

The 1984 Cartagena Declaration: A Critical Review of Some Aspects of Its Emergence and Relevance

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ABSTRACT

This article revisits some aspects of the emergence and relevance of the 1984 Cartagena Declaration on Refugees. After addressing the conceptual framework by proposing a definition of asylum regime and explaining which asylum sub-regimes exist at the regional level in Latin America, the article reviews the ideological nature of the historical set of facts that led to the adoption of the 1984 Cartagena Declaration. It then explains why was there a need for a change of regime in Central America, details both the drafting process that culminated in the 1984 Cartagena Declaration refugee definition and UNHCR's role in it, and undertakes a critical analysis of the potential relevance of the Cartagena Declaration. The article's general conclusion is that the 1984 Cartagena Declaration's practical, political, and legal relevance is obsolescent and that its legacy is most likely to be found both in the broad refugee definitions that are captured in most of the region's domestic legislations, and in the advocacy model which uses ad hoc and sui generis UNHCR-led events to advance conceptual frameworks for refugee protection policy.

KEYWORDS: Cartagena Declaration, Latin America, refugee regime, regional approaches

1. INITIAL REMARKS

The decade from 1974 to 1984 saw the world's refugee population rise from 2.9 million to 10.7 million.¹ Towards the end of that decade the search for asylum in Africa (Djibouti, Somalia, Sudan), Asia (China, Pakistan, Thailand), and the Americas (Honduras) involved large-scale migration of hundreds of thousands and even millions.² The asylum-seekers forming part of these large-scale influxes included both forced migrants falling within the definition of "refugee" in the 1951 Refugee Convention and forced migrants who did not satisfy international refugee law

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1 See UNHCR, *Population Statistics Database*, undated, available at: <http://popstats.unhcr.org> (last visited 25 Aug. 2019).

2 UNHCR, *Report of the United Nations High Commissioner for Refugees*, UN Doc. A/38/12, Supplement No. 12, 17 Aug. 1983, para. 25.

terminology but were, nevertheless, in dire need of international protection. As direct products of the post-war time and in the absence of both progressive legal interpretation and doctrinal development, the 1950 United Nations High Commissioner for Refugees (UNHCR) Statute and the 1951 Refugee Convention risked becoming obsolete. The Western countries, no longer in a majority in the United Nations General Assembly and not directly affected by the large-scale influxes, were unwilling to revisit the 1950 UNHCR Statute or progressively develop the international conventional law of refugees, by and large seeing their interests served by a continuation of the *status quo*.³

The humanitarian, political, and legal conundrum that the large-scale forced migrations represented allowed the UNHCR successfully to make widespread use of diplomatic channels, to offer its 'good offices' as arbitrator, and to be a go-between in relations between governments with different interests so that it could ensure that its persons of concern were protected⁴ – a role that resulted in its being awarded in 1981 its second Nobel Peace Prize. From a position of high moral standing, benefiting from an additional layer of credibility and legitimacy, the UNHCR pursued two-fold action through global and regional initiatives that aimed both at changing the refugee regime and addressing more effectively the phenomenon of the massive influx of asylum-seekers.

A successful initiative undertaken by the UNHCR at the global level led to a series of events that culminated in the adoption of the 1984 Cartagena Declaration, which is heralded as one of the greatest accomplishments in the development of the refugee protection regime in Latin America.⁵ Plenty of literature has been written on several interesting aspects of the 1984 Cartagena Declaration, ranging from comparison with large-scale refugee influxes⁶ and the 1969 Refugee Convention of the Organization of African Unity,⁷ to evaluations of its relevance

- 3 G.J.L. Coles, "Approaching the Refugee Problem Today", in G. Loescher & L. Monahan (eds.), *Refugees and International Relations*, Oxford, Clarendon Press, 1990, 383.
- 4 J. Sanness, "Presentation: Speech by John Sanness, Chairman of the Norwegian Nobel Committee", in T. Frängsmyr & I. Abrams (eds.), *Peace, 1981-1990* (Series Nobel Lectures), Singapore, World Scientific Publishing Co., 1997, 14.
- 5 M. Reed-Hurtado, "The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America", in V. Türk, A. Edwards & C. Wouters (eds.), *In Flight from Conflict and Violence – UNHCR's Consultations on Refugee Status and Other Forms of International Protection*, Cambridge, Cambridge University Press, 2017, 141. For the purpose of this article, Latin America encompasses 20 countries, namely three Caribbean (Cuba, Dominican Republic, and Haiti), seven Central American (Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, and Panama), and 10 South American (Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay, and Venezuela) countries. Hence, this article excludes from its scope one non-Latin Central American country (Belize), one non-Latin South American country (Suriname), the overseas department of France in South America (French Guyana), and the remaining Caribbean countries and British, Dutch, and French territories.
- 6 T. Tirado, "Evolución del Concepto de Refugiado. La Declaración de Cartagena y el Problema de Flujos Masivos de Refugiados", in *La Protección Jurídica Internacional de la Persona Humana y el Problema de los Indocumentados* (Seminario de La Paz, 12–15 Nov. 1990), La Paz, ACNUR/CICR/CJI/CAJ, 1991, 131–137.
- 7 E. Arboleda, "Refugee Definition in Africa and Latin America: The Lessons of Pragmatism", *International Journal of Refugee Law*, 3(2), 1991, 185–207; E. Arboleda, "The Cartagena Declaration of 1984 and Its

both as a source⁸ and to the development of international refugee law in Latin America,⁹ to legal analyses regarding its broader refugee definition,¹⁰ and to its legal nature and historical importance.¹¹

This section, therefore, does not aim to introduce or analyse the main features of the 1984 Cartagena Declaration or simply review or regurgitate the existing literature. Rather, it critically revisits some aspects of its emergence and relevance by answering the following questions: what is an asylum regime and which sub-regimes exist at the regional level in Latin America? What was the ideological nature of the historical set of facts that led to the adoption of the Cartagena Declaration? Why was there a need for a change of regime in Central America? What was the drafting process that culminated in the 1984 Cartagena Declaration definition of “refugee” and how important was UNHCR’s role in it? What is the Cartagena Declaration, and what is it not?

Lastly, this section focuses predominantly on the regional broad definition of “refugee” that the 1984 Cartagena Declaration recommends, rather than the various other important protection aspects that it covers.¹²

2. THE ASYLUM REGIME AND ITS POLITICAL ASYLEE AND REFUGEE SUB-REGIMES

The concept of “asylum regime” may – and indeed does – vary. That used in this article is inspired by working definitions both of “regime” and of “asylum”.

A very powerful framework within which to analyse multilateral cooperation in the international society – i.e. governance based on self-regulation and self-limitation of sovereignty – is the concept of “regime”. Based on the pioneering work on regimes conducted by American political scientists, the most commonly used definition is that crafted by Krasner. It states that regimes are “sets of implicit or explicit

Similarities to the 1969 OUA Convention – A Comparative Perspective”, *International Journal of Refugee Law*, special issue, 1995, 87–101.

- 8 H. Gros Espiell, “La Declaración de Cartagena como fuente del derecho internacional de los refugiados en América Latina”, in *Memoria del Coloquio Internacional: 10 Años de la Declaración de Cartagena sobre Refugiados* (Coloquio de San José de Costa Rica, 5–7 Dic. 1994), San José, IIDH/ACNUR, 1995, 453–470.
- 9 L. Franco, L. & J. Santistevan de N., “Contributions of the Cartagena Process to the Development of International Refugee Law in Latin America”, in UNHCR, *Memoir of the Twentieth Anniversary of the Cartagena Declaration on Refugees*, San José, Editorama, 2005, 61–119.
- 10 A. Fortín, “Doctrinal Review of the Broader Refugee Definition Contained in the Cartagena Declaration”, in UNHCR, *ibid.*, 255–290.
- 11 J. Ruiz de Santiago, “The Cartagena Declaration: Legal Nature and Historical Importance”, in UNHCR, *ibid.*, 291–314.
- 12 I.a. the ratification and/or accession to the 1951 Refugee Convention and to its 1967 Protocol; the enactment of domestic legislation; the peaceful, apolitical, and humanitarian nature of the protection through asylum; the importance and nature of the principle of *non-refoulement*; the location of and the problem of attacks on refugee camps; the situation of internally displaced persons; voluntary repatriation; family reunification; the need for coordination of the work of non-governmental organisations; the cooperation between regional organisations – in particular the Organization of American States and the Inter-American Commission on Human Rights – with UNHCR; and the use of the 1969 American Convention on Human Rights to protect the human rights of political asylees and refugees; cf. *Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: problemas jurídicos y humanitarios* (Memorias del Coloquio de Cartagena de Indias, 19–22 Nov. 1984), Bogotá, ACNUR/Centro Regional de Estudios del Tercer Mundo/Universidad Nacional de Colombia, 1985, 335–338.

principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations".¹³ This definition was criticised in the very same publication in which it appeared; therefore, it was not surprising that many scholars came up with their own definitions. In the absence of a true consensus definition, but inspired by Krasner's seminal definition, this author's working definition of "regime" is "the ensemble of norms and practices that are used by states and other relevant actors in the cooperation and/or coordination of the international and/or national actions aimed at regulating an issue area".

As for asylum, even though it constitutes a millennial practice, none of the various treaties that were adopted and entered into force in the 20th century at both global and regional level dealt with the task of defining it. However, in September 1950, less than a year before the 1951 Refugee Convention was adopted, the Institute of International Law came up with a resolution containing a rather useful definition during its Bath session: "[a]sylum [is] the protection which a state grants on its territory, or in some other place under the control of its organs, to a person who comes to seek it."¹⁴

In light of the above definitions of "regime" and "asylum", this author's working definition of "asylum regime" is

the ensemble of norms and practices that states and other relevant actors use when cooperating and/or coordinating the international and/or national actions aimed at regulating the protection which a state grants on its territory, or in some other place under the control of its organs, in the exercise of its sovereignty, to a person who comes to seek it.

The asylum regime includes sub-regimes – regarded by some experts as exotic and highly specialised¹⁵ – and is wider than their sum. It encompasses through its sub-regimes not only the protection of refugee status holders¹⁶ but also of those persons who enjoy another sort of protective status, including that of political asylee, humanitarian, subsidiary protection, or temporary protection, or any other legal status accorded by a State with a view to protecting the person both by avoiding *refoulement* and ensuring a set of rights and duties (i.e. a legal status) on its territory. The asylum regime is thus a genus of which there are several species (sub-regimes) and also a special regime in the sense that, as put by Koskenniemi,¹⁷ it is a special branch of International Law with its own principles, institutions, teleology, and set of rules.

13 S.D. Krasner, "Structural Causes and Regimes Consequences: Regimes as Intervening Variables", in S.D. Krasner (ed.), *International Regimes*, Ithaca/London, Cornell University Press, 1983, 2.

14 Institut de droit international, "Résolutions adoptées par l'Institut à la Session de Bath, sep. 1950 – I. L'asile en droit international public (à l'exclusion de l'asile neutre)", *Annuaire de l'Institut de droit international*, 43(II), 376 (author's translation).

15 M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law? – Report of the Study Group of the International Law Commission*, UN Doc. A/CN.4/L.682, 13 Apr. 2006, Geneva, International Law Commission, 2006, 11.

16 That is, of those persons whose "refugeehood" (*la qualité de réfugié* or *la condición de refugiado*) has been recognised through a declaratory act and in respect of whom a corresponding refugee status has been granted through a constitutive act.

17 Koskenniemi, *Fragmentation of International Law*, 252.

In the Latin American region, the asylum regime has two main sub-regimes,¹⁸ those of political asylee (*asilado político*) and refugee (*refugiado*).¹⁹ The fundamental difference between these two sub-regimes is the “ensemble of norms and practices” they use both to define and protect those who seek asylum. The use of the sub-regimes, through their norms and practices, will determine whether the asylum-seeker will be granted political asylee status or will be recognised as a refugee and granted refugee status. The norms and practices regulating the political asylee sub-regime derive from the long-standing Latin American practice of diplomatic and of territorial asylum, and were finally codified in the 1954 Caracas Conventions on Territorial and on Diplomatic Asylum. In turn, the norms and practices regulating the refugee sub-regime derive mostly from the 1951 Refugee Convention, its 1967 Protocol, and UNHCR’s protection advocacy work.

3. THE LATE 1970S AND EARLY 1980S FORCED MIGRATION MOVEMENTS IN CENTRAL AMERICA

In the late 1970s and early 1980s, there was a development and diversification of conflicts in Nicaragua, El Salvador, Guatemala, and Honduras, which resulted in the forced displacement of large segments of populations.²⁰ Nationals of these countries were forcibly displaced *en masse* mostly because of the consequences of civil war and foreign aggression, and fled in their hundreds of thousands to neighbouring countries.²¹ The region was caught amidst the geopolitics of the Cold War and was severely victimised by the anti-communist policies and action of various United States (US) Administrations. The lack of accurate and trustworthy figures concerning the forced migration movements in Central America has been a major obstacle to the determination of the precise magnitude of the problem, but it is estimated that some two million people were displaced by the various conflicts.²²

18 In Europe, for instance, in addition to the refugee sub-regime, there is i.a. the subsidiary protection sub-regime and the temporary protection sub-regime, cf., respectively, Council of the European Union, Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, OJ L 212/12, 7 Aug. 2001; and Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9, 20 Dec. 2011.

19 This author prefers the concept of “regime” and of “sub-regime” to the use of “institute” or “institution”, which is sometimes to be found in the Latin American literature (i.e. “*instituto del refugio*”, “*instituto del asilo político*”). A legal institute or institution is a juridical notion that misses important elements of the definition of “regime”, such as the practices (in addition to the norms), the role of non-state relevant actors, and the means used (cooperation and/or coordination, as opposed to law enforcement).

20 The best narrative of the protection of refugee groups in Central America from 1981 until 1985 is to be found in I. Jackson, *The Refugee Concept in Group Situations*, The Hague, Martinus Nijhoff Publishers, 1999, 347–395.

21 H. Gros Espiell, S. Picado & L. Valladares Lanza (CIREFCA Legal Document), “Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America”, *International Journal of Refugee Law*, 2(1), 1990, 87.

22 J.H. Fischel de Andrade, “Regional Policy Approaches and Harmonization: A Latin American Perspective”, *International Journal of Refugee Law*, 10(3), 1998, 400.

The first wave of forced migration was that of Nicaraguans, as a result of the civil war which started in 1978. In 1972, an earthquake had already destroyed nearly 90 per cent of its capital, Managua, two-thirds of whose one million inhabitants had been displaced and had faced food shortage and disease. The Nicaraguan Government accepted relief from countries such as the US and Mexico but, as it was not distributed, President Somoza was accused of having taken them for himself and his entourage. Even the economic elite was reluctant to support Somoza, as he controlled a monopoly of industries that were vital to reconstructing the country. The ranks of the leftist Sandinista National Liberation Front (FSLN), originated in the milieu of various oppositional organisations, youth, and student groups in the late 1950s and early 1960s, were flooded with disaffected young Nicaraguans who had nothing to lose. In 1978, the FSLN led anti-Somoza guerrilla forces into a violent uprising against the military and civil war began. In 1979, Sandinista forces entered Managua and Somoza resigned, causing the long-lasting Somoza family dictatorship to end. The Sandinistas took power, prompting the exodus of the majority of Nicaragua's bourgeois middle class, wealthy landowners, and professionals. Some 100,000 Nicaraguans are believed to have been killed in the 1978–1979 events. Of the 200,000 who are estimated to have left the country during that phase of the civil war, some 30,000–40,000 remained abroad, in addition to thousands of undocumented Nicaraguans who were in Mexico and the US.²³

The Carter Administration cooperated with the new Government, but aid was suspended when the Americans obtained evidence of a Nicaraguan shipment of arms to left-wing El Salvadoran rebels. In the meantime, the US-backed right-wing rebel groups, collectively known as the “Contras”, formed to oppose the new socialist, Sandinista Government. The Reagan Administration authorised the CIA to help the Contras with funding, armaments, and training, although congressional approval was never obtained. The Contras operated out of camps in the neighbouring countries of Honduras and Costa Rica.²⁴ They engaged in a systematic campaign of terror and committed numerous human rights violations against the rural Nicaraguan population to disrupt the social reform projects of the Sandinistas. During the conflict between the Contras and the Sandinistas, some 30,000 people were estimated to have been killed.

In a report on the situation of human rights in Nicaragua during the civil war, the Inter-American Commission of Human Rights (IACmHR) stated that Nicaragua was responsible for serious attempts against the right to life and in violation of the international humanitarian norms by repressing the insurrections that occurred in

23 S. Aguayo Quezada, “Los Aspectos Políticos del Éxodo Centroamericano”, in *La Protección Internacional de los Refugiados en América Central, México y Panamá: problemas jurídicos y humanitarios* (Memorias del Coloquio en Cartagena de Indias, 19–22 Nov. 1984), Bogotá, ACNUR/Centro Regional de Estudios del Tercer Mundo/Universidad Nacional de Colombia, 1985, 118.

24 The possibility of plotting against the ruling government in the neighbouring country remained a persistent trend of Ibero-American politics, until the leaders of Costa Rica, El Salvador, Honduras, Guatemala, and Nicaragua met in 1987 in Guatemala City to sign the Arias Plan aimed at bringing the Sandinistas and the Contras to negotiate a cease-fire and allow democratic elections in Nicaragua. The Arias Plan explicitly incorporated a clause formulated to ban a government's support of rebel initiatives in adjoining nations; cf. M. Sznajder & L. Roniger, *The Politics of Exile in Latin America*, Cambridge, Cambridge University Press, 2009, 89–90.

the main cities of the country in an excessive and disproportionate manner. The IACmHR concluded that the bombing of towns by the National Guard had been carried out in an indiscriminate fashion and without prior evacuation of the civilian population, causing innumerable deaths of those who were not involved in the conflict and, in general, a dramatic situation.²⁵

The second wave of forced migration was that of Salvadorians. The history of El Salvador during the 1970s is characterised by right-wing paramilitary death squads and left-wing guerrillas who fought each other continuously. In February 1977, the Party of National Conciliation won the presidential elections, although opposition political parties claimed election fraud. To face the protests, the new Government declared a state of siege and suspended civil liberties. With tensions mounting, the civil-military Revolutionary Government Junta deposed President Gen. Carlos Humberto Romero in a coup in 1979. The US Administration feared that El Salvador could fall to communist revolution, and therefore supported the new military Government and started significantly to increase its spending in El Salvador. Between 750,000 and one million victims and potential victims of the conflict started fleeing the country in 1979. Some 500,000 of those who did not go to neighbouring countries remained in El Salvador as internally displaced persons,²⁶ seeking protection in the few areas that were not directly involved in the conflict.

In the early months of 1980, Salvadoran guerrilla groups, workers, communists, and socialists unified to form the Farabundo Martí National Liberation Front (FMLN), which immediately announced plans for an insurrection against the Government. From 1980 to 1992, El Salvador was the scene of a brutal civil war. In 1981, there were 60,000 Salvadorians in Honduras in UNHCR-run camps near the border. Around one-third of the labour force had fled the country. Some 20,000 Salvadorians had sought protection in Nicaragua, another 80,000–110,000 had fled to Guatemala, and many, later and subsequently, to Mexico.

The IACmHR reported that the spiral of violence had reached truly alarming levels in El Salvador in 1980 and that the armed confrontation, terrorist assault by armed groups of the extreme left and the extreme right, the discovery of bullet-ridden, mutilated bodies, and kidnappings of prominent figures were increasing dramatically.²⁷ The IACmHR also reported that, with respect to the right to life, the statistics on El Salvador were alarming, since it was estimated that in 1984 the total number of those who had died as a consequence of the violence had reached 50,000. Many of these people were assassinated in the most cruel way, in acts attributable to the security forces or those that operated with their acquiescence.²⁸

The third wave of forced migration came in 1981 from Guatemala, a country that from 1960 to 1996 suffered Central America's longest civil war, fought between

25 IACmHR, *Report on the Situation of Human Rights in Nicaragua*, Doc. OEA/Ser.L/V/II.45, doc. 18 rev. 1, 17 Nov. 1978.

26 Aguayo Quezada, "Los Aspectos Políticos del Éxodo Centroamericano", 118.

27 IACmHR, *Annual Report of the Inter-American Commission on Human Rights 1979-1980*, Doc. OEA/Ser.L/V/II.50, doc. 13 rev. 1, 2 Oct. 1980.

28 IACmHR, *Annual Report of the Inter-American Commission on Human Rights 1983-1984*, Doc. OEA/Ser.L/V/II.63, doc. 10, 24 Sep. 1984.

left-wing insurgents and the armed forces of successive governments. The 1960s phase caused an influx of political migrants primarily to Mexico, joining a pre-existing diaspora of professional, middle-class Guatemalan political exiles in Mexico. During the second phase of the war, centred in the Western Mayan highlands, the first large-scale migration to Mexico began. This was due in part to the civil war and to the destruction brought by the 1976 earthquake, as a result of which thousands ended up in camps run by the UNHCR in the South of Mexico.

The strong sense of Mayan identity of many highland communities led the Guatemalan army to regard the Mayan population as subversive and supportive of the insurgency, which by late 1970s was operating in the Mayan highlands. In 1981, State security forces responded with massive scorched earth attacks. Some 150,000 Guatemalan were reportedly killed or “disappeared” in 1981 alone. Even in the non-conflict zones, the violence damaged the highlands’ commercial and trade systems, causing many to lose their livelihood. The Guatemalan economy also suffered by being cut off from international economic assistance, in response to the army’s brutality, and thus the migration from Guatemala increased significantly for a combination of political and economic reasons. Around one million Mayan villagers became internally displaced persons. After some 800 *campesinos* arrived in the Mexican jungles in May 1981, another 200,000 followed, 46,000 of whom now lived in UNHCR-run camps in Southern Mexico.²⁹

In a report on the situation of human rights in Guatemala, the IACmHR concluded that an alarming climate of violence had prevailed in Guatemala and that violence had either been instigated or tolerated by a government unwilling or unable to contain it. It also stated that while victims of this violence were found in all sectors of society, those most affected had been political leaders of opposition parties, trade unionists, priests, lawyers, journalists, professors, and teachers, as well as the thousands of peasants and Indians who had been assassinated.³⁰

The fourth and last wave of forced migration was composed of Hondurans, nationals of a country that both produced its own forced migrants and received forced migrants from El Salvador, Nicaragua, and Guatemala. Even though Honduras did not experience the brutalising civil wars suffered by its neighbours, it did not go untouched by the Lost Decade. In 1981, Roberto Suazo Córdova won the elections and Honduras started assisting the Nicaraguan Contra guerrillas. The US established a continuing military presence in Honduras with the purpose of supporting the Contra guerrillas fighting the Nicaraguan Government. A US-trained military intelligence unit carried out a campaign of torture, extrajudicial killing, and State-sponsored terror against Honduran civilians. Honduras became an active front in the Contra war, and many Hondurans who dissented disappeared into secret prisons. Hundreds disappeared or were extra judicially killed, and many more were abducted and tortured. Since mid-1983, many Hondurans have fled to Mexico and the US.³¹

29 Aguayo Quezada, “Los Aspectos Políticos del Éxodo Centroamericano”, 118.

30 IACmHR, *Report on the Situation of Human Rights in the Republic of Guatemala*, Doc. OEA/Ser.L/V/II.53, doc. 21 rev. 2, 13 Oct. 1981.

31 Aguayo Quezada, “Los Aspectos Políticos del Éxodo Centroamericano”, 119.

4. THE NEED FOR A CHANGE OF REGIME IN CENTRAL AMERICA

As a result of the events mentioned above all eight Central American countries³² were affected by the massive forced migration and had inadequate, ambivalent, and contradictory policies towards Central Americans asylum-seekers.³³ Even though they had (more often than not) a protection-sensitive approach to those seeking asylum, in consonance with the long-established Latin American asylum tradition, some countries such as Mexico and Costa Rica moved towards more restrictive policies as a consequence of economic difficulties and increasingly moderate governments.³⁴

In addition to the political and economic effects resulting from the forced migrant influxes, there was a major legal problem: even though there was both an almost consensual decision to protect those seeking asylum and an international human rights law obligation – captured i.a. in Article 22(8) of the 1969 American Convention on Human Rights and in Customary International Law – not to deport or return those whose life or personal freedom was in danger of violation, there was a legal void as to the legal instruments applicable when it came to what legal status should be granted to forced migrants seeking asylum.

This was not the first time Latin American countries faced the problem resulting from the inadequacy of their political asylee sub-regime. In fact since 1959, when the mass exodus of Cubans began and was followed by influxes from countries such as Haiti, Paraguay, Bolivia, the Dominican Republic, Nicaragua, and Honduras, it became evident that few countries in the Latin American region had sufficient resources to provide protection and care to asylum-seekers, and that their capacity for absorption was rather limited. Nor had many countries developed institutions and adopted adequate legislation to handle asylum-seekers in accordance with the social and legal challenges presented by their sudden and massive influx.³⁵

The IACmHR had already in the mid-1960s identified, among the main challenges faced by the region, the lack of domestic legislation that adequately recognised and defined the situation of political refugees [*sic.*], the non-existence of an Inter-American convention that contemplated and regulated the situation of political refugees [*sic.*], and the lack of an organisation in the Inter-American system empowered to coordinate the protection and assistance of political refugees [*sic.*].³⁶

32 Belize, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, and Panama. Even though Belize is not covered in this article as not being a Latin Central American country, and hence part of Latin America (*supra*), it enacted a Refugees Act (No. 26) in 1991, amended (Chapter 165) in 2001, that contains a broad definition of “refugee” which reproduces *ipsis litteris* the extended definition adopted in the 1969 OAU Refugee Convention. This indicates that even though Belize wanted to distance itself from the 1984 Cartagena Declaration, it was inspired by the Spirit of Cartagena (*infra*).

33 K.W. Yundt, “International Law and the Latin American Political Refugee Crisis”, *University of Miami Inter-American Law Review*, 19, 1987–1988, 137.

34 E.G. Ferris, “The Politics of Asylum: Mexico and the Central American Refugees”, *Journal of Interamerican Studies and World Affairs*, 26(3), 1984, 360.

35 IACmHR, *Informe sobre Refugiados Políticos en América*, Doc. OEA/Ser.L/V/II.11, doc. 7 rev. 2, 2 Nov. 1965, 75–76.

36 *Ibid.*, 76–77. When referring to “political refugees”, the IACmHR introduced a misconceived idea, based on a wrong understanding that endured over decades, that refugees, as opposed to political asylees, move in large numbers and are destitute (cf. *ibid.*, 75). A *contrario sensu*, two relevant examples of large-scale granting of political asylee status were when in late 1973, early 1974, in Chile over 2,000 persons enjoyed diplomatic asylum as political asylees [cf. Comisión Internacional de Juristas (CIJ), *Aplicación de las*

Notwithstanding the recommendations of the IACmHR and as a result of lack of political will, domestic legislation was not adopted, no organisation was set up or charged with the task of coordinating protection and assistance works,³⁷ and the 1966 Draft Convention on Refugees proposed by the Inter-American Juridical Committee³⁸ was stillborn.

Until the mid-1970s, the countries in the region did not feel the combination of moral and material pressure that normally leads to change and were mostly satisfied with the then prevailing political asylee sub-regime. As a result of the political situation in Chile and Argentina, advocacy was undertaken mostly with a view to ensuring ratification or accession to the 1954 Caracas Conventions on Territorial and Diplomatic Asylum and the 1951 Refugee Convention, the respect of *non-refoulement*, and resettlement to those whose protection situation justified it (CIJ 1975, 51). However, in the late 1970s and early 1980s, forced migration in Central America became, from the factual point of view, the driving force that triggered recognition – initially by countries of the sub-region – of the need for regime change.

The siren song of regime change was not missed by the UNHCR. It was in those days that it started playing a significant and decisive role in the region as a norm entrepreneur.³⁹ At that time the sole asylum regime that existed in the sub-region was the political asylee sub-regime based on seven regional conventions that dealt, exclusively or otherwise, with the regulation of asylum and to which there were varying degrees of adhesion.⁴⁰ The UNHCR set out initially to bring Central American countries into the refugee sub-regime. As an immediate result of successful

Declaraciones y Convenciones Internacionales referentes al Asilo en América Latina, Ginebra, CIJ, 1975, 149] and when in 1980 over 10,000 Cubans enjoyed diplomatic asylum in Havana's Peruvian Embassy. For a further criticism of the pseudo-difference between political asylees and refugees based on the latter's rural origin, limited economic resources, low level of education, and political irrelevance, cf. J. Ruiz de Santiago, "Contribución de Héctor Gros Espiell al desarrollo del Derecho Internacional de los Refugiados", in *Héctor Gros Espiell – Amicorum Lieber*, v. 2, Bruxelles, Bruylant, 1997, 1370.

37 The Argentinean member of the Inter-American Juridical Committee, Miguel Angel Espeche Gil, recommended that the IACmHR assume the role of protection and assistance coordination; cf. Comité Jurídico Interamericano (CJI), "Anteproyecto de Convención Interamericana sobre Refugiados", in *Trabajos Realizados por el Comité Jurídico Interamericano durante su Periodo Extraordinario de Sesiones (Abr. 1966)*, Doc. OEA/Ser.I VI.2 – CIJ-8S, Union Panamericana/OEA, Washington, 1966, 47.

38 *Ibid.*

39 In the theory of international relations, literature "norm entrepreneur" is defined as an individual or organisation that sets out to change the behaviour of others; cf. A. Florini, "The Evolution of International Norms", *International Studies Quarterly*, 40, 1996, 375.

40 See the 1889 Montevideo Treaty on International Penal Law (five States Parties: Argentina, Bolivia, Paraguay, Peru, and Uruguay), the 1928 Havana Convention on Asylum (16 States Parties: Brazil, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and Uruguay), the 1933 Montevideo Convention on Political Asylum (14 States Parties: Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, and Peru), the 1939 Montevideo Treaty on Political Asylum and Refuge (one State Party: Paraguay), the 1940 Montevideo Treaty on International Penal Law (seven States Parties: Argentina, Bolivia, Brazil, Colombia, Paraguay, Peru, and Uruguay), the 1954 Caracas Convention on Territorial Asylum (11 States Parties: Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Panama, Paraguay, Uruguay, and Venezuela), and the 1954 Caracas Convention on Diplomatic Asylum (13 States Parties: Argentina, Brazil, Costa Rica, Ecuador, El Salvador, Guatemala, Mexico, Panama, Paraguay, Peru, Dominican Republic, Uruguay, and Venezuela).

diplomatic efforts and accession advocacy, Costa Rica and Panama (both in 1978), Nicaragua (1980), El Salvador, and Guatemala (both in 1983) became parties to the 1951 Refugee Convention.⁴¹

Despite the progress made, the great majority of Central American forced migrants qualified neither as political asylees in accordance to the political asylee sub-regime, nor as refugees in accordance with the definition of “refugee” adopted in the 1951 Refugee Convention. In consequence, these forced migrants in most host countries did not have a clearly defined legal status and were generally not allowed to work.⁴² This result was due to the fact that the very reason for their flight from their countries of origin – massive human rights violations resulting from the widespread consequences of civil war, such as the spiral of violence, indiscriminate bombing, armed confrontation, and terrorist assault (supra) – was neither contemplated as a convention ground in any of the instruments of the asylum regime, nor interpreted in such a way as to be included in one of the convention grounds. Therefore, there was a need for a change of regime, i.e. for a change in the normative structure of the embryonic refugee sub-regime.⁴³

The major change the normative structure needed concerned the very definition of “refugee”, i.e. of the grounds that would justify their refugeehood. The definition used by the UNHCR for recognising asylum-seekers as refugees, adopted in paragraphs 6 and 7 of the 1950 UNHCR Statute, had already been broadened by several UN General Assembly resolutions.⁴⁴ In fact, the widening of the definition had enabled the UNHCR to make an objective assessment of refugee situations and to extend protection to groups of persons who might not be able to invoke a well-founded fear of persecution according to the traditional criteria. This normative development – a true change of refugee regime at the international global level – had enhanced the UNHCR’s protection response in refugee situations involving large-scale influxes.⁴⁵ Even though the UNHCR was already using its own broad definition in Central America, it was anxious to promote the use by countries in the region of a wider definition that would be better adapted to large-scale group situations.⁴⁶ In this way, the forced migrants who were seeking asylum could at least be initially recognised as refugees, and ultimately be granted refugee status by those States. The definition being used by the few States that were (and were becoming) parties to the 1951 Refugee Convention was not straightforward in encompassing the vast majority of those who were fleeing the Central American countries. One needed, therefore, a definition that would include those forced migrants, by having regard to

41 Belize (1990), Honduras (1992), and Mexico (2000) followed suit a bit later.

42 UNHCR, *Report of the United Nations High Commissioner for Refugees*, UN Doc. A/36/12, 28 Aug. 1981, para. 199.

43 According to Kratochwil & Ruggie, a change in the normative structure of a regime produces change of – as opposed merely to *within* a – regime; cf. F. Kratochwil & J.G. Ruggie, “International Organization: A State of the Art on an Art of the State”, *International Organization*, 40(4), 1986, 767.

44 A comprehensive list of UN/GA resolutions is presented in UNHCR, *Note on International Protection*, UN Doc. A/AC.96/830, 7 Sep. 1994, footnote 8.

45 UNHCR, *Note on International Protection*, UN Doc. A/AC.96/593, 31 Jul. 1981, para. 18.

46 Jackson, *The Refugee Concept in Group Situations*, 395.

the reasons for their fleeing their countries of origin, so that they could enjoy asylum as – legally speaking – refugees.⁴⁷

5. THE DRAFTING PROCESS THAT CULMINATED IN THE 1984 CARTAGENA DECLARATION DEFINITION OF “REFUGEE”

The drafting of the broad definition adopted in the Cartagena Declaration started well before 1984. In fact it began in 1981 as a result of a decision made in October 1980 by the UNHCR Executive Committee (ExCom) in its Conclusion No. 19 (XXXI), “to request the High Commissioner to convene as soon as possible a representative group of experts to examine temporary refuge in all its aspects within the framework of the problems raised by large-scale influx”.⁴⁸ The group of experts met in Geneva in April 1981 and the Report of their four-day gathering concluded that

The refugee problem has become particularly acute due to the increasing number of large-scale influx situations in different areas of the world. The asylum-seekers forming part of these large-scale influxes *include* persons who are refugees within the meaning of the 1951 United Nations Convention and the 1967 Protocol relating to the Status of Refugees or who, *owing to external, aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of their country of origin or nationality* are compelled to seek refuge outside that country.⁴⁹ (emphasis added)

A few weeks later, in May 1981, the Mexican Diplomatic Academy, Instituto Matías Romero, organised, with the cooperation of the National Autonomous University of Mexico (UNAM) and under the auspices of the UNHCR, a five-day colloquium on “Asylum and International Protection of Refugees in Latin America”. The UNHCR was well represented: the then-High Commissioner, Poul Hartling, opened the colloquium and other high-ranking UNHCR staff also attended. Presentations were made i.a. by members of the Inter-American Court of Human Rights (IACtHR), the IACmHR, and the Organization of American States’ (OAS) Secretariat for Legal Affairs. In addition to the UNHCR and other international organisation participants and observers, the general attendants were mostly Mexican. At the end of the colloquium, its participants adopted nine conclusions and eight recommendations. The fourth conclusion reads:

4. It is *necessary to broaden* in Latin America the protection that the universal and Latin American instruments grant to refugees and asylees, to all those

47 A change of regime at a regional level had already taken place in Africa, where the 1969 OAU Refugee Convention states in Article 1.2 that “the term ‘refugee’ shall also [i.e. in addition to the grounds of the 1951 Refugee Convention] apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”.

48 UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, 7th edn., Geneva, DIP/UNHCR, 2014.

49 UNHCR, *Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx* (Geneva, 21–24 Apr. 1981), UN Doc. EC/SCP/16, 3 Jun. 1981, para. 37.

persons that flee their country as a result of aggression, foreign occupation or domination, massive human rights violations, or events that seriously disturb public order, in either part or the whole of the territory of the country of origin.⁵⁰

Some points merit comment here. First, three participants attended both the April 1981 Expert Group meeting in Geneva and the May 1981 Mexico Colloquium: the UNHCR's Director of International Protection, Michel Moussalli, the UNHCR's Chief of General Legal Section, Frank Krenz, and the Brazilian Law Professor and member of the IACmHR, Carlos A. Dunshee de Abranches. It is more than likely that these three participants significantly influenced the wording of the Mexico Colloquium's fourth conclusion, which clearly mirrors paragraph 37 of the April 1981 Report of the Expert Group (supra).⁵¹

Secondly, there are two differences between these two broad definitions of "refugee". The first is that the Mexico Colloquium's fourth conclusion adds "massive human rights violations" as a reason for persons to flee their countries. The second – and equally important – difference is that while the April 1981 Report of the Expert Group's broad definitions is framed as a description, the May 1981 Mexico Colloquium speaks of the "necess[ity] to broaden in Latin America the protection that the universal and Latin American instruments grant to refugees and asylees" who meet the criteria it lists. Both this non-descriptive but rather propositive wording and the addition of "massive human rights violations" as grounds for refugeehood were adopted by the successive regional attempts to expand the definition (infra).

Thirdly, at the regional level, there was a particular interest at the time in exploring the potential role that the Inter-American human rights system could play on behalf of refugees.⁵² The message was well copied by the regional human rights mechanisms and the IACmHR in its 1981–1982 Annual Report, which for the first (and only) time devoted an entire sub-chapter to "Refugees and the Inter-American System".⁵³ In its Annual Report, the IACmHR not only refers to the 1981 Mexico Colloquium and its recommendations [*sic.*], but also proposes to the OAS General Assembly that the definition of "refugee" in the region be broadened to encompass the grounds mentioned in the colloquium.⁵⁴ The OAS General Assembly, however, in exemplary diplomatic language, merely "1. note[d] with interest the annual report and the recommendations of the IACmHR and express[ed] appreciation for the serious and

50 *Asilo y Protección Internacional de Refugiados en América Latina* (Memorias del Coloquio de Ciudad de México, 11–15 May 1981), Ciudad de México, Universidad Nacional Autónoma de México, 1982, 206 (author's translation; emphasis added).

51 It should not pass unnoticed that at the end of the 1981, Mexico Colloquium Prof. Dunshee de Abranches wrote a set of "Conclusions and Recommendations" from which the colloquium's final conclusions and recommendations drew inspiration; cf. C.A. Dunshee de Abranches, "Conclusiones y Recomendaciones", *ibid.*, 201–203.

52 See, e.g. Recommendations Nos. 3, 4, 5, and 7, *ibid.*, 207–208.

53 IACmHR, *Informe Anual de la Comisión Interamericana de Derechos Humanos 1981-1982*, Doc. OEA/Ser.L/V/II.82, doc. 6 rev. 1, 20 Sep. 1982, Chapter VI B. In fact the IACmHR Prof. Dunshee de Abranches had already mentioned in his Conclusion No. 14, resulting from the 1981 Mexico Colloquium, the IACmHR's competence to write up reports on the situation of asylees and refugees in the Americas; cf. Dunshee de Abranches, "Conclusiones y Recomendaciones", 202.

54 IACmHR, *Informe Anual de la Comisión Interamericana de Derechos Humanos 1981-1982*, Chapter VI B, 11, d.

important work it carries out in the area of protecting and promoting human rights” and “10. request[ed] that body to present a report to the General Assembly on the Commission’s recommendations contained in Chapter VI of its report”.⁵⁵

Lastly, at the international global level, the UNHCR continued its advocacy of a broader definition by recalling that “the Colloquium on Asylum and the International Protection of Refugees, held in Mexico in May 1981, recognised the need for inter-American concepts of asylum and refugee status to be coalesced with those adopted at the international level”.⁵⁶

In June 1981, some weeks after the May 1981 Mexico Colloquium, an important Round Table on the Problems Arising from Large Numbers of Asylum Seekers [*sic.*] was organised at the Sanremo-based International Institute of Humanitarian Law. The round table counted on the participation of several governmental representatives, academics, and UNHCR staff (such as Mr Krenz, who had attended both the April 1981 Group of Expert Meeting and the May 1981 Mexico Colloquium) and considered that the definition of “refugee”

[...] *should be interpreted to include every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality was compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.*⁵⁷

Four months later, in October 1981, the ExCom adopted its Conclusion No. 22 (XXXII) on the Protection of Asylum-Seekers in Situations of Large-Scale Influx, which stated in paragraph I.1 that

[...] asylum seekers [*sic.*] forming part of these large-scale influxes *include persons who are refugees within the meaning of the 1951 United Nations Convention and the 1967 Protocol relating to the Status of Refugees or who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of, or the whole of their country of origin or nationality are compelled to seek refuge outside that country.*⁵⁸

The subsequent UNHCR Note on International Protection did not waste time in asserting that the broadened concept of “refugee” that figured in ExCom’s Conclusion No. 22 (XXXII) had made it possible for the international community effectively to meet important humanitarian needs in various areas of the world.⁵⁹

55 OAS, “AG/Res. 618 (XII-0/82) on Annual Report of the Inter-American Commission on Human Rights” (adopted on 20 Nov. 1982) in *Proceedings – Certified Texts of the Resolutions*, vol. I, Twelfth Regular Session (15–21 Nov. 1982), Doc. OEA/Ser.P/XII.0.2, Washington, D.C., 15 Dec. 1982, 62–63.

56 UNHCR, *Report of the United Nations High Commissioner for Refugees*, 1983, para. 67.

57 International Institute of Humanitarian Law, *Report: Round Table on the Problems Arising from Large Numbers of Asylum Seekers* (Sanremo, 22–25 Jun. 1981), Sanremo, IIHL, 1981, para. 8 (emphasis added).

58 UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, 7th ed., Jun. 2014, available at: <https://www.refworld.org> (last visited 25 Aug. 2019) (emphasis added).

59 UNHCR, *Note on International Protection*, UN Doc. A/AC.96/609/Rev. 1, 26 Aug. 1982, paras. 17–18.

But notwithstanding the relevance of UNHCR advocacy on behalf of a broad definition at the international global level, it was equally (if not more) important to convince the Latin American countries of the benefits of both putting the new definition to use and regarding the region's large-scale asylum-seekers as refugees. The UNHCR insisted on a regional approach which had already been successful in Africa, but the Latin American States were still reluctant.

In the face of the stand-still the UNHCR organised a second event in the region in April 1983. This time it was a four-day Seminar in La Paz, Bolivia, entitled "Political Asylum and the Refugee Situation" and was organised with the support of the Bolivian Ministry of Foreign Affairs. Participants were mostly UNHCR staff (including Mr Krenz), academics, and Bolivian officials from a variety of ministries. At the seminar's closure seven conclusions and eight recommendations were adopted. The sixth conclusion states:

6. emphasize[d] the *need to extend* the scope of application of the 1951 Convention and the 1967 Protocol on the status of refugees, as well as the legal norms that are enacted to this end, to all those persons that flee their country as a result of *aggression, foreign occupation or domination or massive human rights violations, or due to events of a political nature that seriously disturb public order in the country of origin or provenance*.⁶⁰

With a result almost identical with that of the 1981 Mexico Colloquium, the 1983 La Paz Seminar's sixth conclusion reiterated the *need* for a broader definition of "refugee". The regional approach thus differed from its international global counterparts (*supra*) in the sense that it did not have a merely descriptive but rather propositive wording, in addition to adding "massive human rights violations" as a ground for refugeehood.

The third and final regional event that advocated a broader definition was the four-day "Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: legal and humanitarian problems", held in November 1984 in Cartagena de Indias, Colombia. Also organised by the UNHCR, this time with the Regional Center for Third World Studies and the National University of Colombia (UNC), the colloquium was opened once again by the then High Commissioner, Poul Hartling, and the Colombian President, Belisario Betancour, and was attended by a combination of State and unofficial delegations. This time, however, there were presentations by governmental delegates of six out of eight Central American countries, namely Belize, Costa Rica, El Salvador, Honduras, Mexico, and Nicaragua. As at the previous events, conclusions and recommendations were adopted, 17 and five, respectively. The third conclusion reads

III. [...] the definition or concept of a refugee *recommended* for use in the region is one that, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, also considers refugees persons who

60 *Asilo Político y Situación del Refugiado* (Memorias del Seminario de La Paz, 19–22 abr. 1983), La Paz, Ministerio de Relaciones Exteriores y Culto/ACNUR, 1983, 116 (author's translation; emphasis added).

have fled their country because their lives, safety or freedom have been threatened by *generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order*.⁶¹

The conclusion *recommending* the widening of the definition of “refugee” in Central America listed virtually the same grounds as those of the April 1981 Geneva Group of Experts, the May 1981 Mexico Colloquium, the June 1981 Sanremo Round Table, the October 1981 ExCom Conclusion, and the April 1983 La Paz Seminar. However, the UNHCR decided robustly to promote and advocate it at the global, regional, and national levels. Somewhat timidly, the 1985 UNHCR Note on International Protection laconically stated that the conclusions adopted by the Colloquium and embodied in the 1984 Cartagena Declaration “will undoubtedly contribute to the further development of refugee law in Latin America”.⁶² The ExCom then adopted Conclusion No. 37 (XXXVI) on Central American Refugees and the Cartagena Declaration, which “(c) Noted with interest the Cartagena Declaration [...]” and “(d) [w]elcomed the use of regional approaches in resolving refugee problems of regional scope”.⁶³ That conclusion was followed, at the regional level, by a 1985 OAS General Assembly resolution on the Legal Status of Asylees, Refugees and Displaced Persons in the American Hemisphere that underscored the importance of the 1984 Cartagena Declaration and “*recommend[ed]* to the member states that they apply that Declaration in dealing with the refugees in their territory”.⁶⁴ At the national level, UNHCR staff individually met Latin American diplomats and advocated the global and regional support and endorsement of the 1984 Cartagena Declaration by their respective countries.⁶⁵

From a summary of events cited above, one can see that in the early 1980s, the UNHCR directly and proactively influenced, as a norm entrepreneur, the spontaneous transformation of the refugee sub-regime in Central America. In general, the aim was to address the phenomenon of massive influx of asylum-seekers in Latin America. In addition, the UNHCR sought a solution to the status of asylum-seekers

61 *Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: problemas jurídicos y humanitarios*, 336 (author’s translation; emphasis added).

62 UNHCR, *Note on International Protection*, UN Doc. A/AC.96/660, 23 Jul. 1985, para. 51.

63 UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, 7th ed., Jun. 2014, available at: <https://www.refworld.org> (last visited 25 Aug. 2019) (emphasis added).

64 OAS, “AG/Res. 774 (XV-0/85) on Legal Status of Asylees, Refugees, and Displaced Persons in the American Hemisphere” (adopted on 9 Dec. 1985), in *Proceedings – Certified Texts of the Resolutions*, vol. I, Fifteenth Regular Session (5–9 Dec. 1985), Doc. OEA/Ser.P/XV.0.2, Washington, D.C., 2 Apr. 1986, 33 (emphasis added).

65 To mention but one example, at a meeting held on 9 August 1985 between Guilherme Lustosa da Cunha, Head of the UNHCR’s Americas Section, and Fernando Carvalho Lopes, Counsellor at the Brazilian Permanent Mission to the UN in Geneva, they discussed “the possibility of Brazil’s support of an endorsement of the Cartagena Declaration, within the framework of UNHCR’s efforts to diffuse and promote the Declaration, in the following three main fora: a) The UNHCR Executive Committee, b) The General Assembly of the Organization of American States, and c) The Contadora Group”; cf. UNHCR, *Note for the File*, drafted by Francisco Galindo Vélez, Geneva, 12 Aug. 1985, UNHCR Archives: 010.BRA Folio 5.

who were left out of the 1951 Refugee Convention definition. The endorsement of the 1984 Cartagena Declaration by the ExCom and by the OAS General Assembly and the ensuing practice of States concerned allowed the legitimacy of the regime change and resulted in the incorporation of the new norms, in particular the *recommended* broad definition of “refugee”.⁶⁶

6. THE CARTAGENA DECLARATION: A REALITY CHECK

Decades have elapsed since its adoption, yet the 1984 Cartagena Declaration is still hailed by doctrine and practitioners as a relevant instrument. To what extent does this hold true? This section comments on four distinct but overlapping areas of its potential relevance: practical, political, legal, and advocacy.

The 1984 Cartagena Declaration’s enormous practical relevance has withered with the passing of time. The irony is that its loss of practical relevance is the result of its own success. In the early 1980s, the Central American forced migrants who did not qualify as refugees did not have a clearly defined legal status (*supra*). In other parts of the world, there were attempts, since the beginning of the mid-1970s large-scale forced migration movements, to introduce a new legal status, one that would encompass the rights and duties of those benefiting from a so-called “temporary refuge”.⁶⁷ These attempts made at the global level resulted in ExCom Conclusions No. 5 (XXVIII) of 1977, No. 14 (XXX) of 1979, and No. 19 (XXXI) of 1980, which referred to “temporary refuge”, and Conclusions No. 11 (XXIX) of 1978 and No. 15 (XXX) of 1979, which referred to “temporary asylum”.⁶⁸ In the 1990s, the terminology evolved to “temporary protection”, as one may see in ExCom Conclusions No. 68 (XLIII) of 1992, No. 71 (XLIV) of 1993, and No. 74 (XLV) of 1994.⁶⁹

The 1984 Cartagena Declaration, therefore, successfully prevented the introduction of a parallel legal status in Central America by bringing those forced migrants who did not fall under the 1951 Refugee Convention within the purview of a broader definition that accorded them the same rights and duties enjoyed by Convention refugees. This important development – which is present in both Latin America and Africa – did not materialise in Europe, where legal statuses entailing lower rights and parallel to refugee status had already been introduced.⁷⁰

Another example of the practical relevance of the 1984 Cartagena Declaration is the fact that in addition to initially changing the practice of most Central American

66 K.W. Yundt, *Latin American States and Political Refugees*, Westport, CT and London, Praeger, 1988, 59.

67 G.J.L. Coles, “Temporary Refuge and the Large Scale Influx of Refugees”, *Australian Year Book of International Law*, 8, 1980, 202–207; D.A. Martin, “Large-Scale Migrations of Asylum Seekers”, *American Journal of International Law*, 76(3), 1982, 603–607.

68 UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, 7th ed., Jun. 2014, available at: <https://www.refworld.org> (last visited 25 Aug. 2019) (emphasis added).

69 *Ibid.* It should be noted that “complementary forms of protection”, mentioned in ExCom Conclusions No. 87 (L) of 1999 and No. 89 (LI) of 2000, is not the terminological evolution of temporary refuge, asylum, or protection. In fact, in its Conclusion No. 103 (LVI) of 2005 the ExCom noted “that temporary protection, without formally according refugee status, as a specific provisional protection response to situations of mass influx providing immediate emergency protection from *refoulement*, should be clearly distinguished from other forms of international protection”; cf. *ibid.*

70 See note 18 above.

countries, the recommended definition has inspired the domestic refugee legislation and practice of the vast majority of Latin American countries.⁷¹ While some countries have directly imported the definition contained in the 1984 Cartagena Declaration in their national legislation, others have used different wording, and only a few have not incorporated a broad definition in their domestic law.⁷² Given that the majority of the Latin American countries already have in their national statutes a broad definition that complements the 1951 Refugee Convention's definition, the on-going practical relevance of the 1984 Cartagena Declaration is difficult to sustain. Instead of making an apology or eulogy of the 1984 Cartagena Declaration and its broad definition, its advocates should see to it that country-tailored interpretive guidelines are given to the various different wordings captured in the region's national legislation broad definitions.⁷³

The last reason for the lack of practical relevance of the 1984 Cartagena Declaration is unfortunate: despite having been replicated or having inspired the domestic legislation of the majority of Latin American countries, the broad definition is seldom used, thus having greater application in rhetoric than in practice.⁷⁴ A long avenue of legal advocacy lies ahead of the UNHCR to revive this particular aspect of the 1984 Cartagena Declaration's practical relevance.⁷⁵

The 1984 Cartagena Declaration was politically relevant in the second half of the 1980s and in the early 1990s. This is no longer the case. The first reason it was

- 71 The widening of the definition proved to be very useful when asylum-seekers from other continents, in particular Africans who did not fall under the 1951 Refugee Convention refugee definition, sought asylum in the region; cf. A. D'Alotto, & R. Garretton, "Developments in Latin America: Some Further Thoughts", *International Journal of Refugee Law*, 3(3), 1991, 500; J.H. Fischel de Andrade, "Refugee Protection in Brazil (1921-2014): An Analytical Narrative of Changing Policies", in D.J. Cantor, L.F. Freier & J.-P. Gauci (eds.), *A Liberal Tide? Immigration and Asylum Law and Policy in Latin America*, London, Institute of Latin American Studies/University of London, 166; J.H. Fischel de Andrade, "Aspectos Históricos da Proteção de Refugiados no Brasil (1951-1997)", in L.L. Jubilut & G.G. de Godoy (eds.), *Refúgio no Brasil – Comentários à Lei 9.474/97*, São Paulo, Ed. Quartier Latin, 2017, 68; P. Kourula, *Broadening the Edges – Refugee Definition and International Protection Revisited*, The Hague, Martinus Nijhoff Publishers, 1997, 153.
- 72 Reed-Hurtado, "The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America", 158–161.
- 73 The 1989 "CIREFCA Legal Document" and UNHCR's guidelines on claims for refugee status related to situations of armed conflict and violence only partially address this need, as they focus only on the elements of the 1984 Cartagena Declaration and not on the variations that one finds in the different Latin American domestic refugee legislations; cf., respectively, H. Gros Espiell, S. Picado & L. Valladares Lanza (eds.) (CIREFCA Legal Document), "Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America"; UNHCR, *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions*, UN Doc. HCR/GIP/16/12, 2 Dec. 2016, 12–16, available at: <https://www.refworld.org> (last visited 25 Aug. 2019).
- 74 Reed-Hurtado, "The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America", 163–167, 179–180.
- 75 The actual use in the region of a broad definition already enshrined in domestic legislation is only one of a long list of areas that need improvement and which includes i.a. accelerated procedures which do not comply with internationally established due process guarantees, RSD procedures that are not regulated through domestic law, and RSD bodies which still lack training, efficiency, independence, and expertise; cf. J.H. Fischel de Andrade, "Forced Migration in South America", in E. Fiddian-Qasimiyeh et al. (eds.), *The Oxford Handbook of Refugee and Forced Migration Studies*, Oxford, Oxford University Press, 661.

relevant is that relations between Central American countries had become strained, which made it harder for them to find a formal solution through legally binding instruments.⁷⁶ The colloquium in which the 1984 Cartagena Declaration was adopted allowed for an informal agreement, concluded by experts and some government representatives in a *sui generis* UNHCR-led event much less formal than an international regional conference would have been. The UNHCR played a key role in breaking the political deadlock that existed, in disguising the 1984 Cartagena Declaration's political nature, and in attenuating the highly political context that prevailed.

Another reason why the 1984 Cartagena Declaration was politically relevant was its wording. The conflicts that emerged in Central America in the late 1970s and early 1980s were of an internal nature; however, its dynamics were hugely influenced by the Cold War and the geopolitical interests of other countries. The extent to which the 1984 Cartagena Declaration is a political document is clearly assessed by what is *not* written in its text, i.e. by what was withdrawn from previous versions. For instance, the broad definitions of “refugee” captured in the 1981 Mexico Colloquium, in the 1981 ExCom Conclusion No. 22, and in the 1983 La Paz Seminar all refer to (foreign) occupation or domination, while the 1984 Cartagena Declaration omits both terms. The 1984 Cartagena Declaration also avoided the wording of the then recent 1983 La Paz Seminar, which referred to the “political” nature of events disturbing public order. One sees that the wording of the 1984 Cartagena Declaration sanitised the previous versions in order to render it less politically sensitive, and that it was due precisely to the very politically sensitive environment in which it was drafted and its political character. The changes that occurred in Central America and in the world (in particular, the end of the Cold War) have made the 1984 Cartagena Declaration lose the political features that were originally imbued in the choices made regarding its wording.

The legal relevance of 1984 Cartagena Declaration has varied over time and is nowadays rather limited. Being the final text of a colloquium that aimed at “studying the legal and humanitarian aspects of the refugee situation in Central America”,⁷⁷ it clearly never had the original intention of establishing binding law. However, it has been argued by a renowned scholar and former President of the IACtHR that the 1984 Cartagena Declaration is part of the origin of the creation of a Latin American and Caribbean regional custom, and that its persuasive force derives from the fact that there was generalised *opinio juris* (i.e. the belief that an action is carried out because it is a legal obligation) when it was formed.⁷⁸ The progressive rationale offered by Gros Espiell is sound, although it may be subject to criticism; international refugee law scholar Grahl-Madsen, for instance, has argued that in “customary

76 J. Ruiz de Santiago, “O Direito Internacional dos Refugiados: características e desenvolvimento na América Latina”, in A.A. Canção Trindade (ed.), *A Proteção dos Direitos Humanos nos Planos Nacional e Internacional: perspectivas brasileiras* (Seminário de Brasília, jul. de 1991), San José/Brasília, IIDH/Friedrich-Naumann Stiftung, 1992, 138.

77 *Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: problemas jurídicos y humanitarios*, 11.

78 Gros Espiell, “La Declaración de Cartagena como fuente del derecho internacional de los refugiados en América Latina”.

(unwritten) international law there is no such thing as a generally accepted definition of ‘refugee’. It follows that it conveys no meaning to speak of “refugees in the juridical sense” or “*der Begriff des Flüchtlings*” except in the context of a particular legal instrument.⁷⁹ The 1984 Cartagena was not a *legal* instrument but rather, as defined by the UNHCR, a “conceptual framework for refugee protection policy”.⁸⁰

That the 1984 Cartagena Declaration is non-binding does not mean that it is without any legal significance. It constitutes a recommendation to States to base their legal practice on its principles, and to some extent State practice has fallen in line with the Declaration’s specific recommendations or at least with its “spirit”.⁸¹ The 1984 Cartagena Declaration’s legal relevance, therefore, stems both from its acceptance by States as the expression of legal principles and the crystallisation of some of its principles and recommendations in the region’s domestic legislation.

Even if one puts Grahl-Madsen’s argument aside and considers that the 1984 Cartagena Declaration had far-reaching legal consequences, it is hard to assert that it has become an authoritative expression of Customary International Law particularly because it has not been unanimously and harmoniously adopted. The fact that only a fraction of States have adopted domestic legislation that directly imported the definition contained in the 1984 Cartagena Declaration and that some others altered (sometimes drastically) the original wording proposed by the Declaration corroborates the understanding that there is not a consensus as to a regional definition of “refugee” to be used in Latin America. However, that the majority of Latin American States have adopted legislation broadening the definition of the 1951 Refugee Convention is a clear indication of the importance of the 1984 Cartagena Declaration in paving the way to the progressive development of international refugee law in the region – even if that development has significant domestic variations.

The last area on which this section assesses the 1984 Cartagena Declaration’s relevance is its role as an instrument in advocacy and an effective advocacy model. The UNHCR had already used events of the sort in the region and acknowledged – e.g. when referring to the 1981 Mexico Seminar – that “[s]eminars and colloquia such as th[is] play a recognised role in the promotion and dissemination of the principles of international protection and refugee law.”⁸² However, unlike previous seminars and colloquia, the 1984 Cartagena Declaration had an unprecedented impact in Latin America both on policy and legal development, and on the way protection policy advocacy is conducted.

As for policy and legal development, during the late 1980s and 1990s, the 1984 Cartagena Declaration was *the* region’s conceptual framework for refugee protection policy, having inspired public policy and domestic legislation in the majority of the region’s States. Even if only a fraction of the latter used the exact wording of the definition recommended by the 1984 Cartagena Declaration in their domestic legislation, the Spirit of Cartagena prevailed: the adopted definitions led to the granting

79 A. Grahl-Madsen, *The Status of Refugees in International Law*, vol. I, Leiden, Sijthoff, 1966, 73.

80 UNHCR, *Note on International Protection*, 1994, para. 36.

81 It is this author’s understanding that the “Spirit of Cartagena” was based on the conviction that a progressive change of regime was needed, i.e. a regime change that would embrace as refugees those forced migrants who were in need of protection as a result of the consequences of armed conflict and violence.

82 UNHCR, *Report of the United Nations High Commissioner for Refugees*, 1981, para. 76.

of refugee status to forced migrants who were in need of protection as a result of the consequences of armed conflict and violence.

The success of the 1984 Cartagena Declaration as a conceptual framework for refugee protection policy led the UNHCR to increase the use of events of this sort as a model in its advocacy work. The multiplying effect resulting from the 1984 Cartagena Declaration's tangible achievements can be seen i.a. in the adoption of the 1994 San José Declaration on Refugees and Displaced Persons, the 2000 Rio de Janeiro Declaration on the Protection of Refugees, the 2004 Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America, the 2010 Brasília Declaration on the Protection of Refugees and Stateless Persons in the Americas, the 2012 Fortaleza Mercosul Declaration of Principles on the International Protection of Refugees, and the 2014 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" and respective Plan of Action. Hence, inspired both by the accomplishments of the very effective advocacy model resulting from the 1984 Cartagena Declaration and by the region's reluctance in promoting refugee-related legally binding instruments, the advocacy model consolidated by the Cartagena colloquium has been successfully used to advance refugee protection policy in Latin America.

7. CONCLUDING REMARKS

The 1984 Cartagena Declaration's broad definition of "refugee" is neither innovative nor pragmatic. Its wording does not differ substantially from that of previous regional and global broad definitions and, as shown above, the essence of the 1984 Cartagena Declaration's broad definition had already been drafted in 1981 in an international global framework to address the problem of large-scale forced migration movements that was affecting several continents. While it has an advisory, recommendatory nature, what made it truly pragmatic was the successful UNHCR advocacy persuading States both to accept the 1984 Cartagena Declaration as a "conceptual framework for refugee protection policy" and to use it in a sensible and realistic fashion, based on practical considerations.

The Latin American tradition of asylum was put to a severe test from the mid-1970s to mid-1980s and the regime norms – which as a rule are the result of the interaction of a set of facts with values and interests – had to be changed. The interaction of the reality of hundreds of thousands of asylum-seekers who were not regarded as refugees⁸³ with the protection values defended by the UNHCR and the political interests of Central American States led to a change of the region's regime norms. The trigger to the regime change, however, was not the very adoption of the 1984 Cartagena Declaration. After all, many similar declarations and conclusions had been adopted before. In this case, rather, the way the UNHCR skilfully promoted it defined the period of change.

In this regard, the role played by the UNHCR in the "transformation to stardom" of the 1984 Cartagena Declaration makes a good showcase of the interplay of competing theories of international relations. On the one hand, according to Realism, the

83 UNHCR, *Note on International Protection*, UN Doc. A/AC.96/643, 9 Aug. 1984, para. 31.

international global and regional asylum regimes remain an artefact of States. On the other, according to Constructivism, institutions matter because they constitute and change the identities and preferences of States. The combination of the Central American States' self-serving interests in addressing the geopolitical situation caused by thousands of forced migrants who were on their territories and of the protection values defended by the UNHCR led to a successful and protection-sensitive change of regime. Of paramount importance in that process was the UNHCR's role as a norm-entrepreneur in directly contributing to the creation, endorsement, dissemination, and implementation of the principles and norms enshrined in the 1984 Cartagena Declaration.

The UNHCR's promotion of regional approaches⁸⁴ had its advantages and disadvantages. In Latin America, it allowed for a practical solution which both avoided the creation of another category of protected persons and broadened the definition of "refugee" to encompass forced migrants fleeing from the consequences of armed conflict and violence. The regional initiative resulting from the promotion of the 1984 Cartagena Declaration, however, also showed its limits. Because the broad definition was only a recommendation, many States in the region ended up having definitions in their domestic legislation that vary significantly. Therefore, there is no common, harmonised regional broad definition of "refugee" adopted and used in Latin America.

Just as the 1951 Refugee Convention was a product of its time, so was the 1984 Cartagena Declaration. With the passage of time, its practical, political, and legal relevance has become obsolescent. The 1984 Cartagena Declaration's legacy is most likely to be found both in the broad definitions of "refugee" adopted in most of the region's domestic legislation, and in the advocacy model that uses *ad hoc* and *sui generis* UNHCR-led events to advance conceptual frameworks for refugee protection policy. The Spirit of Cartagena is still very much alive and palpable in the region's resolve not to be stuck in the past, but rather to face and address both the changing nature of forced migration movements and the protection needs of their victims.

84 For the various ExCom conclusions specific to regional approaches, as well as those which refer to regional initiatives and regional instruments, see UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, 462–470.