. COSTELLO and M. MOUZOURAKIS, EU Law and the Detainability of Asylum-Seekers, in *Refugee Survey Quarterly*, 2016, n. 35/1, p. 59; G. CAMPESI, The EU Pact on Migration and Asylum and the Dangerous Multiplication of 'Anomalous Zones' for Migration Management, in *Asile Project Forum*, 27 November 2020.

status determination to preliminary admissibility screenings. In these spaces, accelerated procedures effectively privilege the fiction of non-entry at the expense of substantive due process, prioritizing the filtration of migratory flows over the safeguarding of rights.[16]

2.1. The Globalization of this Fiction

The legal fiction of non-entry is neither novel nor geographically confined. This doctrine was notably articulated by the U.S. Supreme Court in *Shaughnessy v. Mezei*.[17] Under this legal fiction, a non-citizen's physical arrival at a port of entry—despite being within the territory—does not constitute legal admission into the country.[18] This concept was subsequently institutionalized in Europe through regimes such as the French waiting zone (*zone d'attente*), which operates as a derogatory legal space extending from disembarkation to immigration control, where individuals are subjected to exceptional procedures distinct from those applicable within the territory.[19] The primary administrative objective within this space shifts from protection to the mastery of migratory flows, reconfiguring asylum from a right into a preliminary filter designed to prevent access to the territory itself.[20] Thus, the transit zone becomes a space of pre-emptive exclusion, prioritizing migration management over the substantive assessment of protection needs. This phenomenon illustrates the exception not as a legal void, but as a governance technique that reframes migration as an existential threat, thereby justifying the suspension of legal protections.[21] In the airport context, this takes the form of a space characterized by securitized management, where the foreigner is subjected to confinement disguised as transit.[22] Resting on this legal fiction, the State maintains that foreigners who have not formally entered the territory are precluded from claiming the rights guaranteed by domestic law, thereby plunging them into a state of legal uncertainty.[23]

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[16] M. ISERTE, Enquête en «zone d'attente réservée» de l'aéroport de Paris-Charles de Gaulle: vers une gestion sécuritaire des «flux migratoires», in *Cultures & Conflits*, n. 71, 2008; J. VEDSTED-HANSEN, Border Procedure: Efficient Examination or Restricted Access to Protection?, in *Special series of posts on the New Migration Pact*, 18 December 2020. [last visit: 30 January 2026]

[17] U.S. Supreme Court, Shaughnessy v. Mezei, 345 U.S. 206, Argued January 7-8, 1953 and decided March 16, 1953, U.S. Supreme Court, §§ 13, 15.

[18] D. WILSON, American Fiction: Overturning the Doctrine of Immigration Entry Fiction as Established in Shaughnessy v. Mezei, in *MINN. J. INT'L L*, n. 253, 2025, p. 257.

[19] C. MAKAREMI, Penalización de la circulación y reconfiguración de la frontera: el mantenimiento de los extranjeros en "zonas de espera", in *Cultures & Conflits*, 2009; T. BASARAN, Security, Law and Borders: At the Limits of Liberties, London, 2010, p. 59; ID., *Legal borders: the Waiting zones*, *op. cit.*, p. 65;

[20] ANAFÉ, La roulette russe de l'asile à la frontière: Zone d'attente, qui détourne la procédure? Rapport sur la procédure d'admission sur le territoire au titre de l'asile, Paris, 2003, p. 9. See also A. AMMIRATI, A. MASSIMI, G. CRESCINI, and V. CAPEZIO, Airport transit zones as places of arbitrary deprivation of freedom and suspension of rights. Italian legal framework and judicial strategies, ASGI, 2021, p. 6.

[21] J. HUYSMANS, International Politics of Insecurity: Normativity, Inwardness and the Exception, in *Security Dialogue*, n. 37/1, 2006, p. 16. See also, V. APATZIDOU, *Bordering Asylum*, *op. cit.*, p. 213.

[22] M. ISERTE, *Enquête en «zone d'attente réservée»*, *op. cit.*, pp. 31, 32.

[23] G. ALONSO MARTÍNEZ, *La Regulación Jurídica*, *op. cit.*, p. 330.

2.2. The Manifestly Unfounded Standard and the Politics of Credibility

In the specific context of the transit zone, the manifestly unfounded criterion operates as the principal mechanism sustaining the legal fiction of non-entry. In theory, its function is narrowly circumscribed: it is intended to protect the asylum system from procedural abuse by filtering out applications that are plainly unrelated to the *ratione materiae* of the 1951 Refugee Convention. In practice, however, this function is significantly distorted. The manifestly unfounded is a form of negative evidence, implying that rejection is justified only where it is immediately and unequivocally apparent that a claim cannot engage international protection obligations. Notwithstanding this limited scope, border authorities routinely conduct substantive assessments of credibility, coherence, and plausibility—evaluations that, given the structural constraints of the transit zone, are fundamentally incompatible with the requirements of a fair refugee status determination.[24]

Within transit zones, asylum seekers are often interviewed shortly after arrival, without adequate interpretation or legal assistance. Administrative decisions frequently rely on perceived inconsistencies, imprecision, or the applicant's inability to recall dates, names, or political details, despite the well-documented impact of persecution and displacement on memory and narration. Rather than serving as an exceptional filter, the manifestly unfounded standard becomes a mechanism for summary decision, systematically denying the benefit of the doubt that lies at the core of refugee protection. In doing so, it displaces the competence of specialized refugee status determination bodies[25] toward border police and security-oriented administrative authorities. The cumulative effect of the fiction of non-entry and the expansive use of the manifestly unfounded standard is the displacement of procedural guarantees. By categorizing asylum seekers as legally absent, states justify the application of exclusion or inadmissibility regimes characterized by restricted access to legal remedies and the denial of suspensive effect for appeals. This allows expulsion or return to occur before any judicial authority has examined the legality or merits of the rejection, leaving the decision to receive or process the asylum application to the discretion of border authorities. The border thus becomes a space where constitutional and international guarantees formally exist but can be rendered ineffective through the interpretation and discretion of the authorities.

2.3. The Production of the Inadmissible Subject and Comparative Judicial Challenges

Migrant illegality is not a natural state but a product of the law itself, as the law produces the legal categories of inclusion and exclusion that render certain subjects deportable.[26] In the transit zone, the

[24] F. LANGROGNET, Screening for Asylum at Airports: The Implementation of the 'Manifestly Unfounded' Filter in France and Germany, 1980–2005, in *Social Policy & Administration*, n. 59, 2025, p. 611.
[25] T. BASARAN, *Legal borders: the Waiting zones*, *op. cit.*, p. 65.
[26] See N.P. DE GENOVA, Migrant 'Illegality' and Deportability in Everyday Life, in *Annual Review of Anthropology*, n. 31, 2002, pp. 419–447.

fiction of non-entry serves to produce the asylum seeker not as a subject of rights, but as a subject of inadmissibility. Border control practices, specifically the discretionary power exercised by immigration authorities, serve to render mobility irregular.[27] Such approaches actively produce irregular migrants by channelling them into specific administrative categories through accelerated procedures that undermine the substantive right to asylum.[28] Consequently, the airport transit zone becomes a site where mobility is stratified, and rights are spatially contingent. The international airport acts not as a neutral infrastructure but as a sophisticated filter that differentiates between the "kinetic elite" and risk groups who are subjected to intense immobility and surveillance.[29] This stratification creates a category of unadmitted migrants who are subject to a detrimental legal framework[30] distinct from that applied to those formally admitted, severing the link between the physical power the state exercises individually and the legal responsibility to protect fundamental rights.

However, comparative jurisprudence has increasingly challenged this logic. In *Amuur v. France*,[31] the European Court of Human Rights held that confinement in an airport transit zone constitutes a deprivation of liberty that engages the state's obligations under the European Convention, explicitly rejecting the claim that non-entry suspends human rights protections. This reasoning was reinforced in *Gebremedhin v. France*,[32] where the Court required the availability of an effective remedy with suspensive effect against the denial of entry to seek asylum, precisely to prevent refoulement from border zones. Similarly, the Court of Justice of the European Union, in *FMS and Others (C-924/19 PPU and C-925/19 PPU)*,[33] confirmed that mandatory confinement in transit zones amounts to detention and must comply with strict procedural guarantees under EU law. Across these decisions, a consistent principle emerges: it is the effective control exercised by the State over the individual, rather than the formal classification of the territory, that determines the applicability of rights.

3. The Incompatibility of the Fiction of Non-Entry with Inter-American Standards

In South America, the fiction of non-entry is not codified as an explicit legal category; nevertheless, its exclusionary effects are increasingly reproduced through administrative practices at international airports.

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[27] A. CROSBY and A. REA, La fabrique des indésirables: Pratiques de contrôle aux frontières dans un aéroport européen, in *Cultures & Conflits*, n. 103-104, 2016, pp. 65, 66.
[28] A. SCIURBA, Categorizing migrants by undermining the right to asylum: The implementation of the 'Hotspot approach' in Sicily, in *Etnografia e ricerca qualitativa*, n. 1, 2017, p. 112.
[29] J.B. FRÉTIGNY, The Border Put to the Test of Space Mobilities: The Example of Paris Charles-de-Gaulle Airport, in *Annales de géographie*, n. 690/2, 2013, pp. 151–174.
[30] F. RONDINE, Between physical and legal borders: the fiction of non-entry and its impact on fundamental rights of migrants at the borders between EU law and the ECHR, in *Cahiers de l'EDEM*, August 2022, p. 59.
[31] ECtHR, Amuur v. France, no. 19776/92, Judgment of 25 June 1996.
[32] ECtHR, Gebremedhin v. France, Application no. 25389/05, judgment 26 April 2007.
[33] Grand Chamber, FMS and Others (C-924/19 PPU and C-925/19 PPU), Judgement of 14 May 2020.

This proliferation of migration control mechanisms must be analysed against the region's binding legal obligations, revealing a central tension rooted in the protection dilemma of the modern state.[34] In this dialectic, the sovereign imperative to control borders clashes with the fundamental obligation to protect human rights. In the South American context, this conflict is increasingly resolved through policies of non-admission, which exploit procedural technicalities to evade international responsibilities.

From a doctrinal perspective, international refugee law posits that protection rights arise automatically from a refugee's physical presence within a state's jurisdiction. However, some South American states employ the fiction of non-entry to sever this link between physical presence and legal entitlement. By exercising effective control over individuals in transit zones while simultaneously disclaiming territorial jurisdiction, authorities create a protection gap[35] where national law is interpreted to the detriment of the asylum seeker. These border procedures rest on the flawed premise that the State can excise certain areas from its normal jurisdiction, effectively conditioning the exercise of rights upon formal admission rather than mere presence.[36]

This administrative presumption—that the individual is merely "in transit"—erroneously implies that they remain under the jurisdiction of the country of origin or destination, rather than the state where they are physically detained. Such an interpretation disregards the Inter-American principle that state jurisdiction derives from the effective control exercised by authorities—in this instance, over airport facilities. Consequently, this practice contravenes the fundamental purpose of human rights treaties, which is to ensure that a State respects the rights of all individuals subject to its jurisdiction.[37]

3.1. Non-Refoulement as a Non-Derogable Obligation

The practice of jurisdictional severance through the fiction of non-entry is fundamentally incompatible with the region's international obligations under the 1951 Convention, its 1967 Protocol, and the Cartagena Declaration. The Inter-American system has articulated a robust rejection of this doctrine, emphasizing that the principle of *non-refoulement* applies *ratione loci* to all areas under state jurisdiction, expressly including airport transit zones.

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[34] J. VEDSTED-HANSEN, Europe's response to the arrival of asylum seekers: refugee protection and immigration control, New Issues in Refugee Research, Working Paper No. 6. UNHCR, 1999, p. 1.
[35] T. GAMMELTOFT-HANSEN, *Access to Asylum*, *op. cit.*, p. 94.
[36] G. CORNELISSE, Territory, Procedures and Rights: Border Procedures in European Asylum Law, in *Refugee Survey Quarterly*, n. 35, n. 1, pp. 75 et seq.
[37] T. MERON, Extraterritoriality of Human Rights Treaties, in *The American Journal of International Law*, n. 89/1, 1995, p. 82.

In the landmark case of *Pacheco Tineo Family v. Bolivia*,[38] the Inter-American Court of Human Rights (IACtHR) emphasized the complementarity between International Refugee Law and International Human Rights Law, identifying *non-refoulement* as the cornerstone of international protection. Interpreting Article 22(8) of the American Convention, the IACtHR affirmed that the guarantee of *non-refoulement* necessarily implies that any person recognized or seeking recognition as a refugee cannot be rejected at the border or expelled without an adequate and individualized examination of their claim. This jurisprudence clarifies that administrative fictions cannot displace human rights obligations and that protection against return applies regardless of migratory status. Furthermore, in Advisory Opinion OC-25/18, the IACtHR established that the right to seek asylum precludes States from relying upon legal fictions to evade their obligation to provide access to protection procedures.[39]

These binding standards are further elaborated in the Inter-American Commission's Resolution 04/19, specifically within the Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking.[40] Principle 6 expressly defines state jurisdiction to include *de jure* border entry points, such as airport transit zones, and affirms that *non-refoulement* obligations arise independently of formal admission. Furthermore, Principle 56 reinforces the prohibition of summary rejection at borders and underscores that access to asylum cannot be conditioned on the presentation of identity or travel documents. Likewise, the 2014 Brazil Declaration and Plan of Action, established to mark the thirtieth anniversary of the Cartagena Declaration, set parameters for the "Quality Asylum" program. This instrument commits States to strengthen national refugee status determination systems to ensure effective access to procedures, especially at borders, airports, and ports, respecting due process and ensuring the prompt identification and referral of people in need of international protection.[41]

However, current administrative trends in the region, such as the imposition of transit visas and the refusal to process claims in transit zones, directly contravene these standards. As Wihtol de Wenden noted regarding the French context, states faced with rising migratory flows often resort to restrictive revisions that narrow the definition of the refugee and accelerate procedures to frame asylum seekers as suspects.[42] In South America, this is evident in the manipulation of concepts such as the "safe third

[38] IACtHR, Pacheco Tineo Family v. Plurinational State of Bolivia, Judgment of 25 November 2013 (Preliminary objections, merits, reparations and costs).
[39] IACtHR, The institution of asylum and its recognition as a human right in the Inter-American System of Protection (interpretation and scope of articles 5, 22.7 and 22.8, in relation to article 1.1 of the American Convention on Human Rights). Advisory Opinion OC-25/18 of 30 May 2018. Series A No. 25, § 122.
[40] IACHR, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking, (Resolution 04/19 approved by the Commission on 7 December 2019).
[41] Brazil Declaration "A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean", Brasilia, 3 December 2014, § f(i).
[42] See C. WIHTOL DE WENDEN, The French Response to the Asylum Seeker Influx, 1980-93, in *The Annals of the American Academy of Political and Social Science*, n. 534, 1994, 81–90.

country," the application of which creates procedural obstacles allowing states to shift responsibility for refugee protection to other jurisdictions, thereby denying the asylum seeker the right to a substantive hearing.[43]

4. Chile: From Administrative Arbitrariness to Judicial Protection

In Chile, the right to seek asylum is firmly established across all legal tiers. At the constitutional level, Article 5, second paragraph of the Political Constitution of the Republic of Chile indirectly elevates this right by mandating respect for inherent human rights, including those guaranteed by ratified international treaties. Domestically, Law No. 20.430 on the Protection of Refugees (2010) explicitly extends its provisions to refugee status applicants or refugees within national territory, without exceptions. Despite this legal framework, the airport transit zone has emerged as a site of friction where administrative bodies attempt to enforce a fiction of non-entry, compelling the judiciary to intervene to restore the rule of law.

4.1. Inadmissibility to the Territory as a Barrier

The tension between the statutory right to asylum and the imperatives of border control is starkly illustrated in the *Torres Peñaloza* case (2020),[44] which demonstrates how the Investigative Police (PDI) leverage the classification of "transit traveller" to preclude protection claims. In this instance, a female Venezuelan national arrived at Santiago International Airport from Colombia, ostensibly in transit to a final destination in Bolivia. Upon arrival, she attempted to request asylum, citing political persecution and gender-based violence in her country of origin. However, following an interrogation lasting an hour and a half, immigration authorities denied her entry. They contended that she lacked the requisite consular tourism visa for Venezuelan nationals and was merely a "passenger in transit",[45] consequently, she was summarily returned to Colombia.

The initial judicial response from the Court of Appeals of Santiago upheld this administrative exclusion, employing reasoning that closely mirrors a politics of suspicion. The Court rejected the writ of amparo,[46] arguing that there were no objective grounds to presume a genuine need for refuge. Crucially, the Court accepted the administrative contention that the asylum claim was a fraudulent stratagem designed to circumvent visa requirements. The judgment posited that the applicant sought to bypass these obligations

[43] V. WESTIN, O conceito de "safe" third country: obstáculos para a proteção de refugiados à luz dos Sistemas Interamericano e Europeu de Direitos Humanos. Master's thesis, Pontifícia Universidade Católica do Rio de Janeiro, 2022, p. 48.
[44] Court of Appeals of Santiago, writ of Amparo No. 2918-2020, 18 December 2020.
[45] Ibidem, § Fourth.
[46] The writ of amparo is established in Article 21 of the Chilean Constitution. It is a legal remedy similar to *habeas corpus* and protects personal freedoms. See H. FIX ZAMUDIO, The Writ of Amparo in Latin America, in *Miami Inter-Am. L. Rev.* n. 13, 1981, p. 367.

simply by introducing the word "refuge" into her declaration. Furthermore, the Court held that the police had acted within their statutory authority to control borders, warning that validating such claims would render migration control "illusory," as any traveller could effectively nullify visa regulations merely by invoking international protection.[47] This ruling effectively formalized the fiction of non-entry, treating the transit zone as a jurisdiction where administrative regularity—specifically the possession of a visa—supersedes the fundamental right to seek international protection.

4.2. The Supreme Court as Guarantor of Asylum Access

However, this exclusionary logic was dismantled by the Supreme Court of Chile in judgment No. 154.849-2020, adjudicated on 04 January 2021, which acted as a decisive counterweight to administrative arbitrariness. Reversing the lower court's decision, the Supreme Court granted the writ of amparo, establishing that the right to seek asylum cannot be conditioned on migratory regularity.

The Supreme Court's reasoning was anchored in Article 3 of Law 20.430, which enshrines the principles of *non-refoulement*, prohibition of rejection at the border, and non-sanction for illegal entry. The Court relied on audiovisual evidence provided by the defence—recordings made at the airport where the applicant clearly stated the demand for asylum—to prove that the administrative authority had ignored an explicit request for protection.

It should be noted that the ruling established two fundamental elements. First, the Court echoed that border police officers have the duty to immediately inform the respective Commission of the background information on the asylum application. In this regard, it affirmed that border police lack the authority to evaluate the merits of the application; their function is strictly limited to receiving the application and forwarding it to the specialized authority. Secondly, the Court ruled that even if the applicant did not meet the requirements for a tourist visa, the authorities should allow her entry to process the asylum application. In this sense, the principle of family unity (the applicant had her husband in Chile) and the absence of penalties for irregular entry prevailed over the administrative requirement of a tourist visa.

By ordering the Chilean Investigative Police (PDI) to allow the applicant entry to formalize her asylum application, the Supreme Court of Chile effectively eliminated the legal fiction of being denied entry. In this regard, the court reaffirmed that the airport transit zone is not a legal vacuum, but a space fully subject to human rights obligations where the label of "transit" cannot be used to deprive people of their right to seek asylum.

[47] Writ of Amparo No. 2918-2020, *cit.*, § Eighth.

5. Ecuador: From Administrative Exclusion to Constitutional Oversight

In Ecuador, the governance of asylum at the border is characterized by a pronounced tension between a progressive constitutional framework and restrictive executive practices. Article 41 of the 2008 Constitution explicitly guarantees the right to seek and receive asylum, while Article 75 enshrines the principle of *non-refoulement* as a constitutional mandate, prohibiting the expulsion or return of any person to a territory where their life, liberty, or physical integrity would be imperilled. Furthermore, Article 417 elevates international human rights instruments to constitutional hierarchy, thereby integrating the 1951 Refugee Convention, its 1967 Protocol, and the Cartagena Declaration on Refugees directly into Ecuador's domestic legal order. This protective architecture is reinforced by the Organic Law on Human Mobility (LOMH), which, in Article 98, expressly recognizes the right to seek asylum and adopts an expanded definition of a refugee. Crucially, Article 100 permits individuals to apply for asylum within 90 days of entering Ecuadorian territory, irrespective of their immigration status or point of entry.

Despite these statutory guarantees, the administrative reality reveals a persistent reliance on the fiction of non-entry. The LOMH grants the State authority to deny entry based on specific grounds of inadmissibility found in Articles 136 and 137. Although the law theoretically prohibits the application of inadmissibility procedures against those seeking international protection at airports, administrative practice often diverges from this standard. Immigration officials frequently classify restricted airport areas as 'international' or neutral zones (*suelo neutro*),[48] contending that a foreign national has not legally entered the country until they have cleared border control.[49] This interpretation places individuals in a jurisdictional limbo where constitutional rights are treated as suspended, facilitating the border rejection and *de facto* detention of passengers.

5.1. Inadmissibility as Sovereign Prerogative

The judicial validation of this administrative practice was initially evident in the jurisprudence of lower courts. In a paradigmatic case before the Court of Criminal Guarantees in Quitumbe, five foreign nationals sought a writ of habeas corpus,[50] arguing that their prolonged confinement in an airport transit

[48] See El Comercio. 2017. 41 pasajeros inadmitidos de enero a agosto del 2017 en el Aeropuerto Internacional Mariscal Sucre de Quito. El Comercio, 14 September 2017; Infobae. En una semana, Ecuador negó la entrada a 19 extranjeros en los aeropuertos de Quito y Guayaquil. Infobae, 2 December 2024.

[49] See defense arguments in Habeas Corpus No. 17240-2018-00006, adjudicated by the Criminal Guarantee Court in the Quitumbe Parish of the Metropolitan District of Quito, Province of Pichincha, on 09 March 2018.

[50] In Ecuador, the purpose of the writ of habeas corpus is to protect the freedom, life, physical integrity, health, and other related rights of those who are deprived of their liberty. M.E. DÍAZ CORAL and D.N. PERALTA SILVA, Guía de Jurisprudencia Constitucional. Hábeas Corpus: Actualizada a noviembre del 2024 (Jurisprudencia Constitucional: 17), Corte Constitucional del Ecuador; Centro de Estudios y Difusión del Derecho Constitucional (CEDEC), Quito, 2024, p. 9.

area while seeking asylum constituted an unlawful and arbitrary deprivation of liberty.[51] The court ruled in favour of the authorities and denied the habeas corpus petition. In its reasoning, the court argued that the foreigners' inadmissibility constituted a legitimate exercise of sovereign authority under Article 136 of the LOMH. The court accepted the administrative thesis that the applicants were not detained by the State but were in custody and care of the airline, invoking Annex 9 of the International Civil Aviation Convention in conjunction with Article 137 of the LOMH. Consequently, the restriction on movement was characterized as a voluntary and self-imposed condition resulting from the applicants' refusal to board a return flight, effectively absolving the State of liability for deprivation of liberty. Concerning the principle of *non-refoulement*, the ruling established that the mere scheduling of admissibility interviews by the Directorate of International Protection sufficed to satisfy State obligations, notwithstanding the requirement that applicants remain within the transit zone. By doing so, the decision tacitly endorsed the administrative classification of these spaces as 'waiting areas'—a legal fiction similar to the French model previously analysed.

This restrictive reasoning was subsequently upheld by the Provincial Court of Justice of Pichincha.[52] The appellate court affirmed that since the individuals were denied entry, they were never legally in Ecuador. The court maintained that the essential requirement for habeas corpus, which is the unlawful or arbitrary deprivation of liberty by public authorities, was not met because the custody remained with the respective airlines. The court further distinguished between those whose asylum claims were formally admitted and those who could not demonstrate formal admissibility, arguing that for the latter group, the status of inadmissibility remained valid and their continued retention in the airport was lawful.

5.2. The Constitutional Shift: Ruling No. 1214-18-EP/22

A decisive jurisprudential shift occurred with the Constitutional Court of Ecuador's ruling in Judgment No. 1214-18-EP/22.[53] In this landmark decision, the Court dismantled the lower courts' reliance on the fiction of non-entry, firmly establishing that the protection of fundamental rights extends to all areas under state jurisdiction, including airport transit zones or so-called international areas. The Court reasoned that while Article 66 of the Constitution permits restrictions on movement, such measures must strictly adhere to international human rights instruments, specifically the International Covenant on Civil and Political Rights. Crucially, the Court categorically rejected the argument that placing individuals under the custody of private airlines absolves the State of liability, asserting instead that state agents retain

[51] Court of Criminal Guarantees in Quitumbe, Metropolitan District of Quito, Province of Pichincha, case No. 17240-2018-00006, adjudicated on 09 March 2018.
[52] Provincial Court of Justice of Pichincha, case No. 17240-2018-00006, adjudicated on 13 April 2018.
[53] Constitutional Court of Ecuador, ruling No. 1214-18-EP/22, adjudicated on 27 January 2022.

ultimate control and oversight within these zones.[54] This reasoning resonates with Costello's critique of immigration detention, effectively dismissing the State's contention that such individuals are merely passengers physically present but legally outside the territory.[55]

Perhaps most significantly, the ruling reinforced the principle of *non-refoulement* pursuant to Article 66 of the Constitution and Article 33 of the 1951 Refugee Convention. The Court clarified that a request for international protection triggers an automatic suspension of any return measures. The obligation to refer an individual to the competent authority arises from the mere expression of fear, irrespective of formal entry or specific procedural formalities. In this regard, the Court invoked its prior jurisprudence in Judgment No. 335-13-JP/20, holding that the State cannot purport to release itself from its national and international obligations in transit or "international" zones within airports; rather, the obligation to respect and guarantee rights without discrimination extends to all points of entry, including de jure borders.[56]

Similarly, the Court referenced its ruling in No. 897-11-JP/20 to emphasize that *non-refoulement* applies universally, regardless of an individual's legal status. Consequently, the immigration authorities' failure to refer the applicants to the Directorate of International Protection, alongside the denial of access to the Ombudsman's Office, was found to violate both the constitutional right to seek asylum and the guarantee of due process. The standards established by the Constitutional Court have since guided lower courts,[57] affirming the principle that international borders cannot be understood as zones of exclusion or exception regarding human rights obligations.[58]

6. Brazil: From Statutory Protection to the Judicial Consolidation of Restriction

Brazil has historically distinguished itself within the Latin American region by adopting a broad and robust interpretation of the principle of non-refoulement, aligning its domestic legal framework with the highest international and regional human rights standards. This principle, codified in Article 7 of Law No. 9.474/1997, explicitly proscribes the deportation or rejection of any individual to a territory where

[54] N. GUERRERO, *Nuestra propia versión del filme 'La Terminal'*, in Defensoría Pública: Casos Relevantes 2022, Defensoría Pública del Ecuador, Quito, 2023, p. 65.
[55] C. COSTELLO, Immigration Detention: The Grounds Beneath Our Feet, in *Current Legal Problems*, n. 68/1, 2015, pp. 143–177.
[56] Constitutional Court of Ecuador, ruling No. 335-13-JP/20, adjudicated on 12 August 2020, § 99, citing UNHCR, Legal Considerations on the Responsibility of States Regarding Persons Seeking International Protection in Transit Zones or "International Zones" of Airports, 17 January 2019, and IACHR, Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons and Victims of Trafficking in Persons, Principle 6.
[57] For instance, see Civil Judicial Unit of Guayaquil, Case No. 09332-2021-04157, adjudicated on 26 April 2021; Judicial Unit on Violence Against Women in Quito, Case No. 17284-2021-0001T, adjudicated on 6 July 2021; Judicial Unit of Family, Women, Children and Adolescents in Quito, Case No. 17203-2021-04877, adjudicated on 26 October 2021.
[58] Constitutional Court of Ecuador, ruling No. 1214-18-EP/22, *op. cit.*, § 99.

their life or liberty is jeopardized. Notably, Brazilian law underscores that irregular entry into the national territory does not preclude an individual's entitlement to seek asylum.[59] The 1988 Federal Constitution further elevates asylum from a discretionary state prerogative to a fundamental human right, affirming the prevalence of human rights and the inviolability of rights for all persons within the national territory. In addition, Law No. 9474/1997 (National Refugee Act), which implements the 1951 Refugee Convention and the expanded Cartagena definition, creates a binding obligation on the state to admit claims regardless of migratory status.[60] As a result, all criminal or administrative proceedings related to illegal entry are suspended until refugee status is determined.[61]

However, the trajectory of Brazilian asylum governance has recently shifted from this protective statutory framework to one of sharp administrative and judicial restriction. The implementation of Technical Note No. 18/2024[62] by the Ministry of Justice and Public Security represents a decisive restrictive turn that validates the fiction of non-entry. This administrative measure effectively bars transit passengers without entry visas from seeking asylum, treating them as inadmissible under the presumption that their applications constitute an abuse of the migratory system. As Magalhaes has pointed out, there is an asymmetry where the opinion of the authorities carries more weight than the claims of the asylum seeker.[63] Consequently, the State pre-emptively treats transit passengers as lacking credibility, viewing them as irregular migrants rather than potential refugees.

6.1. The Conflict Between Lex Specialis and Migration Control

To analyse the shifting landscape of Brazilian border governance, it is necessary to examine the landmark ruling of the 6th Federal Court of Guarulhos in *Habeas Corpus* No. 5008029-65.2024.4.03.6119.[64] The controversy centred on the summary denial of an asylum application submitted by a Cameroonian national who arrived at the airport without a consular visa. Invoking Technical Note No. 18/2024, the Federal Police contended that the individual was merely a "passenger in transit" to Bolivia who had fraudulently misused a visa exemption. The administration posited that such conduct constituted an

[59] L.F. FREIER & J.O. GAUCI, Refugee Rights Across Regions: A Comparative Overview of Legislative Good Practices in Latin America and the EU, in *Refugee Survey Quarterly*, n. 39, 2020, p. 341.
[60] A. DE CARVALHO RAMOS, *Novas tendências do direito dos refugiados no Brasil*, in L. Jubilut L.& G. De Godoy (Ed.) Refúgio no Brasil: Comentários à Lei 9.474/97, São Paulo: Quartier Latin/ACNUR, 2017, p. 283.
[61] L.F. FREIER, A Liberal Paradigm Shift?: A Critical Appraisal of Recent Trends in Latin American Asylum Legislation, in J.P. Gauci et al. (Ed..) *Exploring the Boundaries of Refugee Law Current Protection Challenges*, 2015, p. 342.
[62] Ministry of Justice and Public Security, Nota Técnica Nº 18/2024/Gab-DEMIG/DEMIG/SENAJUS/MJ, Brazil, 02 August 2024.
[63] B. MAGALHAES, The Politics of Credibility: Assembling Decisions on Asylum Applications in Brazil, in *International Political Sociology*, n. 10, 2016, p. 147.
[64] 6th Federal Court of Guarulhos, Civil Habeas Corpus No. 5008029-65.2024.4.03.6119, adjudicated on 14 November 2024. Regarding the Habeas Corpus in Brazil see N. J. NADORFF, Habeas Corpus and the Protection of Political and Civil Rights in Brazil: 1964-1978, in *MIA Inter-Am. L. Rev.*, n. 14/2, 1982), pp. 297-336.

impediment to entry under Article 45, VII of the Migration Law (Law No. 13.445/17), which permits the state to deny admission when a traveller's stated purpose diverges from their visa category.

The court, however, declared this administrative refusal illegal, dismantling the executive's argument through the application of the principle of specialty (*lex specialis derogat legi generali*). The judiciary reasoned that the National Refugee Act (Law No. 9474/97) serves as a special norm specifically designed to protect individuals in need of international protection, whereas the Migration Law governs only general entry requirements. This reasoning aligns with established doctrine, which identifies the 1951 Refugee Convention as a specialized human rights instrument that provides a distinct legal status tailored for all individuals in need of international protection.[65]

Furthermore, the court equated the situation of a transit traveller seeking to remain in Brazil without a visa to a case of irregular entry. It asserted that Article 8 of the National Refugee Act explicitly mandates that irregular entry "does not constitute an impediment to the foreigner's application for asylum." Consequently, this specific rule must prevail over general grounds for inadmissibility. The court maintained that applying an administrative Technical Note to block asylum claims would render Article 8 a "dead provision,"[66] effectively stripping the norm of its legislative purpose

The judgment also addressed the separation of administrative powers, noting that by summarily rejecting the application at the border, the Federal Police usurped the exclusive jurisdiction of the National Committee for Refugees (CONARE) to examine the merits of asylum claims, as stipulated in Article 12 of Law No. 9474. Finally, the decision was reinforced by the principle of non-refoulement, which the court designated as a norm of jus cogens derived from Article 33.1 of the 1951 Convention and Article 22.8 of the American Convention on Human Rights. Given the claimant's narrative of persecution, the court concluded that the State's duty to follow the regular refugee status determination procedure cannot be obstructed by secondary administrative regulations.

6.2. The Consolidation of the Barrier for Transit Travelers

The protective reasoning of the lower court was subsequently dismantled by the intervention of superior tribunals, specifically through the precedent established by the National High Court (STJ) in the Suspension of Preliminary Injunction and Judgment No. 3522 (2024/0452510-2).[67] In this ruling, which

[65] J. McADAM, 'Introduction', *Complementary Protection in International Refugee Law*, Oxford Monographs in International Law, Oxford, 2007, p. 5.

[66] 6th Federal Court of Guarulhos, Civil Habeas Corpus No. 5008029-65.2024.4.03.6119, II. *Fundamentaçao.*

[67] National High Court (STJ), Suspensão de Liminar e de Sentença No. 3522 - SP (2024/0452510-2), adjudicated on 1 December 2024. It should be noted that the Suspension of Preliminary Injunction and Judgment is a prerogative stablished in Article 4 of Law 8.437/1992, which allows the President of the TSJ to suspend a preliminary injunction or a ruling on the grounds that the measure granted may be prejudicial to order, health, safety and public economy.

concerned 104 migrants denied admission at Guarulhos International Airport (Aeroporto Internacional André Franco Montoro), the STJ validated the administrative restriction by prioritizing national security and the combat against human smuggling over the individual right to seek protection. The STJ's reasoning rested on a strict interpretation of the relationship between the right to asylum and border control. While acknowledging the right to seek asylum, the Court emphasized that this right is not absolute and must be exercised within the framework of migration statutes. Adopting the government's argument, the Court held that migrants entering under transit visa exemptions with the actual intention of remaining in Brazil or continuing to North America had committed an abuse of rights and a fraud against the migration system. Consequently, the Court ruled that Article 8 of the Refugee Statute could not be invoked to validate what it deemed a fraudulent entry strategy.

Crucially, the STJ introduced a restrictive interpretation of the principle of non-refoulement. Dismissing the Public Defender's arguments, the Court asserted that returning migrants to their last country of departure—which is not necessarily their country of origin—did not constitute refoulement. The Court placed a high burden of proof on the asylum seekers, arguing they had failed to demonstrate an immediate risk of persecution in the transit country or the country of departure. This logic implicitly adopts a safe third country concept without legislative authorization, presuming that transit passengers can access protection elsewhere or are merely economic migrants devoid of protection needs.

Furthermore, the STJ relied on Article 144 of the Brazilian Constitution, which grants the Federal Police authority over border control, to justify the containment of migrants within the airport's international transit zone. The Court accepted the legal fiction that these individuals had not technically entered Brazilian territory, thereby limiting their full access to legal rights. Despite acknowledging the difficult conditions and psychological distress present in the "restricted" zone, the Court found that national security concerns—specifically the risk of human trafficking and the potential for encouraging irregular migration—constituted sufficient justification for immediate removal.

Following this precedent, the Regional Federal Court of the 3rd Region (TRF-3) overturned the protective ruling in Habeas Corpus No. 5008029-65.2024.4.03.6119. Adopting the STJ's reasoning, the appellate court held that because the plaintiff was in international transit to a third country, he lacked the intention to remain (*animus manendi*) in Brazil. This, according to the court, constituted an abuse of the right to seek asylum. The judgment concluded that the right to refuge requires proof of a bond with the country (such as family reunification) or a genuine intent to settle, rather than utilizing Brazil merely as a transit route to other countries.[68]

[68] Regional Federal Court of the 3rd Region, Civil Appeal No. 5008029-65.2024.4.03.6119, 25 April 2025.

It can be observed that the Brazilian judiciary, confronted with increasing migration flows and asylum applications at the airport, has opted to validate the exception rather than uphold the statutory guarantee of asylum.[69] This administrative and judicial exclusion—mirroring trends in Chile and Ecuador—is deeply rooted in the politics of suspicion, where a lack of immediate evidence from the asylum seeker is interpreted as proof of deception.[70] In conclusion, the Brazilian judiciary is effectively validating a liminal legal space, where access to rights for transit travellers is severed from their physical presence.

7. Discussing findings: The Normalization of Differential Legality

A comparative analysis of asylum procedures in Brazil, Chile, and Ecuador reveals that South American airports are increasingly operating as sites of exclusion, in which the restrictive application of migration law progressively undermines the region's historically grounded humanitarian commitments. The judicial endorsement of the fiction of non-entry in Brazil, alongside administrative resistance to constitutional guarantees in Chile and Ecuador, illustrates that South American states are not merely reacting to global developments but are actively adopting containment strategies traditionally associated with the Global North.[71] This shift normalizes a regime of differential legality, under which human rights protections are selectively curtailed or suspended,[72] often in tension with international legal obligations. Crucially, this airport-specific legal regime generates a paradox frequently mischaracterized as a condition of formal rightlessness, even though statutory and human rights norms remain, at least in principle, legally invokable by individuals confined to transit zones.[73]

The Resilience of the Fiction

For those who manage to reach the territory of Brazil, Chile or Ecuador, the legal fiction of non-entry allows States to exert effective control, detaining and returning individuals while simultaneously absolving themselves of legal responsibility. This mechanism establishes a liminal legal space that inhibits mobility and access to asylum procedures. Furthermore, the use of this legal fiction, even in contravention of the constitutional mandates in these countries, affirms its utilitarian function of selectively depriving those arriving at the borders of some of their rights, such as the right to request and receive asylum.[74] Within

[69] J. HUYSMANS, *International Politics of Insecurity*, *op. cit.*, p. 16.
[70] M. GRIFFITHS, Vile Liars and Truth Distorters': Truth, Trust and the Asylum System, in *Anthropology Today*, n. 28/5, 2012, pp. 8–12.
[71] N. CINTRA, *Visa Policies as Externalisation*, *op. cit.*
[72] Regarding the non-application of human rights norms in airport transit areas, see T. BASARAN, *Legal borders, op. cit.*, pp. 66, 67; A. DEL VALLE GÁLVEZ, *La fragilidad de los derechos humanos, op. cit.*, p. 36.
[73] D. THYM, European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the ›New‹ Pact on Migration and Asylum. EU Immigration and Asylum Law and Policy, in *Special series of posts on the New Migration Pact*, 28 September 2020. [last visit: 30 January 2026]
[74] E. LEE, *The End of Entry Fiction*, *North Carolina Law Review*, Vol. 99, 2021, pp. 565–642.

this space, the person declared inadmissible to the territory is trapped in a legal vacuum, present enough to be detained and removed, yet absent enough to be denied international protection.[75]

Procedural Barriers and the Politics of Credibility

Furthermore, the operationalization of this fiction relies heavily on accelerated procedures and the politics of credibility.[76] The widespread use of manifestly unfounded screenings in the airport's transit zones confirms Langrognet's findings that such procedures are often context-dependent enforcement tools rather than neutral legal assessments.[77] As evidenced by administrative practices in Santiago, Guayaquil, and Guarulhos, the uncertainty of an applicant's narrative is weaponized to deny entry,[78] and therefore asylum. The truncated nature of these assessments, combined with a lack of legal assistance and the coercive environment of the transit zone, renders it nearly impossible for applicants to present complex claims adequately, thereby creating a severe risk of *refoulement*.[79] These bureaucratic hurdles transform the right to seek asylum from a statutory guarantee into a privilege conditional upon proper documentation, specifically, the possession of a visa.

The Stratification of Mobility

Consequently, the administrative categorization of migrants at these borders serves to strip them of their agency, reducing them to objects of security management rather than subjects of rights.[80] This confirms Frétigny's observation that the border is no longer a static line but a sorting process embedded within the airport's architecture, distinguishing between those who have the "right to rights" and those reduced to bare life.[81] The transit passenger is reclassified not as a potential refugee, but as a suspect in immigration fraud, a shift explicitly validated by the Brazilian STJ. This reclassification is legally significant as it reverses the burden of proof, requiring the asylum seeker to demonstrate the veracity of their claims and, notably in Brazil, their ties to the country or an *animus manendi*.

Judicial Divergence

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[75] F. RONDINE, The Fiction of Non-entry in European Migration Law: Its Implications on the Rights of Asylum Seekers and Irregular Migrants at European Borders, in *European Journal of Migration and Law*, Vol. 26, 2024, pp. 291–316. See also H. SOMMER, *Denials of Existence*, *op. cit.*, p. 97

[76] B. MAGALHAES, *The Politics of Credibility*, *op. cit.*, pp. 133–149.

[77] F. LANGROGNET, *Screening for Asylum*, *op. cit.*, p. 609.

[78] M. GRIFFITHS, *'Vile Liars and Truth Distorters': Truth, Trust and the Asylum System*, *Anthropology Today*, n. 28/5, 2012, pp. 8–12.

[79] R. JEFFERIES, D. GHEZELBASH and A. HIRSCH, Assessing Protection Claims at Airports: Developing Procedures to Meet International and Domestic Obligations, *Policy Brief 9*, Kaldor Centre for International Refugee Law, 2020.

[80] See the analysis of A. SCIURBA, Categorizing migrants by undermining the right to asylum. The implementation of the «hotspot approach» in Sicily, in *Etnografia e ricerca qualitativa, Rivista quadrimestrale,* n. 1, 2017, pp. 100 et seq.

[81] J.B. FRÉTIGNY, The Border Put to the Test of Space Mobilities: The Example of Paris Charles-de-Gaulle Airport, in *Annales de géographie*, n. 2/690, 2013, pp. 151–174.

The judicial response to these practices reveals a critical divergence. In Brazil, the judiciary's validation of these restrictions—particularly the STJ's prioritization of national security over the right to asylum—illustrates a politics of insecurity, where the judiciary, faced with increased flows, opts to validate the exception rather than uphold the statutory guarantee of asylum. [82] By implicitly adopting a safe third country logic without legislative authorization, arguing that transit passengers should seek asylum elsewhere, these states are dismantling the effective right to seek asylum.[83] The use of the concepts of transit and safety effectively unmakes the territory as a space of rights protection, leaving the asylum seeker trapped in the regime of non-entry.[84] Conversely, Ruling No. 1214-18-EP/22 of the Ecuadorian Constitutional Court offers a critical counter-narrative, reaffirming the supremacy of the Constitution and establishing that administrative practices cannot nullify human rights obligations. However, the persistent tension between these jurisprudential mandates and executive enforcement highlights the fragility of judicial oversight in the face of migration control imperatives.

8. Conclusion: Non-Entry Fiction as a Threat to the Regional Asylum Regime

The comparative analysis of Brazil, Chile, and Ecuador demonstrates a convergent tendency to reconfigure asylum governance through legal and administrative techniques that restrict access to protection at airport transit zones. Central among these techniques is the fiction of non-entry, which allows states to exercise effective control over asylum seekers while disclaiming the full application of constitutional and procedural guarantees. In this way, airports emerge as spaces of selective legality, where the enjoyment of rights is made contingent upon formal admission rather than effective jurisdiction.

From a constitutional standpoint, this development is deeply problematic. Individuals confined in transit zones are subject to significant exercises of state power—retention, screening, removal—without the safeguards that ordinarily accompany such measures. The cases examined show that this outcome is not solely the product of executive action, but is also shaped by judicial responses that, in some contexts, accept the fragmentation of jurisdiction and the prioritization of migration control over access to asylum procedures.

Furthermore, the divergent trajectories observed across the three countries underscore the decisive role of courts. While Chilean and Ecuadorian jurisprudence has, at times, reaffirmed that physical presence suffices to activate state obligations, recent Brazilian developments illustrate a restrictive turn in which public order and migration management prevail over the right to seek asylum. These dynamics highlight

[82] J. HUYSMANS, *International Politics of Insecurity*, *op. cit.*, p. 16.
[83] V. WESTIN, *O conceito de "safe" third countr, op. cit.,* p. 127.
[84] L. F. FREIER, E. KARAGEORGIOU and K. OGG, The Evolution of Safe Third Country Law and Practice, in C. COSTELLO (Ed.) *The Oxford Handbook of International Refugee Law*. Oxford University Press, 2021, p. 534.

the airport as a critical testing ground for the effectiveness of constitutional guarantees under conditions of securitized border governance.

More broadly, the normalization of exclusion at points of entry reflects a transformation of asylum from a right grounded in constitutional and international law into a discretionary filter embedded in administrative practice. Reaffirming the primacy of jurisdiction based on effective control—rather than legal fictions such as non-entry—remains essential if constitutional commitments to fundamental rights are to retain their practical significance in contemporary migration governance.