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PREFACE

THE WAY AHEAD FOR THE INTERNATIONAL PROTECTION OF REFUGEES IN LATIN AMERICA

The commemoration of the 20th Anniversary of the 1984 Cartagena Declaration on Refugees proved to be a very opportune moment to bring together States, international and civil society organizations, and regional experts to reflect about the state of refugees in Latin America. It also served to translate into concrete actions their commitment in providing international protection and finding durable solutions for refugees, internally displaced persons (IDPs) and other persons of concern.

Today, the situation of individuals in need of international protection differs in nature and magnitude from the context in which the Cartagena Declaration on Refugees was adopted. Refugee camps no longer exist in the region and States are now better equipped with a normative and institutional framework to protect those fleeing conflict, persecution or other human rights violations. Also, the civil society is better organized in local, national and regional protection networks with the capacity to complement the protection provided by States. At the same time, they can contribute with valuable inputs in the adoption of public policy. In addition, there is now a more developed Inter-American System for the promotion and protection of human rights which constitutes an important avenue that individuals under the jurisdiction of the State may have recourse to, in case the authorities fail to respect and ensure their human rights, irrespective of their migratory status.

However, the existing humanitarian crisis in Colombia, along with the occurrence of regional and extra-regional mixed migratory flows, threaten to overburden the national asylum systems of countries in the region, characterized by a long-standing and generous tradition of providing protection to those persecuted. Unequal development and lack of economic opportunities pose great challenges to the living conditions faced by both the displaced population and the receiving communities. Furthermore, valid concerns over the national and regional security and the fight against terrorism sometimes lead to the adoption of measures that are not compatible with the unqualified respect for the full scope of human rights. Unfortunately, the ill-founded conception that refugees are terrorists hovers in the media and public opinion, fueling xenophobic sentiments and forgetting that refugees are, on the contrary, the very victims of intolerance and violence in the world.

Hence, renewed commitment and a regional coordinated response were called for vis-à-vis the situation of refugees and other persons in need of international protection. And this call did not go unanswered: on 16 November, 2004, twenty countries from Latin America gathered in Mexico City and adopted a Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America. These instruments set up the framework to improve refugee protection in the region and respond in

particular to the humanitarian situation of Colombians in need of protection. They also propose specific projects to strengthen the capacity of State authorities and NGOs to provide international protection, as well as concrete initiatives for the economic betterment of the displaced population –in order to more effectively achieve their integration– and the receiving communities alike, especially those communities located in the border areas. Similarly, the Plan of Action embraces the proposal put forward by Brazil to establish a regional resettlement programme.

This book provides a comprehensive account of the 2004 commemorative process and contains the official text of the Mexico Declaration and Plan of Action. It also contains a series of articles that critically appraise the contribution of the Cartagena Declaration on Refugees to the international protection regime, including its well-known regional refugee definition, and its applicability to today's circumstances.

It is my strong conviction that the pragmatic and innovate character of the Cartagena Declaration on Refugees lies at the heart of the Mexico Declaration and Plan of Action. Both instruments represent, in the framework of the *Agenda for Protection*, a common regional understanding on the actions required to strengthen the capacity of States, international organizations and the Civil Society to provide timely and appropriate responses to refugees, IDPs and other persons of concern. These regional efforts are to be enhanced by the resolute commitment and support of the international community to fully come to fruition.

Philippe Lavanchy
Director of the Americas Bureau
UNHCR

Geneva, August 2005

INTRODUCTION

It is a pleasure for me to present the English version of the memoir of the 20th anniversary commemoration of the 1984 Cartagena Declaration on Refugees. This memoir includes the main discussion papers, conclusions and recommendations which paved the way for the adoption of the Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America.

The main challenges and opportunities for refugee protection in Latin America were thoroughly discussed last year in a participatory consultative process among government representatives, international organizations, regional experts and representatives of civil society. The recommendations and conclusions of that process are duly reflected in the Mexico Plan of Action, which constitutes an important protection tool and a regional framework to guide our operational priorities in this region. Furthermore, its protection and durable solutions components reflect once again the principled and pragmatic approach of Latin America, a region well-known for its generous asylum tradition.

Since the adoption of the Mexico Plan of Action, UNHCR has shared its contents with several regional groups, including before the Organization of American States, GRULAC, and the Regional Conference on Migration (Puebla Process), besides UNHCR's Executive Committee and donors. My Office is also working closely with States in Latin America and other regional partners to implement the Plan. It is a pleasure for me therefore to announce that new projects to strengthen the international protection of refugees in Latin America are already being implemented throughout the region with the support of the international community.

While the contribution of Latin America and the Inter-American System to refugee protection and the progressive development of International Refugee Law have been highlighted by UNHCR and the international community over the years, it is important to spread this "legal and protection wealth" to other regions.

At a time when my Office is increasingly confronted with restrictive asylum policies and security concerns fueled by intolerance and extremism, it is extremely encouraging to see that refugee protection, inspired by the principles of international solidarity, responsibility sharing and international cooperation, remains a core value in Latin America. Refugee protection is essential to the protection of human rights and it concerns us all.

Finally, let me reassure you that my Office is committed to further reinforce our partnerships with States, international organizations and civil society to ensure full implementation of the Mexico Plan of Action.

António Guterres

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I. Importance of the commemoration process of the 20th Anniversary of the 1984 Cartagena Declaration on Refugees

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DISCUSSION DOCUMENT

THE REFUGEE SITUATION IN LATIN AMERICA: PROTECTION AND SOLUTIONS BASED ON THE PRAGMATIC APPROACH OF THE CARTAGENA DECLARATION ON REFUGEES OF 1984

I. INTRODUCTION

The current document has been elaborated to facilitate the discussion between the participants of the regional preparatory meetings for the final commemorative event of the 20th anniversary of the Cartagena Declaration on Refugees of 1984, to be celebrated in Mexico City, on November 15 and 16 of the present year. Its content has been complemented by the recommendations and conclusions adopted in the regional meetings of San Jose (13-14 August), Brasilia (26-27 October), Cartagena (16-17 September) and Bogota (7-8 October).

This commemoration should be seen as an opportunity to recognize the important contribution of Latin America and the Inter-American System to the international protection of refugees, not only through the Cartagena Declaration, but also through the compendium of principles, standards, jurisprudence and state practices that the region, in the matters of asylum and protection of those persecuted, has developed since the end of the 19th century.

In this sense, it is important to emphasize that the Cartagena Declaration reflects in a succinct way this tradition of protection and best practices of Latin America. Moreover, its singularity lies precisely in its pragmatic and innovative approach based on the complementary use of the different branches of International Protection Law.[1]

It is, therefore, an occasion to analyze the principal traits observed in Latin America in the matter of the protection of asylum seekers, refugees and other persons of concern to UNHCR. This paper intends to focus the discussion on identifying the main challenges and opportunities for international protection in our region, and to reflect on the validity and relevance of the principles contained in the Cartagena Declaration in the face of new regional realities.

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1 To this effect, see Cançado Trindade, Antônio Augusto, *Derecho internacional de los derechos humanos, derecho internacional de los refugiados y derecho internacional humanitario: aproximaciones y convergencias.* Report of the International Conference *"Tenth Anniversary of the Cartagena Declaration on Refugees",* organized by UNHCR, IIHR and the government of Costa Rica, San Jose, 5 to 7 of December, 1994. In the same vein, see the reasoned opinion of Judge Cançado Trindade in the case **Plan de Sánchez Massacre**, judgment of 29 April 2004 and his concurrent opinions in the cases concerning provisional measures for the **Peace Community of San José de Apartadó**, order of 18 June 2002; the case of the **Communities of the Jiguamiandó and of the Curbaradó**, order of 6 March 2003; the case of **Kankuamo Indigenous Community**, order of 5 June 2004; and the case of **Sarayaku Indigenous Community**, order of 6 June 2004.

This joint vision of the past and the future raises certain questions: What are the major trends of forced migration in Latin America today? What are the regional humanitarian responses in the face of this forced migration, and upon what normative and institutional frameworks are they founded? What are the antecedents, the principles and the state practices that inspire and nurture the Cartagena Declaration on Refugees of 1984? How can the political will of the States articulate, joined by international cooperation and the participation of different sectors of civil society, a regional focus that guarantees the humane treatment of those in need of protection? How can the humanitarian spirit and the pragmatism of the Cartagena Declaration be used to deal with the new regional realities, so that the human needs of those in need of protection will be considered one of the legitimate interests of the States?

II. REGIONAL CONTEXT

In general, it can be asserted that with the end of the Central American crisis and its large influx of people in the late eighties, the States of the region have provided protection and assistance to individual cases of asylum seekers and refugees. The reception of, provision of assistance to, and recognition of individual cases were part of a continuing trend during the nineties, particularly with respect to a very small number of regional refugees—primarily from Haiti and Peru—as well as for a growing number of refugees from outside the region, from Africa (Angola, Nigeria, Liberia and the Sudan), Eastern Europe (the former Yugoslavia) and the Middle East (Iran and Iraq), passing through Latin America with the final objective of arriving in the United States and Canada.

The closing of refugee camps in Mexico and Central America in the mid-nineties, and the organization of voluntary repatriation movements to Guatemala, El Salvador and Nicaragua, as well as the accomplishments in matters of local integration, coincided with a drop in the number of asylum seekers and refugees in the region. On the other hand, on the international scene there was an increase in migratory flows, which resulted in the adoption of policies of containment. Thus, the attention formerly given to humanitarian themes in national and regional agendas, shifted to inter-regional and extra-regional migratory movements.

In this way, stricter migratory controls have been adopted, without effective safeguards to identify the asylum seekers and refugees within the mixed migratory flows, who for their part are also victims of smuggling and human trafficking networks. The adoption of more restrictive migratory policies carries with it an increase in the use of detention and the interception of migrants, and this in turn gives rise to the presumption that asylum seekers and refugees are economic migrants as long as the contrary cannot be proved.[2]

2 In some cases, asylum seekers and refugees have been subject to sanctions for illegal entry, including detention, for not complying with the migratory requirements for their entry into the country, situation which is at variance with Article 31 of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees. With respect to international standards in matters of administrative detention of asylum seekers and refugees, see: UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers of 26 February 1999, and Conclusion No. 44 of the Executive Committee of the High Commissioner's Programme, XXXVII (1986). In regards to the safeguards in matters of interception, see: The key conclusions of the Regional Workshops in Ottawa and in Macao in regards to *Incorporating Refugee Protection Safeguards Into Interception Measures*, Global Consultations on International Protection, EC/GC/01/03 of 31 May 2001, as well as Conclusion No. 97 regarding the Protection Safeguards in Interception Measures, Executive Committee of the High Commissioner's Programme, LIV (2003).

In parallel, towards the end of the nineties the internal and external effects of forced displacement in Colombia increased, initiating significant cross-border migratory movements. Such cross-border movements will continue in a sustained manner towards Ecuador, Panama and Venezuela, involving a significant number of people in need of protection, particularly since 1999.[3] These people are for the most part fleeing their country due to the activities of non-state agents of persecution and to the violence prevailing in their zones of origin.

Although large flows of refugees are currently not reported in the Americas, the Caribbean, and above all the Andean region and other countries affected by the Colombian conflict are receiving a growing number of asylum seekers and refugees[4]. The governments of Costa Rica, Ecuador, Panama and Venezuela estimate the number of Colombian nationals leaving their country for reasons related to the conflict, to be in the order of the hundreds of thousands in some cases. At the same time, approximately two million internally displaced persons are reportedly within Colombia. Arguably, the "invisibility" of the forced migration phenomenon obscures the existence of at least three million Colombian nationals displaced by the violence within and outside of Colombia.

In the Southern Cone, protection and humanitarian assistance continue to be provided to individual cases of asylum seekers and refugees, and pilot resettlement projects are being launched. In keeping with the spirit of international solidarity and shared responsibility, Chile and Brazil have become emerging resettlement countries in the last three years and are receiving the first cases of extra-regional refugees who had previously been recognized as refugees in another country.

This means that in Latin America various situations co-exist today: 1) countries that continue receiving a small number of asylum seekers and refugees immersed in regional and hemispheric migratory flows; 2) countries hosting a significant number of asylum seekers and refugees from Latin America; 3) emerging resettlement countries. It is interesting to note that these situations converge in some countries in the region, creating, therefore, multifaceted situations.

Nowadays, it is necessary to emphasize that the largest number of asylum seekers and refugees in our region come from Latin America,[5] a region known internationally for its generous tradition of

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3 While entries into Panama are recorded since 1996 and 1997, cross-border movements of considerable number of individuals intensified as from 1999. In June of 1999, more than 2,000 people crossed the border to Casigna el Cubo, in the state of Zulia, Venezuela, and more than 400 persons entered into Jaqué in the province of El Darién, Panama in December of 1999. Afterwards, large movements were reported towards the province of Sucumbíos, Ecuador in 2001, 2002 and 2003.

4 With regards to the profiles of asylum seekers and refugees three main tendencies are evident: 1) persons of urban extraction with medium high education levels (this tendency is confirmed by the arrival of Colombian asylum seekers and refugees to Canada, Costa Rica, Spain and the United States of America); 2) a Colombian population settled in the border regions of Ecuador, Panama and Venezuela whose socioeconomic profile is of rural extraction; 3) asylum seekers and refugees from outside the continent, mostly single males.

5 According to UNHCR's official figures, at the end of 2003 the refugee population in Latin America reached the number of 38,124 individuals, out of which 15,740 refugees were Colombian nationals. Similarly, during the same period there was a total of 15,949 new asylum claims in Latin America, of which 14,568 corresponded to Colombian citizens. Costa Rica and Ecuador together host some 15,000 recognized Colombian refugees, and at various times they have processed a monthly average of 500 and 1,000 asylum claims, respectively. These numbers do not take into account the less evident phenomenon of "silent" forced migration, involving those who arrive through regular or irregular means and in the end remain in clandestinity, as a result of the lack of documentation.

asylum and which has always provided for the needs of its own refugees through creative, innovative and pragmatic approaches. Furthermore, the region has demonstrated that political will, regional and international solidarity, and shared responsibility are essential principles for providing protection and attaining durable solutions.

International protection of asylum seekers and refugees in Latin America is confronting new challenges. The protection needs of the victims of persecution, intolerance, human rights violations, violence and conflicts[6] co-exist with social exclusion, poverty, unemployment, organized crime, corruption and the struggle against drug trafficking and terrorism.[7] These legitimate national and regional concerns leave their mark on the international agenda and influence national policies in matters of asylum.

Thus, in the last year, certain tendencies are observed to have had positive effects on the right to seek and enjoy asylum, along with its correlative regional right, the right to seek and to be granted asylum in the hemisphere.[8] These positive developments include the following: 1) the experience acquired by the States and the various sectors of civil society in the region for the treatment and protection of refugees; 2) the growing interest on the part of the States to adopt or modify their national refugee legislation;[9] 3) the establishment of national structures for determining refugee status;[10] 4) the recognition of differentiated protection needs based on age and gender;[11] 5) the use of domestic legal remedies to protect the rights

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6 This has been recognized in the past twenty years by the General Assembly of the OAS through the adoption of annual resolutions concerning the protection of asylum seekers, refugees and other persons in need of protection in the Americas. With respect to the text of said resolutions, see the legal database on the UNHCR's Spanish Web site: www.acnur.org.

7 UNHCR reiterates the importance of preserving the integrity of asylum as an instrument of protection for the persecuted. To this effect, see the UNHCR document*: "Addressing Security Concerns without Undermining Refugee Protection – UNHCR's Perspective,"* Geneva (2001), in which it reiterated that terrorists cannot benefit from the recognition of refugee status by virtue of the application of the exclusion clauses. Similarly, the preservation of the integrity of asylum as an instrument of protection requires a correct interpretation of the refugee definition within a procedure that satisfies all of the guarantees of due process and respect for basic human rights standards. The Inter-American Convention Against Terrorism approved by the General Assembly of the OAS in Barbados in 2002, includes specific safeguards for the protection of refugees and moreover utilizes the terms established in the 1951 Convention for the application of exclusion clauses (serious reasons). With respect to the fight against terrorism and its implications for the protection of asylum seekers and refugees, see the report of the Inter-American Commission on Human Rights: "Terrorism and Human Rights" December 2003, in particular Section H on the issues of asylum and refugees.

8 UNHCR is of the opinion that, in light of Article 29 of the American Convention on Human Rights, in order to interpret Article 22(7) of the American Convention with respect to the right to seek and be granted asylum, in relation to Article XXVII of the American Declaration of the Rights and Duties of Man, it is necessary to refer to the 1951 Convention and its 1967 Protocol relating to the Status of Refugees *(lex specialis)*.

9 In recent years national legislation on refugee matters has been adopted by the following countries: Panama (1998), Guatemala (2001), El Salvador (2002), Honduras (2003), Costa Rica (2001), Colombia (2002), Peru (2002), Venezuela (2001 and 2003), and Paraguay (2002), as well as Canada (2002) and the United States of America (2003). At the moment, 21 countries of the continent have adopted national refugee legislation and there exists also draft legislation on refugees currently being discussed in Argentina, Costa Rica, Mexico and Nicaragua. See the section on national legislation in the legal database of the UNHCR's Spanish Web site: www.acnur.org.

10 The first decisions on the recognition of refugee status were adopted by the National Eligibility Commissions in El Salvador, Guatemala and Venezuela. Similarly, a national eligibility mechanism was created in Uruguay (2003).

11 It is important to note that gender-based persecution has been duly recognized in the national refugee legislation of the following countries: Panama (1998), Guatemala (2001), El Salvador (2002), Honduras (2003), Venezuela (2001 and 2003) and Paraguay (2002). Similarly, it should also be noted that today the documentation of refugees in the region is issued on an individual basis. Moreover, there is greater awareness on the need to have interviewers and staff with gender sensitivity training within the refugee status determination procedures, as well as individual interviews both for men and women. There has been gradual progress towards the elimination of the term "head of the family" for the concept of "protection case", thus aiming at avoiding comparisons founded on the roles traditionally assigned to men and women in any given society, when in practice the important issue is to establish if the person concerned has a case that merits international protection.

of asylum seekers and refugees;[12] 6) an increase in the number of decision by the human rights organs of the Inter-American System in matters related to asylum and the protection of refugees;[13] and 7) the creation and strengthening of protection networks at the regional and national level, composed by the various sectors of civil society.[14]

III. NORMATIVE AND INSTITUTIONAL FRAMEWORKS FOR THE PROTECTION OF ASYLUM SEEKERS, REFUGEES AND OTHER PERSONS IN NEED OF PROTECTION IN LATIN AMERICA

Normative and institutional frameworks for the protection of refugees have been strengthened considerably in the last twenty years. In fact, an important number of countries have enshrined the right of asylum at the constitutional level.[15] At the same time, a large majority of Latin American countries are party to one or both international instruments for the protection of refugees. Likewise, the great majority of countries have set up national organs, norms and procedures for refugee status determination. In some countries, these national norms equally recognize that persecution can be

12 The judicial organs of countries as diverse as Colombia, Costa Rica, Ecuador and Venezuela have addressed the issue of the protection of asylum seekers and refugees. Likewise, the integration of international and regional norms and standards on human rights has resulted in new normative developments on the right of asylum as a legal right, through jurisprudential interpretations, such as those issued by the Constitutional Court of Costa Rica. See the section on national jurisprudence of the legal database of the UNHCR's Spanish Web site: www.acnur.org.

13 The Inter-American Commission on Human Rights has addressed the situation of asylum seekers and refugees in many of its decisions. Thus, within the framework of individual petitions, there have been cases concerning countries such as Canada, Chile, the United States of America and Honduras. Similarly, the Commission has also adopted precautionary measures in cases concerning the Bahamas, Canada, Chile, Panama, the Dominican Republic and Venezuela. Likewise, the Inter-American Commission has repeatedly examined this subject-matter in several annual and special reports on the situation of human rights in the continent. For its part the Inter-American Court of Human Rights has not specifically dealt with cases of asylum seekers and refugees, but the jurisprudence established in other cases can be equally applied by analogy to the protection of refugees. To this regard, reference should be made to contentious cases (i.e. Villagrán Morales v. Guatemala and Baena Ricardo v. Panama), cases related to the adoption of provisional measures (the case of Haitians and Dominicans of Haitian origin in the Dominican Republic, the case of the communities of Jiguamiandó and of Curbaradó, the case of the Peace Community of San José de Apartadó, the case of the indigenous community of Kankuamo and the case of the indigenous community of Sarayaku), as well as advisory opinions (OC-17 in matters of the legal condition and human rights of children and OC-18 in matters of the legal condition and human rights of undocumented migrants). With respect to the jurisprudence of the supervisory human rights organs of the Inter-American System, see the legal database on the UNHCR's Spanish Web site: http://www.acnur.org/secciones/index.php?viewCat=21.

14 Amongst the most advanced cases, it is worth mentioning the protection networks in southwest Mexico and Guatemala. In the latter country, the network REPARA comprises governmental and state instances charged with the definition and adoption of public policies on refugee matters, as well as their treatment and protection.

15 The Latin American countries that have included the right to asylum at a constitutional level are the following: Brazil (Article 4 of the 1988 Constitution of the Federative Republic of Brazil); Colombia (Article 36 of the 1991 Political Constitution); Costa Rica (Article 31 of the 1949 Political Constitution); Cuba (Article 13 of the 1976 Political Constitution); Ecuador (Article 29 of the 1998 Political Constitution); El Salvador (Article 28 of the 1983 Political Constitution); Guatemala (Article 27 of the 1985 Political Constitution); Honduras (Article 101 of the 1982 Political Constitution of the Republic); Nicaragua (Article 42 of the 1987 Political Constitution of the Republic of Nicaragua); Paraguay (Article 43 of the 1992 Constitution of the Republic); Peru (Article 36 of the 1993 Political Constitution), and Venezuela (Article 69 of the 1999 Constitution of the Bolivarian Republic of Venezuela). For a comparative analysis on this topic, see: Gianelli, Maria Laura, *"Estudio comparativo de las legislaciones nacionales,"* in Alto Comisionado de las Naciones Unidas para los Refugiados, *"El asilo y la protección internacional de los refugiados en América Latina."* First ed. – Buenos Aires: Siglo XXI Editores Argentina, 2003, p. 214 et seq.

related to gender and age, taking into consideration the different protection needs of men and women, boys and girls,[16] youth, adults and the elderly.

Even in those countries where there is not internal refugee legislation, there exists *ad hoc* procedures for determining refugee status.[17] This signifies that in almost all of Latin America UNHCR is no longer concerned with determining the status of refugees under its mandate, but rather it continues to provide its technical assistance to States by participating, with voice and no vote, in the national eligibility commissions or by offering its legal opinion to national organs charged with determining refugee status.

Despite the aforementioned normative and institutional developments in the strengthening of protection, it is necessary to note that some of these national mechanisms are still incipient and require more human and material resources in order to operate in an effective and efficient manner.[18] Similarly, it is necessary that these national mechanisms be equipped with technical and financial resources, including training on International Refugee Law. Likewise, in some countries in the region, these national mechanisms are not operational and in practice have not functioned for many years, leaving asylum seekers and refugees in a juridical limbo while awaiting a decision on their juridical status.

Within the tendency to adopt restrictive asylum and immigration policies, some countries have included in their national legal framework lower protection regimes which fall short of international standards on refugee protection and human rights.[19]

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16 The special protection of refugee children is reflected in the national legislation of countries such as Guatemala, Paraguay and Peru. At the regional level, it is equally applicable by analogy the judgment adopted by the Inter-American Court of Human Rights in the case of Villagran Morales v. Guatemala, as well as its advisory opinion No. 17 on the *"Juridical Condition and Human Rights of the Child"*. To this effect, it can be asserted that the Convention on the Rights of the Child (Article 22) in relation to the American Convention on Human Rights (Articles 8, 19, 22.7 and 25) and the 1951 Convention and its 1967 Protocol relating to the Status of Refugees form a *corpus iuris* for the protection of refugee children in the Americas and, especially, with respect to their access to the procedures for refugee status determination, administrative detention of refugee children and asylum seekers, and family reunification.

17 This is the case in Nicaragua, where decisions regarding the determination of refugee status are adopted by the General Directorate of Immigration with the technical support of UNHCR through its implementing agency. For its part, Mexico continues perfecting the national mechanism for refugee status determination. With respect to the obligation to adopt legislative mechanisms or of other nature for refugee status determination, UNHCR is of the opinion that this obligation emanates from the good faith principle enshrined in Article 26 of the 1969 Vienna Convention on the Law of Treaties in relation to the 1951 Convention and its 1967 Protocol relating to the Status of Refugees and, of special importance in the region, Article 22(7) in relation to Articles 1 and 2 of the American Convention on Human Rights, and should be guided by the guarantees and judicial protection established in Articles 8 and 25 of the same American Convention.

18 As to fair and efficient procedures for determining refugee status, see the UNHCR document: Asylum Processes (Fair And Efficient Asylum Procedures) EC/GC/01/12, Global Consultations on International Protection, 31 May 2001. Similarly, at the regional level, the Inter-American Court of Human Rights has indicated that the fair trial guarantees and judicial protection contained in Articles 8 and 25 of the American Convention on Human Rights are also applicable to administrative and any other kind of procedures for the determination of the rights of the individual. To this effect, see the case Baena Ricardo et al. v. Panama (February 2001) and the case of the Constitutional Tribunal v. Peru (January 2001), in the legal data base on the UNHCR's Spanish Web site: www.acnur.org.

19 In order to guarantee that national legislation conform with international standards on refugee protection and human rights, States have at their disposal the technical advice from UNHCR, who has been charged not only with the obligation to cooperate with States in the fulfillment of their international obligations, but also with the responsibility to supervise the application of international instruments concerning refugees, in conformity with Article 35 of the 1951 Convention, Article II of the 1967 Protocol, and Paragraph 8 of its Statute. Likewise, with respect to temporary protection regimes and

IV. DURABLE SOLUTIONS

The exercise of fundamental rights on the part of asylum seekers and refugees is directly related to the quality of asylum. Furthermore, the quality of asylum is vital for finding durable solutions to the refugee problem. As long as a refugee finds effective protection in a country,[20] he or she will not see the necessity to seek protection in a third country through irregular or secondary movements.

The lack of functioning eligibility commissions in some countries in the region, along with extended waiting periods to carry out refugee status determination ,without access to employment and basic services, may have grave humanitarian and protection consequences for the well-being and integrity of asylum seekers and refugees, as well as in the search for durable solutions. As to durable solutions, the regional focus during the eighties and nineties primarily centered on voluntary repatriation movements.

At the conclusion of the voluntary repatriations organized in Central America and Mexico, a new phase began in the mid nineties where priority was given to legal and socioeconomic local integration[21] through change in migratory status,[22] implementation of specific infrastructure projects, work and micro credit insertion, as well as income-generating projects.[23] Likewise, some countries favored the adoption of migratory amnesty[24] and the facilitation of naturalization.[25] To this effect, countries of the Southern Cone and Peru guarantee the right of employment to asylum seekers.

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complementary forms of protection, including the applicable international standards on human rights, see the following UNHCR documents: *Complementary Forms of Protection,* Global Consultations on International Protection, EC/GC/O1/18 of 4 September 2001; *Complementary Forms of Protection,* April 2001; *Complementary forms of protection: their nature and relationship to the international refugee protection regime*, Executive Committee of the UNHCR's Program, EC/50/SC/CRP.18 of 9 June 2000; and *Protection of persons of concern to UNHCR who fall outside the 1951 Convention: a discussion note*, the Executive Committee of UNHCR's Programme, EC/1992/SCP/CRP.5 of 2 April 1992. On the other hand, some of this legislation perpetuates the confusion in terminology between asylum and "refuge," which can adversely affect the quality of protection provided to those forced to flee from their countries. Regarding the confusion in terminology between asylum and "refuge," see: United Nations High Commissioner for Refugees, *"El asilo y la protección internacional...." op.cit.*, p. 19 et seq. With respect to UNHCR's opinion on the relation between Article 22(7) of the American Convention on Human Rights and the 1951 Convention relating to the Status of Refugees, see *supra* note 7, p. 7.

20 With respect to effective protection, see the UNHCR document: *The Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum Seekers*. Summary Conclusions of the Lisbon Expert Roundtable, Global Consultations on International Protection, 9 and 10 December 2002.

21 To this effect, there are some valuable experiences in the Southern Cone and Central America. For example, in the Southern Cone assistance programs and legal counseling for asylum seekers and refugees have been progressively assumed by the States and organizations from civil society. In Costa Rica, access to land, housing and microcredits has been offered to refugees and the local population through the creating of a trust fund.

22 Refugees benefited from the change in their temporary migratory status to a more durable status of permanent residents in countries such as Belize, Costa Rica, El Salvador, Guatemala and Nicaragua.

23 Within the framework of CIREFCA, UNHCR and its implementing partners have designed and executed so-called Quick-Impact Projects (QIPs), with a territorial rather than a populational approach, benefiting at the same time hosting communities in countries of asylum, and also fostering the rehabilitation and reconciliation of the receiving communities in the countries of origin. These projects were later replicated by UNHCR in other parts of the world, and today they have been incorporated into reintegration programmes in several countries.

24 A migratory amnesty was adopted in Belize (1999-2000) and in Costa Rica (1991 and 1999). Similarly, a programme of migratory regularization and naturalization is currently being implemented in Venezuela.

25 The most generous policies in assimilation and naturalization of refugees have been adopted in Ecuador and Mexico.

Prevailing socio-economic conditions in countries of asylum influence prospects for attaining durable solutions, particularly with respect to local integration opportunities. This requires developing new strategies in matters of local integration and the strategic use of resettlement, the latter understood as a basic element of international solidarity and responsibility-sharing. These projects will depend on the specific conditions of each region and on the profiles of the refugee populations. For example, in the countries bordering Colombia, humanitarian programmes could be strengthened in the border regions, putting an emphasis on the territory rather than the population, so that the host communities benefit on equal footing with the refugee community.

On the other hand, in contrast to the experiences of Canada and the United States of America as resettlement countries, this durable solution has traditionally been used in Latin America in an exceptional manner for individual cases—and actually only on few occasions did resettlement occur within the same region. Nevertheless, in recent years pilot resettlement programmes have been developed in Brazil and Chile. UNHCR advocates for the proper use of different durable solutions, including resettlement in emerging countries of South America. Similarly, within the Colombian context, humanitarian programmes put in place to evacuate individuals at high risk from their country of origin have proven to be useful and viable, such as Canada's "source country programme".

In light of the new regional realities, it is necessary to reflect –based on the principles of international solidarity and responsibility-sharing –upon the strategic use of resettlement as a protection instrument in Latin America, both regarding the reception of refugees from other regions, as well as the existing potential for the acceptance of regional refugees from those countries that already host a significant number of Latin American refugees.[26]

V. THE IMPORTANCE OF THE CARTAGENA DECLARATION ON REFUGEES OF 1984 ON THE COMMEMORATION OF ITS TWENTIETH ANNIVERSARY

In light of the new challenges and opportunities for the international protection of asylum seekers, refugees and other persons in need of protection in Latin America, outlined earlier, it is appropriate to ask to what degree the humanitarian responses of States at the normative, institutional and operational level have been inspired by the Cartagena Declaration on Refugees of 1984. Similarly, on the commemoration of its 20th anniversary, it is necessary to make a critical analysis with respect to the validity and relevance of this regional nonbinding instrument, and its applicability to the new realities of forced displacement in the region.

In recent years, some States have expressed certain doubts with respect to the content of the Cartagena Declaration alleging its wide reach and the difficulty of interpretation. As described below, many of these doubts arise from the assumption that the Cartagena Declaration equates to its broad refugee definition, which in fact is only one of the many diverse themes that this regional instrument of refugee protection touches upon.

26 To this effect, see the resolution of the [OAS] General Assembly AG/RES.2047 (XXXIV-O/04), *Protection of asylum seekers, refugees, returnees and stateless persons in the Americas* of 8 June 2004.

A) The Importance of the Cartagena Declaration as a Regional Instrument for the Protection of Refugees in Latin America

The Cartagena Declaration on Refugees of 1984 constitutes an innovative and creative regional approach for guaranteeing protection to those in need of it. As such, it goes well beyond in its proposal of a broad definition of refugee. The Cartagena Declaration declares that aside from the refugees recognized under the 1951 Convention there are other persons in need of international protection.[27]

The Declaration encompasses the protection and treatment that should be afforded to refugees during the entire cycle of forced displacement. In fact, it represents a compilation of best practices, based on the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, which brings together the generous tradition of asylum in Latin America. The Declaration is also complemented by the integration of human rights norms and standards, in particular the American Convention on Human Rights, and international humanitarian law.

With regards to its innovative and creative character it is important to point out that the Cartagena Declaration on Refugees of 1984 was adopted in a context in which the majority of countries in the region were either not party of the international instruments on refugees or they had only recently adhered to them,[28] and they had neither national legislation nor procedures to fully enforce the normative framework of the 1951 Convention relating to the Status of Refugees.

On the other hand, it represents a flexible and practical instrument that articulates and attempts to harmonize legitimate concerns related to security and regional stability with humanitarian needs for the protection of the individual. As stated above, these legitimate concerns of the States are equally present today and influence the adoption of public policies in matters of refugee protection.

Besides recommending the use of a broad refugee definition for the region, the Cartagena Declaration makes a pioneering reference to the economic, social and cultural rights of asylum seekers and refugees, and also to the problem of internally displaced persons.[29] On the other hand, the Declaration emphasizes the search for

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27 On this matter, it is important to note that the recognition that there are persons that also require protection has already been enunciated in the Conference of Plenipotentiaries [on the Status of Refugees and Stateless Persons] which adopted the 1951 Convention relating to the Status of Refugees. See to this effect recommendation E) of the final Act of the Conference of Plenipotentiaries, which has been reiterated by various resolutions of the General Assembly of the United Nations whereby it is requested that the UNHCR put forth its "good offices" in order to offer assistance to those persons in need of protection. This same statement makes room for those regions where a broad definition of refugee does not exist, to apply temporary protection regimes or other complementary forms of protection based on obligations derived from other human rights instruments. This is the practice in Canada, the United States of America and Europe. Aside from the ten countries that incorporate the broad refugee definition of Cartagena in their national legislation, in our region this implicit recognition that there exists other persons who are also in need of protection has been reflected in the national refugee legislation of Panama through the adoption of a temporary humanitarian status of protection, and a temporary protection regime for mass influx situations, in the case of Peru and Venezuela. To this effect, see the section on national legislation in the legal data base of the UNHCR's Spanish Web site: www.acnur.org.

28 As indicated above, this situation has significantly changed at the formal level with a total of 21 countries in the Americas having adopted national legislation for the protection of asylum seekers, refugees and other persons in need of protection, as well as national mechanisms for refugee status determination.

29 The problem of internally displaced persons will be addressed and developed afterwards in the San José Declaration on Refugees and Displaced Persons, adopted precisely on the commemoration of the tenth anniversary of the Cartagena Declaration. It is equally interesting to note that the definition of an internally displaced person proposed by the Special Representative of the United Nations Secretary-General for the internally displaced was inspired by the Cartagena broad refugee definition. The same is true for the national legislation concerning the internally displaced in Colombia and Peru. In this regard see the material on internal displacement and national legislation in the legal database of the UNHCR's Spanish Web site: www.acnur.org.

durable solutions and underlines the role the human rights bodies of the Inter-American System are called upon to play for the protection of asylum seekers and refugees. It also makes evident the importance of the complementary use of the different branches of international law for the protection of the individual.[30]

B) Antecedents to the Cartagena Declaration on Refugees of 1984

In 1965, within the Organization of American States, the Second Special Inter-American Conference in Rio de Janeiro recommended to the Inter-American Juridical Committee the preparation of a convention on refugees, in order to specifically response to the new situations of forced displacement in the Americas.[31] In fact, the 1950s and 1960s produced large influxes of refugees in the Caribbean, for whom the instruments related to the Latin American asylum proved manifestly insufficient. The new refugee profiles contrasted with the traditional normative frameworks and humanitarian experiences of countries in the region. This gap was particularly evident with the exodus of refugees from the Southern Cone in the seventies, and also with respect to the Central American refugees during the seventies and eighties.

The need to find a normative framework that was coherent, flexible and pragmatic that would permit to provide protection to those in need of it, while at the same time address the legitimate interests and concerns of States, was also acknowledged by the Colloquium of Tlatelolco of 1981,[32] as well as by the Inter-American Commission on Human Rights in its 1981 and 1982 reports, respectively.[33] Furthermore, under the OAS/UNHCR cooperation agreement, a regional comparative study made it evident that "The Inter-American System [...] lacks an adequate refugee definition to meet the needs of the current large scale flows".[34] This issue was reiterated in the document of objectives by the 1983 Contadora Group and in the 1986 Contadora Act on Peace and Cooperation in Central America.[35]

The legitimate concerns for security and regional stability, within a context of various peace efforts, as well as the humanitarian need to provide protection to a growing number of refugees fleeing their countries due to conflict, gave rise to dialogue, political will, coordination and the decisive support of the international community, all of which contributed to the adoption of the Cartagena Declaration on Refugees of 1984.

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30 With respect to the jurisprudence of the human rights bodies of the Inter-American System applicable to the protection of asylum seekers, refugees and other persons in need of protection, see *supra* note 12, p. 5.

31 This first draft of the Convention on Refugees was elaborated in 1966 by the Inter-American Juridical Committee. It is interesting to note that the proposed refugee definition was founded in Article XXVII of the 1948 American Declaration of the Rights and Duties of Man, by virtue of which "it was intended to comprise all causes of persecution, including political, ideological, racial, or religious causes. Thus, its reference to 'persuit not resulting by ordinary crimes.'" 1981-1982 Report of the Inter-American Commission on Human Rights, www.cidh.oas.org/annaulrep/81.82sp/cap.6.htm. This regional draft convention on refugees is also referred in *"Estudio comparativo entre los instrumentos internacionales de las Naciones Unidas y los del Sistema Interamericano aplicables al régimen de asilados, refugiados y personas desplazadas,"* OAS/UNHCR Agreement, Subsecretariat of Juridical Affairs, 1984, introductory note, page iii.

32 One of the conclusions of said Colloquium reads as follows: "this valuable addition [referring to the refugee definition of the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa] foresaw the increasingly frequent cases of mass displacement of persons, unfortunately now also present in our own America, resulting from internal or external conflicts that affect them to the extent that they cannot remain in their habitual residences and they are obliged to seek refuge [sic, should read protection] in other States. The complete text of the conclusions and recommendations of the Colloquium of Tlatelolco on International Protection can be found in the legal database of the UNHCR's Spanish Web site: www.acnur.org.

33 In its 1981 Annual Report, the Inter-American Commission on Human Rights recommended to the General Assembly of the Organization of American States that "...the regional refugee definition recognize that persons who flee their countries because their lives have been threatened by violence, aggression, foreign occupation, massive human rights violations and other circumstances which destroy public order and for which there is no internal remedies." This petition was restated at the General Assembly of the OAS in the 1981-1982 report of the Inter-American Commission on Human Rights.

34 With respect to this comparative study, see *supra* note 30, p. 11.

35 For the content of these documents, see the legal database of the UNHCR's Spanish Web site: www.acnur.org.

C) The Principles and Issues Developed in the Cartagena Declaration on Refugees of 1984

The Cartagena Declaration on Refugees of 1984 is a nonbinding international document of a regional character, adopted at a colloquium by a group of government and academic experts from six Central American countries (Guatemala, Belize, Honduras, El Salvador, Nicaragua and Costa Rica) and from the member countries of the Contadora Group (Mexico, Panama, Colombia and Venezuela).[36]

With respect to its content, it is necessary to point out that the Cartagena Declaration on Refugees addresses issues of the entire cycle of forced displacement, ranging from entry and reception of asylum seekers and refugees, to their humanitarian treatment and to the search for durable solutions.

The Cartagena Declaration on Refugees of 1984 refers to the importance of adhering to international instruments on refugee without reservations, and to the adoption of internal mechanisms for their effective implementation. It also makes reference to the civil, nonpolitical, and strictly humanitarian character of granting asylum and the recognition of refugee status; the unconditional respect for the principle of *non-refoulement*; the importance of correctly utilizing the term refugee and its differentiation from other categories of migrants; and basic standards of protection and assistance to refugees, particularly in the areas of health, education, employment and security.

The Declaration even refers to the location of refugee camps and settlements; the problem of military attacks on refugee camps and settlements; the importance of establishing a standard for the minimum treatment of refugees based on international instruments related to refugees and human rights; the importance of training staff charged with the protection and assistance of refugees; the importance of addressing and eradicating the causes of forced displacement; the non-political and humanitarian mandate of UNHCR and its supervisory responsibility; the principle of family unity; the role of non-governmental organizations in the protection of asylum seekers and refugees; the problem of large-scale influxes; and the dissemination and promotion of International Refugee Law.

The Cartagena Declaration on Refugees puts emphasis on voluntary repatriation, local integration and resettlement, and the establishment of a framework of principles that was later developed within the process of the International Conference on Central American Refugees (CIREFCA, for its acronym in Spanish) and its legal document entitled "Principles and Criteria for the Protection and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America",[37] as well as in the practice of States. Reference should be made, in particular, both to the importance given to the creation of tripartite commissions[38] to facilitate the voluntary repatriation of refugees and refugee visits to verify the prevailing conditions in their countries of origin, to the effective integration of refugees into the economic life of the country of asylum through the creation and generation of employment.

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36 Despite being a nonbinding regional instrument, the constitutional jurisprudence of countries such as Colombia and Costa Rica has established that the nonbinding instruments on human rights, like Declarations adopted by experts, shall be incorporated into the constitutional framework. On this matter, see the section on national jurisprudence in the legal database on the UNHCR's Spanish Web site at: www.acnur.org.

37 See the full text of the CIREFCA juridical document in the legal database on the UNHCR Spanish Web site at: www.acnur.org.

38 In the framework of the organized collective repatriation movements of Guatemalan refugees in Mexico, the tripartite commissions gave rise to the formation of quadripartite commissions with the full participation of the refugee representatives.

The Cartagena Declaration on Refugees also underlines the importance of international coordination and cooperation in a spirit of solidarity and responsibility-sharing, for which the creation of mechanisms of consultation and dialogue between the States is promoted.

In certain issues, the Cartagena Declaration on Refugees of 1984 has undoubtedly been a pioneer, such as the problem of internally displaced persons,[39] the application of human rights norms and standards for the protection of refugees, in particular the American Convention on Human Rights, and the use of the human rights bodies of the Inter-American System,[40] within the framework of OAS/UNHCR cooperation agreement,[41] as well as the mention of the enjoyment of the economic, social and cultural rights of refugees.

An exhaustive and critical analysis reveals that important progress has been made in all these issues in the last twenty years, and that the majority of these principles are accepted and regulated both by State practice and national legislation. Thus, the principles and issues set forth in the Cartagena Declaration have inspired the protection of refugees in Latin America.

D) The Broader Refugee Definition Proposed by the Cartagena Declaration on Refugees of 1984

As indicated above, the broader refugee definition proposed by the Cartagena Declaration is but one of its conclusions, whose importance should not be overestimated, thereby minimizing the full value of the Declaration as a whole.

Without losing sight of this, the third conclusion of the Declaration states that "... the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who 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".[42]

This definition has been incorporated into the national legislations of ten countries in the region,[43] and has been put into practice by other countries (Argentina, Chile and Nicaragua), with respect

39 See *supra* note 28, p. 11.

40 See *supra* note 12, p. 5.

41 The UNHCR signed a cooperation agreement with the Inter-American Court of Human Rights in the year 2000 and a cooperation agreement with the Inter-American Commission on Human Rights in 2002.

42 See the full text of the 1984 Cartagena Declaration on Refugees in the legal database of the UNHCR's Spanish Web site at: www.acnur.org [also available in the UNHCR English Web site at www.unhcr.ch].

43 See the national legislation of the following countries: Mexico, Guatemala, Belize, Honduras, El Salvador, Ecuador, Bolivia, Brazil, Paraguay and Peru. Differences exist in the language utilized in the cases of Belize, Bolivia, Brazil, Honduras and Peru. Colombia eliminated the broader definition from its natinal refugee legislation in 2002. In the case of Argentina, an administrative circular recommends the use of such a broader definition. On this matter, see the sections on national legislation and on the 1984 Cartagena Declaration on Refugees in the legal database of the UNHCR's Spanish Web site at: www.acnur.org.

to both situations of large-scale influx[44] and individual cases.[45] It is also important to note that one country (Bolivia) included the broader refugee definition in 1983, i.e. one year before the adoption of the Cartagena Declaration on Refugees,[46] and that five South American countries that did not participate in the 1984 Cartagena Colloquium were so inspired by the broader refugee definition of Cartagena as to incorporate it into their national refugee legislation.[47] It is equally interesting to note that four countries included the broader refugee definition proposed by the Cartagena Declaration on Refugees of 1984 in the nineties[48] and five other countries have done the same in the present decade.[49] The said definition was also recommended by MERCOSUR through the *Rio Declaration* on the institution of refuge.[50]

Despite its relevance for the protection of refugees in Latin America, in recent years some States have expressed their concern regarding the interpretation of the broader refugee definition.[51]

These concerns can be summarized as follows: 1) the misconception that the broader refugee definition protects all individuals coming from countries in the region living in situations of internal tension, political instability, generalized violence or internal armed conflict; 2) the alleged difficulty in interpreting the grounds for determining who qualifies for international protection; 3) the role of non-state agents as principal agents of persecution in the current context of the region; 4) the alleged application in the context of large-scale influx and not in individual cases; 5) the question of whether or not it requires a well-founded fear of persecution; 6) the doubt as to whether the threat needs to be individualized or not, or if a threat against life, security, or liberty is sufficient; 7) the possibility *sur place* refugees under the framework of the broader definition of refugee proposed by Cartagena; 8) whether there is or not a geographic limitation for its application or definition of beneficiaries; 9) the discussion as to whether it has become regional customary law,[52] 10) the level of enjoyment of rights; and 11) the need to develop specific criteria for the application of exclusion and cessation clauses.

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44 This was the case in Costa Rica and Honduras in the face of large-scale influxes of Central American refugees in the 1980s.

45 Mexico and Ecuador apply the broader refugee definition o proposed by the Cartagena Declaration under individual procedures for refugee status determination.

46 It should be noted that a seminar on Political Asylum and the Refugee Situation took place in La Paz in 1983. Its sixth conclusion states the following: "To underscore the need to widen the scope of the application of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees, as well as of any related national legislation that may be enacted, to all persons fleeing their country due to aggression, foreign occupation or domination, massive human rights violations or as a result of events of a political nature seriously disturbing public order in the country of origin."

47 This is the case for Bolivia (1983), Brazil (1997), Ecuador (1992), Paraguay (2002), and Peru (2002).

48 Reference is made to Mexico (1990), Belize (1991), Ecuador (1992), and Brazil (1997).

49 These countries are the following: Guatemala (September 2001), Paraguay (June 2002), El Salvador (August 2002), Peru (December 2002), and Honduras (December 2003).

50 See the text of the said Declaration in the legal database of the UNHCR's Spanish Web site at: www.acnur.org

51 The nonbinding nature of the 1984 Cartagena Declaration on Refugees, and in particular its broader refugee definition, has been mentioned on various occasions by the governments of Costa Rica, Panama and Venezuela. Nevertheless, the latter country has recently indicated that it recognizes the said Declaration as an interpretive source for examining applications for refugee status.

52 To this effect the Urugayan jurist Hector Gros Espiell, former President of the Inter-American Court of Human Rights, argues that the Cartagena Declaration has acquired the character of regional customary law. Gros-Espiell, Hector: *La Declaración de Cartagena como fuente del Derecho Internacional de los Refugiados en América Latina,* Memoir of the International Colloquium on the Commemoration of the Tenth Anniversary of the Cartagena Declaration on Refugees, published by IIHR in conjunction with UNHCR, San Jose, December 1994, p. 253-470.

The enumeration of the these concerns does not pretend to be exhaustive, but it reflects, to a large degree, the questions raised by the States with respect to the application of the broader refugee definition proposed by the Cartagena Declaration on Refugees of 1984.

It is appropriate to ask for the reasons giving rise to these doubts. In the first place, it is necessary to clarify that in the eighties, in the face of a large-scale influx of persons in need of protection, States turned to *prima facie* and "group determination" recognition. Hence States did not carry out a detailed examination of the asylum claims, rather they resorted to the application of Conclusion No. 22 of the UNHCR Executive Committee.[53] Similarly, in the absence of national procedures and structures, the majority of the countries in the region delegated refugee status determination to the UNHCR, in compliance with its mandate to provide international protection,.

Likewise, no significant interpretative problems have arisen in the context of individual systems for refugee status determination when the number of asylum seekers is small. Nevertheless, as the number of asylum seekers from the same country of origin increases, States have expressed their concern in guaranteeing a coherent and consistent interpretation of the broader refugee definition in a context where the large majority of asylum seekers state the objective conditions prevailing in their country of origin as their reason for fleeing.

On the other hand, it must be acknowledged that there has been little reflection or systemization of state practices with respect to the application of the broader refugee definition contained in the Cartagena Declaration. More training efforts are required for the coherent and consistent interpretation of such a definition, addressed to government officials in charge of refugee status determination procedures in their countries, as well as to the various sectors of civil society, and even UNHCR staff.

In order to clarify these doubts, it is also necessary to note that a primary source for the consistent and coherent interpretation of the broader refugee definition proposed by the Cartagena Declaration is the legal document of the International Conference on Central American Refugees (CIREFCA).[54] Despite the fact that this document proposes with accuracy the manner in which each element of the definition should be interpreted, a systematic analysis of State doctrine and practice is necessary, as well as an elaboration of a Manual of Procedures and Criteria for the systematic interpretation of the broader refugee definition of the Cartagena Declaration on Refugees of 1984. Such a Manual should reflect the progressive development of International Law and, in particular, the importance of the complementarity of its different branches for the effective protection of the individual.

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53 See the full text of Conclusion No. 22 (XXXII) of the Executive Committee of the High Commissioner's Programme, 1981, in the legal database of the UNHCR's Spanish Web site at: www.acnur.org [also available in the UNHCR English Web site at www.unhcr.ch].

54 Principles and Criteria for the Protection and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America, UNHCR, 1989, p. 5-7.

E) The Validity and Applicability of the Cartagena Declaration on Refugees of 1984

As indicated in this document, the Cartagena Declaration on Refugees of 1984 goes far beyond simply a broader refugee definition, and on the commemoration of its 20th Anniversary it is necessary to analyze its validity and integral applicability to the new situations generated by forced displacement in the region. In particular, with respect to those persons in need of international protection who flee their countries as a consequence of generalized violence, massive violations of human rights, internal conflicts and other circumstances seriously disturbing public order.

The Cartagena Declaration on Refugees of 1984 is one of the principal contributions of Latin America to the progressive development of International Refugee Law and, as outlined in this paper, many of the developments on the protection of refugees in this region are inspired and founded upon the principles established in this nonbinding regional instrument.

In the face of a regional context in which a growing number of asylum seekers and refugees in the region frequently receive protection in economically difficult situations for the host country, the challenge today is to maintain a humanitarian space that allows the provision of protection to any person who needs it and deserves it. This can be achieved through the application of regional solutions that succeed in reconciling the legitimate interests of the States, including providing protection to those in need of it, and the respect for the international and regional standards for the protection of refugees.

The commemoration of the 20th Anniversary of the Cartagena Declaration on Refugees will most certainly permit the Office of the United Nations High Commissioner for Refugees, along with the States, other international organizations and various sectors of civil society to analyze and evaluate the protection of refugees in Latin America, including its challenges and opportunities. Such analysis has elucidated the importance of turning to pragmatic and flexible regional approaches that make possible, taking into account the legitimate interests of States, the provision of international protection to those in need of it.

UNHCR
November 2004

BLANCA28

INFORMATIVE DOCUMENT

COMMEMORATION OF THE TWENTIETH ANNIVERSARY OF THE CARTAGENA DECLARATION ON REFUGEES

I. BACKGROUND

November 2004 marks the 20th anniversary of the Cartagena Declaration on Refugees, which was adopted in 1984 by a group of government experts and eminent jurists from Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela. At that time, close to 150,000 Central Americans refugees were being assisted in the region and an additional 1.8 million had been directly affected by conflict, and were obliged to cross an international border or leave their home areas within the borders of their own countries.

The Cartagena Declaration is recognised as an instrument giving legal and political support for an innovative and pragmatic regional approach for providing protection to those in need and to promote durable solutions. Over time, it has proven to be a useful protection tool in Latin America, as attested to by numerous resolutions of the General Assemblies of the United Nations and the Organization of American States. Building on the long-standing asylum practice in Latin America, the Declaration reiterates important norms and principles of human rights and International Refugee Law.

The Cartagena Declaration contains a number of important recommendations for the humanitarian treatment of, and reaching durable solutions for, those in need of protection**.** More significantly, however, the Declaration broadens the definition of a "refugee", set out in the 1951 Convention relating to the Status of Refugees, to include those *who 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.*

The Cartagena Declaration on Refugees was further developed and enhanced by the 1989 International Conference on Central American Refugees (CIREFCA) whose "Principles and Criteria for the protection and assistance of Central American refugees, returnees and internally displaced in Latin America" remains an important guide for the interpretation of the Cartagena refugee definition.

Evidence of its continued relevance, 20 years after its adoption, the broader refugee definition has been promulgated in the national legislation of Belize (using the OAU's wording), Bolivia, Brazil, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Paraguay and Peru. Also, the Cartagena Declaration is applied in practice and used as an interpretation instrument in Argentina and Chile; and its refugee definition has been included in the refugee legislative projects in Argentina, Nicaragua and Uruguay.

The commemoration of the Cartagena Declaration's 20th Anniversary is taking place in a context of growing national security concerns, the fight against terrorism and increasing migratory controls. These concerns have prompted the adoption of more restrictive migratory and asylum policies. Nevertheless, we can attest to the importance of humanitarian responses to the current regional refugee situation, which includes hundreds of thousands of Colombians forced to flee the conflict within and outside their country, and who are in need of protection and durable solutions within the pragmatic, innovative and forward-looking regional standards recommended by the Cartagena Declaration on Refugees. The "spirit of Cartagena" is as much needed today as it was 20 years ago.

II. OBJECTIVES

To commemorate the 20th Anniversary of the Cartagena Declaration, UNHCR is taking the opportunity to invite governments, experts and civil society to analyze together the main challenges confronting refugee protection in Latin America today and to identify lines of action to support asylum countries in providing suitable solutions, according to the pragmatic and creative spirit of the Cartagena Declaration.

As such, the 20th Anniversary is not just an opportunity to commemorate, but also offers an opportunity to reaffirm the relevance, endurance and validity of the Cartagena Declaration on Refugees as a Latin American refugee instrument of international standing, and to launch a process aimed at implementing the Agenda for Protection and Convention Plus initiatives in Latin America.

The process will pursue the following objectives:

- Disseminate the important contribution of Latin America and the Inter-American System towards international refugee protection through its norms, jurisprudence and regional doctrine. It aims at acknowledging, through research, the role played by Latin America as a "land of protection" and at further disseminating internationally this "legal and protection wealth", within the framework of UNHCR's Executive Committee (EXCOM). Latin American Member States of EXCOM and GRULAC will play a fundamental role in the promotion of this initiative.
- Promote the consistent interpretation of this "legal and protection wealth" in Latin America, including the Cartagena Declaration on Refugees, by deepening knowledge about it and reaching regional consensus for its coherent application, based on regional and universal doctrine. This is to be achieved by the production of handbooks and/or guidelines on legal and other protection topics, as recommended by governments, experts and practitioners during the consultation process;
- Promote the application in Latin America of a regional protection system, based on, among other instruments, the 1951 Convention on Refugees, the 1967 Protocol, the 1969 American Convention on Human Rights and the 1984 Cartagena Declaration on Refugees. This aim will be the subject of a refugee law promotion and training program addressed to civil servants, State institutions and International Refugee Law experts;

The implementation of these first three objectives will become the protection chapter of the Mexico Declaration and Plan of Action. This Plan of Action, with an initial geographical scope covering all continental Latin America, will be the conceptual framework for the elaboration and implementation of two complementary protection programmes to achieve the first three objectives: Programme I of Research and Doctrinal Development, and Programme II of Training and Institutional Capacity-building.

- Adopt a durable solutions programme, based on international solidarity, responsibility sharing and cooperation, focusing mainly, but not exclusively, on the situation of thousands of Colombian refugees in the Andean region and other affected countries. The Plan of Action will be inspired by the pragmatic, principled and solutions-oriented approach of the Cartagena Declaration, and should count on the technical and financial support of the international community in recognition of the protection efforts undertaken by the governments and peoples of the asylum countries, affected by the humanitarian consequences of the Colombian conflict.

III. PROCEDURAL ASPECTS

The Government of Mexico has kindly agreed to host the commemorative event tentatively scheduled for 15-16 November 2004 in Mexico City. UNHCR's Regional Office in Mexico is responsible for coordinating, with the External Relations Secretariat, all aspects relating to the commemoration.

UNHCR has established a Coordination Unit based in the Americas Bureau, in Geneva. The Unit is supported technically by the Regional Legal Unit based in San José (Costa Rica). Focal Points have also been appointed in all UNHCR offices in the continent, including the USA and Canada.

The Inter-American system represented by the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights and the Inter-American Institute of Rights (IIDH) has confirmed its support and sponsorship of the initiative, and the Norwegian Refugee Council will act as a co-organiser.

The organisers are advised by an Experts Committee composed of four renowned jurists: Mr. Antonio Cançado Trindade, President of the Inter-American Court of Human Rights, Mr. Leonardo Franco, Former UNHCR Director of International Protection, Mr. Jorge Santistevan, Former Ombudsman of Peru, and Mr. Santiago Corcuera, Professor of the Faculty of Law in the Iberoamerican University.

A first preparatory regional meeting will be held on 12-13 August 2004 in San Jose, Costa Rica with the participation of governments, state institutions and civil society organizations from Mexico, all Central American countries, and a representation of Caribbean countries. A second preparatory regional meeting, with the same level of representation, covering the MERCOSUR region with Chile and Bolivia, will take place in Brasilia, Brazil, on 26-27 August. In the case of Colombia, Ecuador, Panama, Peru and Venezuela, UNHCR will hold a meeting of state representatives in Cartagena de Indias on 16 and 17 September. The Norwegian Refugee Council will also coordinate in Bogota, Colombia, on 7-8 October, a meeting of civil society organizations from the mentioned five countries.

The aim of these preparatory meetings is to canvas the views of a wide array of interlocutors on the most acute refugee problems and possible solutions. This will allow for the early consolidation of inputs and follow up consultations, which should culminate in a draft Declaration and Plan of Action for its presentation, consideration and adoption during the commemorative event in Mexico City.

A Discussion Paper will be prepared by the Experts Committee which will help inform and focus the debate in all meetings. The Experts Committee will reconvene following the regional meetings with a view towards consolidating inputs and providing advice on the course of action to follow in preparation of the commemorative event.

Re-edited in Geneva on 1 October, 2004

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II. Preparatory process for regional consultations

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REPORT OF THE I PREPARATORY SUB-REGIONAL MEETING OF MEXICO, CENTRAL AMERICA AND CUBA ON "THE INTERNATIONAL PROTECTION OF REFUGEES ON THE COMMEMORATION OF THE TWENTIETH ANNIVERSARY OF THE CARTAGENA DECLARATION ON REFUGEES"

San José, Costa Rica, 12-13 August 2004

I. INTRODUCTION

To commemorate the 20th Anniversary of the Cartagena Declaration on Refugees, the Norwegian Refugee Council, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the Inter-American Institute of Human Rights, and the governments of Brazil, Costa Rica and Mexico, in conjunction with the United Nations High Commissioner for Refugees (UNHCR), have issued an invitation to the governments, experts and various sectors of civil society to analyze the main challenges related to the protection of refugees in Latin America today and to identify actions to be taken in order to provide protection to persons in need of such protection and to assist asylum countries in finding durable solutions, based on the pragmatic and creative spirit fostered by the Cartagena Declaration of 1984.

Recognizing the relevant contribution made by Latin America and the Inter-American system of Human Rights in providing international protection of the rights of the individual, the 20th anniversary of the Cartagena Declaration is an opportunity to commemorate and reaffirm its relevance, value and strength as an interpretative criterion of States obligations in providing protection and finding durable solutions to refugee. It is also a fitting moment for initiating a regional process aimed at promoting the effective implementation of the Agenda for Protection and the Convention Plus initiative in and for Latin America.

The Government of Mexico has kindly accepted to host the commemorative event scheduled for 15 and 16 November 2004 in Mexico City. To this end, three preparatory sub-regional meetings will be held to solicit the opinions of a wide spectrum of interlocutors on the most pressing issues related to refugee protection with the aim of proposing possible solutions. This will lead to a timely consolidation of proposals and additional consultations culminating in the formulation of a Plan of Action that will be considered and adopted during the commemorative event in Mexico City.

The Preparatory Sub-regional meeting of Mexico, Central America, and Cuba on "The International Protection of Refugees on the Commemoration of the 20th Anniversary of the Cartagena Declaration on Refugees" came to the following conclusions and recommendations.

II. CONCLUSIONS AND RECOMMENDATIONS

1. The Meeting recognized the link between the international protection for refugees and the search for durable solutions with the consolidation of democratic institutions in the region, the universal respect for human rights and for the principles of solidarity, international cooperation and responsibility-sharing. States bear the obligation to respect and ensure the respect for human rights at all times and in all circumstances.

2. Despite normative and institutional progress in protecting asylum seekers, refugees and other persons in need of protection in Latin America, the Meeting expressed the concern that, twenty years after the adoption of the Cartagena Declaration on Refugees, the causes generating forced displacement of persons still persist in some regions of the continent. The Meeting urged States of the region to make the necessary efforts to address the underlying causes contributing to such forced displacement and to develop new solutions to effectively protect the individual.

3. The Meeting acknowledged that the Cartagena Declaration on Refugees constituted the historical framework for the application in Latin America of the universal system for the protection of refugees. The Meeting expressed that the Cartagena Declaration, including its broader definition, is a useful and practical instrument in providing protection, applicable to individual systems for refugee status determination as well as to situations of large-scale influx. To this end, while reaffirming the validity and relevance of the principles and standards contained in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the Meeting underscored the need to revive the humanitarian spirit of the Cartagena Declaration, particularly its pragmatic and innovative approach based on the complementary and integral nature of the various branches of International Law relating to the protection of the individual.

4. Having recognized the importance of the complementarity between International Human Rights Law, International Humanitarian Law and International Refugee Law - and in light of an integral and harmonious approach to human rights at the normative, interpretative and operational level, the Meeting recommended that the standards and norms of the three areas of International Law be effectively applied in an effort to supplement and strengthen the protection of refugees and other persons in need of protection. The Meeting also recommended incorporating the progress made regarding the protection of children and youth, non-discrimination against women, including domestic violence, the recognition of gender-based persecution, the prohibition of human smuggling and trafficking in persons, as well as the contributions made by the conventions of the International Labor Organization on labor and indigenous peoples' rights. As part of the progress made, the Meeting underscored the pioneering nature of the Advisory Opinion Number 18 of the Inter-American Court of Human Rights related to the protection of the rights of undocumented migrants.

5. The Meeting reiterated the significant contribution of the Cartagena Declaration, including the sources, antecedents and documents supporting its principles, particularly the legal document of the International Conference on Central American Refugees (CIREFCA, for its acronym in Spanish) and the San José Declaration on Refugees and Displaced Persons of 1984.

6. Considering that most of the countries in the region of Mexico, Central America and Cuba have incorporated the broader refugee definition embodied in the Cartagena Declaration into their national

legislation, the Meeting acknowledged the need to have additional criteria to ensure a coherent and consistent interpretation of the broader refugee definition of the Cartagena Declaration. To this purpose, Meeting recommended that the UNHCR elaborate, in collaboration with the Organization of American States, the Inter-American System for the Protection of Human Rights, and with due participation of civil society, a Manual on Procedures and Criteria for the application of the broader refugee definition to compile States practice and the progress made in terms of jurisprudence and international law doctrine , particularly that of the United Nations System and the Inter-American System.

7. The Meeting recognized the importance and magnitude of the migration phenomenon generated by poverty, unemployment and social exclusion, as well as the right of migrants to be considered subjects of law, both in transit or receiving countries and in countries of destination, which bear obligations under national and international human rights law to recognize and ensure the enjoyment of the basic rights of migrants. In addition, the Meeting underlined the importance of promoting full observance of the economic, social and cultural rights underlying the causes of increasing migration influx in the region - which, in some cases, are more numerous than those of forced displacement caused by the armed conflicts in the eighties-, with the purpose of contributing to their development and protection with the cooperation of the international community.

8. The Meeting observed that three main migration trends coexist in the countries of the region: (1) in the Caribbean, the countries are transit territories for migrant and refugee influxes, including a small number of extra-continental refugees (not to mention the reception of an ever increasing number of Haitian nationals); (2) the region between Mexico and Nicaragua is a transit region of a significant South-North migration influx, and is also a zone generating migratory flows and at the same time receiving a small number of refugees, including refugees from Latin America; and (3) Costa Rica is a receiving and transit country of an increasing number of refugees, mainly of Colombian nationality.

9. Unlike the socioeconomic profiles of the refugee population of the eighties, the Meeting confirmed that the refugees arriving today in the countries of the region come mainly from urban areas and most of them are single males in an economically productive age, all of which poses new challenges to their local integration.

10. The Meeting underscored the importance of recognizing and addressing the differentiated protection needs of men and women, boys and girls, youth and the elderly, people with disabilities, and indigenous peoples, without making any distinction based on their migratory status.

11. The Meeting reiterated the importance of striking a balance between the legitimate interests of the States, particularly with respect to security matters, and the humanitarian needs of those requiring and deserving protection. The Meeting recognized that the new regional migration phenomenon is characterized by mixed migratory flows made up of asylum seekers and refugees who are presumed to be irregular migrants. In this context, the Meeting recommended that States adopt measures to identify, provide adequate treatment and protect asylum seekers and refugees. The Meeting also recommended that the participating countries in the Regional Conference on Migration promote the adoption of safeguards for the protection of asylum seekers and refugees in the context of the security measures adopted thereupon in view of the increasingly evident nexus between asylum and migration.

12. The Meeting reaffirmed the fundamental principles of the international protection of refugees and the *ius cogens* nature of the principle of *non-refoulement*, the cornerstone of International Refugee Law.

13. The Meeting observed that migration control and restrictive border controls at ports of entry can undermine the rights embodied in the 1951 Convention relating to the Status of Refugees and in the international human rights instruments, particularly with regard to access to protection, the right to seek and be granted asylum, the right to an effective legal remedy and due process guarantees, including the right to a hearing, and the guarantee to not be subject to sanctions for irregular entry. To counteract these practices, the Meeting recommended: (1) establishing more permanent State policies overriding temporary measures that can be adopted by Governments for the effective application of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol; (2) renewing the political will of States in complying with its obligations with the purpose of eliminating the existing gap between the normative framework and its effective implementation. To that end, States shall implement effective national procedures to identify, receive, examine and adjudicate the claims related to refugee status determination; (3) developing systematic training processes to professionalize the administrative bodies in charge of refugee status determination, as well as to provide training and sensitize state officials, such as migration and police officials and, in some cases, the army, in order to identify and protect these populations, particularly in the border areas, and (4) promoting training for the civil society at large regarding the protection and assistance to asylum seekers, refugees and migrants.

14. The Meeting also recommended harmonizing refugee legislation and reiterated the importance for countries currently in the process of adopting legislation to duly incorporate the principles and standards contained in the 1951 Convention relating to the Status on Refugees and its 1967 protocol. Countries may also consider the incorporation of the broader refugee definition proposed by the Cartagena Declaration.

15. The Meeting recognized the importance of finding durable solutions. In addition to voluntary repatriation and resettlement, the Meeting emphasized the importance of formulating strategies to attain local integration, which requires the unconditional support of the international community. In addition, the Meeting underlined the importance of adjusting local integration strategies to the specific needs of refugees within the new integration challenges of urban and extra-continental refugees, while also meeting the needs of host communities.

16. The Meeting acknowledged the close relationship between effective State compliance with its obligations in providing international protection to refugees and the required international technical and financial cooperation within the context of international solidarity. It also recognized the urgency of obtaining international cooperation to support the States in the fulfillment of their duties.

17. The Meeting reiterated the important role that national human rights institutions (General Attorney and Commissioners on Human Rights, Ombudsman) are called upon to assume, as autonomous institutions that ensure the proper exercise of state authority and the protection of basic human rights of the individual, including refugees and migrants.

18. The Meeting underlined the decisive contribution of Non-Governmental Organizations and other instances of civil society. The Meeting also urged States and the international community to support such organizations so that they may continue their work on behalf of those people in need of

protection in the region by providing legal assistance, supervising compliance with the existing normative frameworks and participating with their opinion and technical input in adopting public policy. It also recommended States to include the civil society in the procedures for refugee status determination.

19. Without detriment to the work of National Institutions for the Protection and Promotion of Human Rights, civil society organizations and existing protection networks, the Meeting ratified that it is the responsibility of States, under national and international law, to respect fundamental rights, promote their realization and protect all individuals under their jurisdiction.

20. The Meeting expressed concern about the use in other regions of the continent of neologisms or terminologies such as "internally displaced persons in transit" or "temporarily protected persons", which are devoid of legal content, deny the declarative nature of refugee status, and adversely affect the quality of protection and the effective exercise of rights.

21. The Meeting recognized that the emphasis on the international protection of refugees must lie in the firm will of the different sectors of society to materialize justice, as a fundamental value and, therefore, provide protection to those persons in need of it. Consequently, the Meeting underscored that it is possible to use different sources or systems within the existing legal frameworks, provided that they are used with an integrating and convergent approach conducive to the respect for the dignity of the individual, without discrimination of any kind.

22. The Meeting underlined the importance of making effective use and exhausting legal domestic remedies (administrative and judicial) to protect the rights of asylum seekers and refugees. It also recognized the importance of using the mechanisms for the international protection of human rights, particularly those of the Inter-American System of Human Rights, and at the same urged for a more extensive use of the said mechanisms. To this end, the Meeting recommended strengthening the collaboration of the UNHCR with the Inter-American Institute of Human Rights, the Inter-American System for the Protection of Human Rights and the different sectors of the civil society.

23. Finally, the Meeting reiterated the importance of disseminating best practices on refugee protection in the region, as well as promoting International Refugee Law, International Human Rights Law, and the Cartagena Declaration on Refugees of 1984.

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REPORT OF THE II PREPARATORY SUB-REGIONAL MEETING OF BRASILIA ON "THE INTERNATIONAL PROTECTION OF REFUGEES ON THE COMMEMORATION OF THE TWENTIETH ANNIVERSARY OF THE CARTAGENA DECLARATION ON REFUGEES"

Brasilia, Brazil, 26-27 August 2004

I. INTRODUCTION

To commemorate the 20th Anniversary of the Cartagena Declaration on Refugees, the Norwegian Refugees Council, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the Inter-American Institute of Human Rights and the governments of Brazil, Costa Rica and Mexico, in conjunction with the United Nations High Commissioner for Refugees, have issued an invitation to the governments, experts and various sectors of civil society to analyze the main challenges facing the protection of refugees in Latin America today and to identify actions necessary to protect persons in need of such protection, as well as to assist asylum countries in finding durable solutions within the pragmatic and creative spirit fostered by the Cartagena Declaration of 1984.

The Cartagena Declaration, its sources, antecedents and the instruments supporting its principles, particularly the Colloquia on international protection, the legal document resulting from the International Conference on Central American Refugees (CIREFCA, for its acronym in Spanish), with all its contributions, including the document of the Regional Forum on Gender Focus in working with Refugee, Returnee and Displaced Women (FOREFEM, for its acronym in Spanish) as well as the San José Declaration on Refugees and Displaced Persons of 1994, constitute the essential legal body for the international protection of refugees and other persons in need of protection. All these instruments reflect, as a whole, the generous tradition of asylum in the region and constitute an invaluable contribution to the development of international law.

Recognizing this relevant contribution of Latin American and the Inter-American system of human rights to ,international refugee protection, the 20th anniversary of the Cartagena Declaration is not only an opportunity to commemorate but also to reaffirm the validity and legitimacy of the said Declaration *vis-à-vis* the duties of the States to provide protection and to find durable solutions to refugees. It is also an occasion to initiate a regional process to promote the effective implementation of the Agenda for Protection and the use of regional approaches in and for Latin America, while consolidating and refining a proposal incorporating the South-South solidarity principle in the region.

The II Sub-Regional Preparatory Meeting held in Brasilia on "The International Protection of Refugees on the commemoration of the 20th Anniversary of the Cartagena Declaration on Refugees" came to the following conclusions and recommendations:

II. CONCLUSIONS AND RECOMMENDATIONS

1. Recognizing that in past decades a significant number of individuals from the region received international protection in Latin America, as well as in other continents, the Meeting reiterated its humanitarian and common commitment towards asylum seekers and refugees in the region. The Meeting also stressed the need to mainstream these guiding principles into the protection policies adopted in the region at the national level, as well as within the integration efforts promoted by MERCOSUR and its associated countries.

2. The Meeting reaffirmed the validity and relevance of the principles and norms contained in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. It also underlined the need to face the new challenges confronted by refugees and other persons in need of protection while maintaining the humanitarian spirit of the Cartagena Declaration. In particular, the Meeting underscored the pragmatic and innovative approach of the Cartagena Declaration, based on the complementary and comprehensive nature of the various areas of International Law relating to the protection of the individual.

3. The Meeting recognized that the Cartagena Declaration on Refugees - including its broader refugee definition, which has been incorporated into the national systems of the countries in the region, through regulatory procedures or through state practice-, is a useful and practical instrument to continue providing protection today.

4. Considering that the great majority of the countries in the region have incorporated the broader definition of the Cartagena Declaration into their national legislation, the Meeting recognized the need to clarify and define the criteria for interpreting the broader refugee definition contained in the said Declaration, particularly the restrictive interpretation of the exclusion clauses, the interpretation of specific circumstances and their application to individual cases, using the jurisprudence created by the human rights bodies and courts. The Meeting also underlined the need to systematize the reasons for rejecting the asylum claims.

5. The Meeting recognized the innovative contribution of the Cartagena Declaration with respect to the protection of economic, social and cultural rights of asylum seekers and refugees. It also recommended that the States observe the principle of indivisibility and interdependence of all human rights.

6. The Meeting recognized the need to protect the rights of migrant workers and their families, including their economic, social and cultural rights. To this end, the Meeting urged the States to ratify the United Nations Convention relating to the Protection of Migrant Workers and their families.

7. The Meeting recognized with great concern the pressing needs of asylum seekers, refugees and other persons in need of protection in the region. To this end, it urged States to protect every individual throughout all stages of the uprooting process and recommended that States, with the support of international cooperation, take the necessary measures to ensure that procedures for determining refugee status are fair and efficient. These procedures should comply with all of the due process guarantees, the respect of judicial protection, the provision of assistance and the facilitation of documentation processes to allow the legal involvement in wage-earning activities.

8. The Meeting underlined the relevance of the complementary nature of International Human Rights Law, International Humanitarian Law and International Refugee Law. Furthermore, the Meeting recommended the use, through a comprehensive and harmonious view of the rights of the individual at the normative, interpretative and operational level, of the standards developed by these three branches of International Law as a means of supplementing and strengthening refugee protection, with the aim of ensuring the highest level of protection for the individual.

9. The Meeting reaffirmed the fundamental principles of international refugee protection, stressing the *ius cogens* nature of the *non-refoulement* principle and the prohibition of rejection at borders as cornerstones of International Refugee Law. It also underscored the progress made in other human rights instruments in relation to development of the principle of *non-refoulement,* such as Article 22(8) of the American Convention on Human Rights and Article 3 of the Convention against Torture.

10. The Meeting observed with concern the use of neologisms or terminologies in other regions of the continent, such as "internally displaced person in transit" or "temporarily protected persons", which are devoid of juridical content, deny the declarative nature of refugee status and have negative implications on the quality of protection and the effective exercise of rights. The Meeting also drew attention to the terminological confusion intrinsic to the "asilo-refugio" duality and its implications for international protection. The creation of a glossary on legal terms concerning refugee protection was recommended to clarify the concepts and overcome these and other terminological confusions.

11. The Meeting reiterated the importance of striking a balance between the legitimate interests of the States, particularly with respect to security concerns, and the humanitarian needs of those requiring and deserving protection. The Meeting recommended that security policies and the fight against terrorism be in keeping with respect for all national and international instruments on the protection of the individual.

12. The Meeting recognized the importance of adopting national legislation for refugee protection and also implementing national structures for determining refugee status in compliance with due process guarantees, effective remedies and other judicial guarantees, including free legal counseling, and translation and interpretation assistance, as well as with full respect of the non-discrimination principle and other human rights. To this end, the Meeting recommended that States ensure a fair hearing to asylum seekers in order to determine whether they meet the criteria contained in the Convention relating to the Status of Refugees and the broader refugee definition of the Cartagena Declaration - in light of the American Convention on Human Rights and other international human rights norms. It was also emphasized that States must promote and support the work of organized civil society as a means of ensuring access, assistance and protection to asylum seekers in the refugee status determination processes.

13. The Meeting reiterated the importance of using constitutional remedies and other national mechanisms to protect the fundamental rights of all persons under the jurisdiction of the State.

14. The Meeting particularly underscored the importance of the Inter-American system for the protection of human rights and the work of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The Meeting especially recommended that the

States respect the right to seek and be granted asylum enshrined in Article 22(7) of the American Convention on Human Rights and similar national constitutional provisions. Recognizing the contribution of the Advisory Opinion OC-18 of the Inter-American Court of Human Rights on the juridical status and rights of undocumented migrants, the Meeting recommended using the advisory jurisdiction of the Inter-American Court to establish the content and scope of the right to asylum, within the framework of the regional and international instruments on human rights. The Meeting also recommended making more extensive use of the supervisory mechanisms to afford greater protection to the individual.

15. Despite the significant normative and institutional progress made in the region regarding the protection of asylum seekers, refugees and other persons in need of protection in Latin America, the Meeting observed with great concern the existing gap between the normative regime and the state practices, particularly with respect to the enjoyment and effective exercise of economic, social and cultural rights. The Meeting recommended that States remain vigilant in the implementation of their policies and laws to ensure effective protection. Similarly, States were also urged to provide adequate technical and financial resources to the national bodies in charge of determining the status of refugees.

16. The Meeting recognized the importance of harmonizing regional legislation as a means of affording the greatest protection possible to individuals based on the Convention relating to the Status of Refugees and its 1967 Protocol, the Cartagena Declaration on Refugees, the American Convention on Human Rights, the San Salvador Protocol and other international human rights instruments.

17. The Meeting urged the governments and international organizations to duly take into account the differentiated protection needs of women, boys and girls, the elderly and other persons at-risk. It also recommended incorporating gender-based criteria and other grounds that are against the principle of non-discrimination principle into the determination of refugee status.

18. The Meeting underlined the positive contribution made by Non-Governmental Organizations and other civil society organizations. The Meeting also urged States and the international community to support such organizations so that they may continue their work on behalf of those people in need of protection in the region by providing legal assistance, supervising compliance with the existing normative frameworks and participating with their opinion and technical input in adopting public policy. It also recommended States to include the civil society in the procedures for refugee status determination.

19. The Meeting emphasized the importance of providing training on International Refugee Law and human rights throughout the entire state apparatus and to all instances of State authority to ensure the full protection of asylum seekers, refugees and other people in need of protection. Civil society in the region has experience working through protection networks and local integration, which may be shared with other regions.

20. The Meeting recognized the link between the search for and implementation of effective and durable solutions and the need for international cooperation, while reiterating the principles of international solidarity and responsibility-sharing. In light of the socioeconomic reality of the region in terms of unemployment, extreme poverty, inequity and social exclusion, the Meeting underlined the importance of promoting the adoption of creative policies to facilitate the integration

of the refugees into the country's economic life, particularly through the establishment of a micro credit system to generate sources of employment. These actions must benefit both asylum seekers and refugees and also the receiving communities. It is essential as well to raise awareness within the civil society, in particular within the social protection networks, so that they may contribute to the local integration of those in need of protection.

21. The Meeting urged States to establish mechanisms to issue documents and to streamline procedures for the validation and recognition of certificates and diplomas in an effort to expedite the local integration of refugees into the academic and professional institutions at all levels, while at the same time accounting for their special situation as refugees.

22. Without detriment to the responsibility of States in the local integration of refugees, the Meeting recognized the efforts made by civil society and the international community and the complementary nature of these contributions. To this end, the Meeting reiterated the importance of coordinating efforts among governments, and underlined the importance of States ensuring and facilitating the participation of civil society in designing, adopting and implementing public policies related to refugee integration.

23. sThe Meeting underlined the efforts made in the Region in finding durable solutions, in particular the experiences of Brazil and Chile as emerging resettlement countries, in light of the principles of international solidarity and responsibility-sharing. The Meeting underscored the need for States to implement resettlement policies containing a set of principles and eligibility criteria, with full respect of principle of non-discrimination.

24. The Meeting noted the proposal made by the Government of Brazil, to be shared with the other MERCOSUR State members and associates, concerning the strategic use of resettlement as a durable solution and as a means of promoting more effective local integration of refugees. The proposal aims at benefiting refugees by establishing a resettlement programme in the region or in the MERCOSUR region for Latin American refugees in line with the spirit of international solidarity. This proposal reinforces the fact that Latin America provides protection and makes conscientious efforts to solve the problems of its own refugees.

25. Taking into consideration the suggestion made by Brazil, the Meeting urged the international community to strengthen and consolidate these initiatives so that they can be improved and replicated in other countries of the region. The Meeting underlined that resettlement is a durable solution and that it must not be considered a burden but rather a duty emanating from the principle of international solidarity.

26. The Meeting acknowledged the importance of the Rio de Janeiro Declaration related to the protection of refugees, adopted within the framework of the VIII Meeting of the Ministries of Internal Affairs of MERCOSUR. The Declaration recognized the political will of the MERCOSUR countries, Bolivia and Chile to adopt measures to receive, protect and assist refugees in compliance with international principles and standards. The Meeting reiterated the importance of including safeguards in the migration policies of the MERCOSUR countries to identify and protect asylum seekers and refugees. To this end, States were urged to reaffirm the political will demonstrated in this Declaration by adopting internal mechanisms and disseminating the protection agreements adopted within the framework of MERCOSUR.

27. The Meeting reiterated the importance of disseminating best practices on refugee protection and durable solutions in the region, and promoting International Refugee Law, International Human Rights Law and the 1984 Cartagena Declaration on Refugees.

28. The Meeting stressed the importance of States taking into account these conclusions and recommendations when reviewing their national legislation. In addition, the Meeting urged UNHCR, as part of its supervisory responsibility, to request periodical reports from the States on the refugee situation and the application of the Convention in countries of the region.

29. Finally, the Meeting recommended that the UNHCR consider the participation of refugees in the commemorative event in Mexico.

REPORT OF THE III PREPARATORY SUB-REGIONAL MEETING ON "THE INTERNATIONAL PROTECTION OF REFUGEES ON THE COMMEMORATION OF THE TWENTIETH ANNIVERSARY OF THE CARTAGENA DECLARATION ON REFUGEES"

Cartagena de Indias, 16-17 September 2004

I. INTRODUCTION

To commemorate the 20th Anniversary of the Cartagena Declaration on Refugees, to be celebrated on 15-16 November in Mexico City, the Norwegian Refugee Council, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the Inter-American Institute of Human Rights, the governments of Brazil, Costa Rica and Mexico, in conjunction with the United Nations High Commissioner for Refugees (UNHCR), have issued an invitation to the governments, experts and various sectors of civil society to analyze the main challenges facing the protection of refugees in Latin America today and to identify actions to be taken in order to provide protection to persons in need of such protection and assist asylum countries in finding durable solutions based on the pragmatic and creative spirit fostered by the Cartagena Declaration of 1984.

The Meeting of Cartagena de Indias, celebrated on 16-17 September 2004, convened by the United Nations High Commissioner for Refugees (UNHCR) brought together representatives of the governments of Colombia, Ecuador, Panama, Peru and Venezuela. As host of the commemorative event, representatives of the Mexican government participated as observers. A representative of the Andean Community of Nations was also present.

Recognizing the important contribution made by Latin American and the Inter-American System for Human Rights to the international protection of the rights of the individual, the 20th anniversary of the Cartagena Declaration on Refugees is an opportunity to commemorate as well as to strengthen a regional process promoting the effective protection of asylum seekers and refugees, as well as other persons in need of protection within the context of regional and international cooperation and in light of the principles of international solidarity and responsibility-sharing. In this effort, there is a need to strike a balance between the legitimate security concerns of the States and the humanitarian needs of those in need of protection while at the same time safeguarding the peaceful, non-political and humanitarian character of asylum.

Recognizing the importance of the principles contained in the Cartagena Declaration on Refugees in providing protection and finding durable solutions, the Meeting recognized the need to consider its recommendations in greater depth given the existence of other situations not anticipated upon its adoption.

Recognizing that all the countries in the region have adopted refugee legislation, as well as the existence of other persons in need of protection, the Meeting noted that some States have incorporated into their national legislation the refugee definition recommended by the third conclusion of the Cartagena Declaration, while other States have adopted some of its elements as sources of interpretation or have established temporary protection regimes.

The Meeting verified the magnitude of the phenomena of forced displacement and mixed migratory flows, in particular those concentrated on the borders of some of the participating countries.

The Meeting ratified the condition of the individual as a subject of rights, especially in situations where the recognition of refugee status, for various reasons, is not requested.

The Preparatory Sub-Regional Meeting of Cartagena de Indias on "the International Protection of Refugees on the Commemoration of the 20th Anniversary of the Cartagena Declaration on Refugees", convened by the UNHCR, *reiterated* the political will to find regional solutions to common problems and came to the following conclusions and recommendations:

II. CONCLUSIONS AND RECOMMENDATIONS

The Meeting of the governmental representatives of the participating countries:

1. *Underlined* that given the serious problems regarding forced displacement in the region, it is necessary to address its causes and formulate pragmatic solutions and policies so as to provide effective protection to those in need of such protection.

2. *Reiterated* the need to make efforts at binational borders in order to promote social and economic development, with the aim of benefiting on equal footing those individuals in need of international protection and the local receiving communities.

3. *Emphasized* the complexity of the humanitarian crisis affecting the region, while pointing out the differences that exist between today's crisis and the Central American crisis of the eighties. Among the distinguishing elements, the Meeting underlined the following: dispersion of the beneficiary population, the need to eliminate its "invisibility" and impoverishment with the purpose of attracting international cooperation in a context with emerging threats such as terrorism, persistent organized crime, drug trafficking, human smuggling and trafficking in persons, and arms trafficking, among others. The Meeting underscored that these new phenomena of transnational crime generate legitimate security concerns for the States of the region.

4. *Recognized* the need to consider the profile of the uprooted population constituting a mainly rural and agricultural population consisting of mostly children and women, which has a disproportionately negative impact on highly vulnerable populations such as ethnic groups, the elderly and people with disabilities. Such efforts aim to contribute to determining their status and designing and implementing protection and local integration programmes addressing the specific needs of this group of the population while also considering the needs of the receiving communities.

5. *Recognized* the humanitarian crisis generated in some countries by the influx of persons in need of protection and expressed that the measures to be adopted entail financial costs which exceed

the capacity of the States, thus requiring not only political will but also the decisive support of the international community.

6. *Reaffirmed* the *ius cogens* nature of the *non-refoulement* principle as the cornerstone of International Refugees Law, which has been embodied in other human rights instruments currently in force in the region.

7. *Urged* the States to respect and ensure human rights and humanitarian law standards, particularly the principle of non-discrimination against individuals on the basis of their refugee or displaced status.

8. *Reiterated* the importance of constitutional and legal provisions related to refugees as well as human rights standards and policies. The Meeting also emphasized the need to harmonize and integrate the said provisions and standards in order to guarantee the effective protection of the individual.

9. *Stressed* the importance of analyzing more in depth the Cartagena Declaration on Refugees to update it by including elements related to the legitimate State security interests and the interpretation of the exclusion clauses, through an open dialogue with the purpose of systematizing state practice and doctrine.

10. *Recognized* the need to strengthen the institutional mechanisms for refugee status determination by providing them with more technical and financial resources, as well as training and technical advice from the UNHCR.

11. *Recognized* the importance of finding multilateral and/or regional solutions, without detriment to existing bilateral agreements. These solutions should be adopted with the participation of the UNHCR, and should be coherent, viable and respectful of the principles and standards of international protection.

12. *Recognized* the importance of early warning and prevention, understood as the need to avert or mitigate a humanitarian crisis through the respect and guarantee of the effective enjoyment of human rights, by ensuring the presence and coordination of all pertinent State agencies, avoiding any measures for the containment of the population. .

13. *Recognized* the importance and need to develop sustained training processes aimed at professionalizing the administrative bodies responsible for determining refugee status. The Meeting also recognized the need for sensitizing and providing training to all state officials involved in refugee matters in order to identify and protect these populations, particularly in border areas.

14. *Underlined* the importance of developing awareness-raising and sensitization programmes targeting the local population to prevent all forms of discrimination.

15. *Acknowledged* the development of best practices by states with respect to access to basic services, education, health, documentation, and income-generating and job-creating projects. The Meeting recognized the importance of disseminating such practices and promoting their continuity, as well as the need, within the context of local integration and self-sufficiency of the populations in need of protection, to benefit on an equal footing the local populations of the receiving communities.

16. *Recommended* that in view of the terminological confusion intrinsic to the "asilo-refugio" duality and its implications on international protection, the UNHCR should develop, in consultation with the States of the region, a glossary of legal terminology related to refugees in order to clarify some concepts in light of international human rights law, and thus overcome this and other terminological confusions while accounting for the Latin American tradition of asylum.

17. *Recognized* the importance of holding periodical meetings with participating countries to foster dialogue and cooperation, and find appropriate solutions to the humanitarian problems.

18. *Underlined* the importance of cooperating with international and regional agencies of the United Nations System, in particular with the UNHCR, and with the Inter-American System and the Andean Community of Nations. To this end, the Meeting agreed to submit to the consideration of the Andean Council of Ministries of Foreign Affairs a proposal to create an Andean committee of authorities responsible for refugee and asylum matters. On the basis of such a proposal, it was suggested that, among other attributions, this body would foster the exchange experiences and information, seek regional South-South cooperation, procure technical and financial cooperation and resources in an effort to promote border development, harmonization of the legal frameworks and procedures, issuance of technical opinions before the General Secretariat and the Andean Council of Ministries of Foreign Affairs either on their own initiative or at their request, and approval of their own regulations.

19. *Noted* with satisfaction the recommendation on the possibility of establishing a regional resettlement programme grounded on the principles of international solidarity and responsibility-sharing under the terms proposed by the government of Brazil, and supported by the other participants in the II sub-regional meeting held in Brasilia in the framework of the commemoration of the 20th anniversary of the Cartagena Declaration. To this end, the Meeting recommended establishing mechanisms as soon as possible to ensure the effective implementation of said programme, with the aim that the programme serve as an instrument for mitigating the impact of the humanitarian situation faced by the countries in the region, and that such programme will be implemented in a sustained manner. Furthermore, the Meeting reiterated, as did the Meeting of Brasilia, that these measures are not to be considered a burden but rather a duty emanating from the principle of international solidarity.

20. As for the Andean Community of Nations, the member countries participating in the meeting *noted* the convenience of granting binding nature to the Andean Charter of Nations, for its close link to refugee matters.

21. *Recommended* that in the execution of the plan of action to be adopted in Mexico, cooperating countries be urged to provide support to the countries of the region and formulate a strategic plan to respond to problematic areas and problems specific within the region. Such programmes should focus on strengthening institutions and protection mechanisms, including protection networks and local integration initiatives to benefit on equal footing the local receiving population.

22. *Verified* the need to find mechanisms to determine the number of persons in need of protection in order to better assess the needs the humanitarian crisis has brought about.

23. *Urged* States, if they have not yet done so, to adopt measures to ensure and respect the legal right of refugees to seek and be granted asylum embodied in Article 22(7) of the American Convention on Human Rights and other national constitutional provisions.

CONCLUSIONS AND RECOMMENDATIONS OF THE SUB-REGIONAL MEETING OF CIVIL SOCIETY ORGANIZATIONS OF COLOMBIA, ECUADOR, PANAMA, PERU AND VENEZUELA

Bogotá, 7-8 October 2004

I. INTRODUCTION

To commemorate the 20th Anniversary of the Cartagena Declaration on Refugees, the Norwegian Refugee Council, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the Inter-American Institute of Human Rights and the governments of Brazil, Costa Rica and Mexico, in conjunction with the United Nations High Commissioner for Refugees (UNHCR), issued an invitation to governments, experts and various sectors of the civil society to jointly analyze the challenges currently facing the protection of refugees in Latin America and to identify actions required to protect those in need of such protection and to assist countries of asylum in finding appropriate solutions within the pragmatic and creative spirit fostered by the Cartagena Declaration on Refugees adopted in 1984.

Throughout this process, important preparatory meetings were held in Brasilia and in San José, Costa Rica with the participation of governments and the civil society of countries from the Southern Cone, Mexico, Central America and Cuba. A meeting was also held with representatives of the Governments of Colombia, Ecuador, Panama, Peru and Venezuela in Cartagena de Indias on 16-17 September 2004.

Recognizing that the Cartagena Declaration on Refugees, its sources, antecedents and documents reflecting its principles, such as the Tlatelolco Colloquium on International Protection of 1981, the contributions made by the Contadora Group, the CIREFCA legal document of 1989, and the San José Declaration on Refugees and Displaced Persons constitute a fundamental legal body for the international protection of refugees, displaced persons or asylum seekers. The Cartagena Declaration constitutes an invaluable contribution to the exercise of the basic rights of these persons and a relevant contribution by Latin America and the Inter-American Human Rights System to the development of the various branches of International Law for the protection of the individual.

Recognizing that the commemoration of the 20th Anniversary of the Cartagena Declaration is an opportunity to reaffirm its validity *vis-à-vis* the responsibility of States to provide protection and find durable solutions for refugees, internally displaced persons and asylum seekers.

Recognizing that the commemorative process of the Cartagena Declaration has prompted the organizations of civil society to reflect upon the causes of displacement in the region, which are linked to inequities, social exclusion, poverty and unemployment, as well as to the humanitarian crisis generated by the Colombian conflict and the indiscriminate effects of regional security policies that greatly influence countries of the region.

Regretting that in this sub-region it was not possible to hold a meeting between the governments and civil society, the Meeting reiterates to States, in light of the cooperative spirit fostered by the commemoration of the 20th Anniversary of the Cartagena Declaration on Refugees, its willingness to hold meetings between the civil society and governments to promote the discussion and adoption of concerted national agendas for the protection of uprooted persons.

As part of the preparation process of the forthcoming commemorative event to be held in Mexico City on 15-16 November of this year, in which a plan of action is expected to be adopted to strengthen international protection in Latin America, the Sub-regional Meeting of civil society organizations of Colombia, Ecuador, Panama, Peru and Venezuela held in Bogotá, reached the following conclusions and recommendations:

II. CONCLUSIONS AND RECOMMENDATIONS

The Meeting of civil society organizations of the participating countries:

1. *Reiterated* the importance of the Cartagena Declaration on Refugees as a pragmatic and innovative contribution by Latin America for the protection of refugees, and underlined the validity and applicability of its principles to situations of forced displacement in the Andean region and Panama.

2. *Recalling* the antecedents and principles that inform and underlie the Cartagena Declaration, the Meeting acknowledged that, in addition to refugees, there are also other individuals in need of international protection. Similarly, the Meeting reiterated the emphasis of the Cartagena Declaration on Refugees on providing protection and finding durable solutions, as well as the complementary nature of the various branches of International Law for the protection of the individual.

3. *Underlined* that the Cartagena Declaration on Refugees contains a series of international protection principles, inspired by the principles of international solidarity and responsibility-sharing, and must therefore not be equated to its definition of refugee, for such a definition is but one of its multiple contributions.

4. *Underscored* the importance of recognizing areas of convergence between International Human Rights Law, International Humanitarian Law and International Refugee Law by adopting an integral and converging approach to the rights of the individuals at the normative, interpretative and operational levels. The Meeting recommended applying the standards of these three areas of international law to supplement and strengthen the protection of refugees, asylum seekers, internally displaced persons and returnees, with the aim of consistently ensuring the highest level of protection for the individual.

5. *Reaffirmed* the validity and relevance of the principles and standards contained in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. The Meeting also recommended incorporating the Guiding Principles on Internal Displacement into the regional protection system and urged States to make a practical application of these standards in light of the humanitarian spirit of the Cartagena Declaration, particularly its pragmatic and innovative approach based on the complementary nature and convergence of the various branches of International Law for the Protection of the individual.

6. *Underlined* the pressing need to promote the enforcement of international refugee law and to rescue the principles of the Cartagena Declaration *vis-à-vis* the magnitude of the forced displacement in the region. The Meeting also recommended promoting the development of a regional approach to address the humanitarian crisis and to adopt appropriate solutions, through political will, dialogue, consensus, and international cooperation.

7. *Urged* States to ensure and respect the right to seek and be granted asylum as embodied in Article 22(7) of the American Convention on Human Rights and similar national constitutional provisions.

8. *Reaffirmed* the fundamental principles of the international protection for refugees and the *jus cogens* character of the principle of *non-refoulement* and the prohibition of rejection at the borders, cornerstones of International Refugee Law. The Meeting also acknowledged the developments of international concerning the principle of *non-refoulement,* in particular its incorporation in human rights instruments such as Article 22(8) of the American Convention on Human Rights and Article 3 of the Convention against Torture.

9. *Urged* States to comply with their responsibilities relating to economic, social and cultural rights such as health, education and housing. Without detriment to the progressiveness principle and the need for international cooperation, the Meeting reiterated the immediate enforceability of a series of obligations *vis-à-vis* refugees, asylum seekers, displaced persons and population at-risk that should not be evaded or unobserved.

10. *Identified* with great concern certain practices carried out to the detriment of refugees and other uprooted populations, including de facto *refoulement* or induced returns, deportations, entry obstacles and the lack of respect of the principle of no sanction for illegal entry and other guarantees to which they are entitled. The Meeting stressed that these practices generate State responsibility, and so does the denial of rights, particularly the economic, social and cultural rights.

11. *Urged* States not to use neologisms or inaccurate terminology such as "in-transit displaced person" or "persons who require protection," which are devoid of juridical content, deny the declarative nature of the refugee status, and have negative implications on the quality of protection and the effective exercise of rights.

12. *Called upon* the States and civil society to take necessary measures to prevent, combat and eliminate all forms of discrimination and xenophobia against non-nationals, particularly migrants, internally displaced persons, refugees and asylum seekers. The Meeting stressed the importance of raising awareness among receiving communities about the humanitarian problems faced by victims of forced displacement, their rights and fundamental guarantees.

13. *Affirmed* the need to put an end to impunity of human rights violations and fundamental freedoms, as well as the victims' rights to due reparation, while underlining that violations of human rights and of international humanitarian law are fundamental causes of forced displacement.

14. *Verified* that the humanitarian crisis persists, the most dramatic consequence of which has been the forced displacement of more than three million people within the Colombian territory.

15. *Urged* the States of the region, international organizations and the various sectors of the society to recognize the existence of an internal armed conflict in Colombia, as well as the occurrence of massive violations of human rights and of international humanitarian law. The Meeting also urged States to become more aware of the scope of the humanitarian crisis within their territory and in border regions in order to search for humanitarian solutions, with the firm support of the international community, in an effort to provide protection to refugees and other persons in need of such protection, while at the same time benefiting the populations of the receiving communities on equal conditions.

16. *Verified* with regret the increasing and extreme situation faced by women, boys and girls and youths as a result of the humanitarian crisis, and urged States to take measures to prevent and mitigate such negative consequences. In addition, the Meeting called on civil society to continue researching and conducting studies to analyze these problems, propose possible solutions, and implement specific programmes of assistance based on outlined priorities.

17. *Urged* all parties directly participating in hostilities within an armed conflict to observe at all times and under all circumstances, the humanitarian principles of limitation, distinction, proportion and protection of the civilian population and to ensure humanitarian access to the affected populations.

18. *Recommended* that States ensure access of humanitarian agents, and the right of the victims of forced displacement to protection and assistance. The Meeting also recommended that States recognize the humanitarian space and humanitarian needs of the victims.

19. *Recognized* the persistence, particularly in the Andean region and the Caribbean, of large-scale influx of asylum seekers and refugees resulting from situations caused by internal armed conflicts, generalized violence, massive human rights violations and circumstances seriously disturbing public order.

20. *Underlined* the importance of considering that four out of the five elements of the refugee definition contained in the Cartagena Declaration, namely: generalized violence, external aggression, internal conflicts and other circumstances seriously disturbing public order, must be interpreted in light of International Humanitarian Law. To this end, the Meeting recommended UNHCR to elaborate a Manual of Procedures and Criteria to ensure the effective application of the refugee definition of the Cartagena Declaration.

21. *Underlined* that, regardless of the crossborder migratory flows that have characterized the region, such flows are linked primarily to causes that generate forced displacement and not exclusively to economic reasons.

22. *Welcomed* the constructive nature of the recommendations and conclusions adopted in the meetings of Brasilia and San Jose, and warned of certain interpretations contrary to International Refugee Law contained in the conclusions and recommendations adopted in the meeting of Cartagena de Indias by government representatives of the Andean region and Panama. Such interpretations were evidenced at the moment of claiming a "due balance between the legitimate security concerns of the States and the humanitarian needs of those who require protection, while safeguarding the peaceful, non-political and humanitarian character of asylum."

23. *Verified* that security concerns have a relevant role in national, regional and international agendas as part of the legitimate interests of the States. However, the policies adopted within this framework must respect human rights, the rule of law, and international obligations assumed by States regarding the protection of individuals.

24. *Urged* States to review their public policies concerning refugee protection in the region, taking into account their international and regional commitments related to refugees, human rights and humanitarian law. The Meeting also suggested reviewing the Andean community normative framework with the purpose of verifying the compatibility and legality of the bilateral agreements in terms of border issues.

25. *Urged* States to refrain from obstructing, either through military presence or undue documentation requirements, the free and legitimate movement of persons.

26. *Verified* the external and internal effects of forced displacement in the region, which influence neighboring countries in a differentiated manner and urged States and receiving communities to bear in mind their common Andean roots in view of increasing security concerns and xenophobic manifestations.

27. *Expressed* its concern for the social exclusion, poverty and increased militarization of some border regions, while urging States to establish a greater presence in the border areas where assistance needs of the uprooted population are concentrated in an effort to strengthen the rule of law through the permanent institutional presence of State agencies and monitoring institutions such as the Ombudsman. The Meeting also urged States to adopt creative policies conducive to the insertion and local integration of uprooted populations in urban centers.

28. *Verified* that the various countries of the Andean region and Panama have national legislation and institutions for refugee protection. However, the Meeting expressed concern that some regional legislation is inconsistent with international and regional standards relating to refugee and human rights. Furthermore, the Meeting urged the governments to amend such legislations in order to eliminate those provisions inconsistent with instruments of international for the protection of the individual.

29. *Verified* that the national legislation of the various countries of the Andean region and Panama is not homogeneous and underlined the importance of harmonizing such legislation as well as the procedures and criteria to determine refugee status. The Meeting urged UNHCR, with the support of the civil society, to provide its technical advice to States in harmonizing their normative framework and procedures, in particular by adopting coherent and consistent criteria for determining refugee status. To this end, the Meeting also urged UNHCR, in accordance with its mandate, to provide opportunities for dialogue with civil society.

30. *Verified* the existence of state practices undermining the protection of refugees and other persons in need of such protection by favoring restrictive interpretations of the refugee definition and through the use of arbitrary migratory controls and inferior protection regimes, all of which contrasts with the generous asylum tradition in the region and the international obligations of the States concerning human rights and refugees.

31. *Expressed* concern about the fact that some countries in the region do not apply the criteria and standards established in their own national legislation for the protection of refugees and other persons in need of such protection. The Meeting also urged civil society to have recourse to constitutional remedies and national legislation to achieve a more effective protection.

32. *Verified* that some of the countries in the region have incorporated the refugee definition of the Cartagena Declaration on Refugees and urged States that have not yet done so to include and apply such a definition in their national legislation.

33. *Recommended* strengthening the work of national eligibility committees and promoting the full and effective participation of civil society, while reiterating the need to reinforce their role as guarantors in these procedures. In addition, the Meeting recommended looking into the possibility of reinforcing the control and guarantee functions of Ombudsmen in such procedures.

34. *Recognized* the importance of ensuring that the national structures to determine refugee status comply with the standards of due process, effective remedies and other judicial guarantees, including the duty to state the reasons for rejecting a case and establishing procedures of appeal before independent instances. To this end, the Meeting urged States to take the necessary measures to adjudicate asylum claims within a reasonable time, to streamline procedures and the issuance of documents, to ensure the presence of these agencies in border regions, and to provide training on refugee law and human rights to their staff.

35. *Recognized* the relevance of the protection efforts made by Ombudsmen in the region and urged them to continue strengthening their monitoring and protection activities by having recourse to constitutional remedies and by supervising the procedures for refugee status determination, to ensure their compliance with all due process guarantees.

36. *Acknowledged* the work of the Inter-American human rights system in the protection of refugees, internally displaced persons and returnees in the region, particularly with regards to the precautionary measures and provisional measures adopted by the Inter-American Commission and the Court, respectively. The Meeting also recommended more extensive use such bodies to complement national protection.

37. *Recommended* using the advisory jurisdiction of the Inter-American Court to establish the content and scope of the right to asylum within the purview of the regional and international human rights instruments. To this effect, the Meeting stressed the importance and pioneering nature of the Advisory Opinion No. 18 of the Inter-American Court of Human Rights on the Juridical Status and Rights of Undocumented Migrants and urged States to ratify the Convention for the Protection of Migrant Workers and their Families.

38. *Urged* the States of the region to provide stable opportunities for dialogue with civil society and representatives of the affected populations in an effort to achieve a higher level of understanding and to improve the protection of uprooted people in the region. The Meeting also emphasized the relevant contribution made by civil society in developing and implementing International Refugee Law and the Cartagena Declaration.

39. *Underlined* the need to ensure that States facilitate and promote the participation of organized civil society to continue their work on behalf of persons in need of protection in the region, by providing legal and humanitarian assistance and supervising compliance with existing regulations, as well as by contributing with their opinions and technical support in public policy-making.

40. *Underlined* the interest of civil organizations in creating common opportunities for regional dialogue in order to share experiences, achieve a higher level of understanding and coordinate actions with the purpose of improving the promotion and protection of uprooted people in the region.

41. *Underlined* the importance of ensuring that States, international organizations and civil society join efforts with communities at-risk and communities that have been victims of forced displacement in order to incorporate them actively in formulating public policies tending to prevent, remedy and punish the actions leading to displacement.

42. *Urged* States and international organizations to duly consider the differentiated protection needs of the population, particularly those of women, boys and girls, indigenous groups and afro descendants in vulnerable conditions and recommended including gender-based criteria and other grounds prohibited by the non-discrimination principle when considering refugee status.

43. *Urged* States to recognize the rights of indigenous peoples, and to recognize and respect their traditional authorities as well as their traditional protection and solidarity mechanisms, regardless of their country of origin.

44. *Expressed* their deep concern for the public manifestations made by some of the governments of the region that disqualify and put at risk the work of non-governmental organizations, human rights advocates and officials of humanitarian agencies seeking to protect and assist internally displaced persons, asylum seekers and refugees. To this effect, the Meeting urged the Offices of Public Prosecutors and all immediate superiors to comply with their responsibility of punishing all individuals whose declarations, actions or omissions (a) disqualify or put at risk the life, integrity or security of refugees and internally displaced persons, as well as human rights advocates or (b) incite xenophobia.

45. *Urged* the mass media to promote a respectful image of refugees and internally displaced persons, as individuals entitled to rights and as beneficiaries of international protection with the purpose of avoiding the dissemination of stereotypes and racist or xenophobic manifestations. Additionally, the Meeting urged the media to contribute to the creation of programmes promoting the values of solidarity, respect, tolerance and multiculturalism as the groundwork for human rights education.

46. *Underlined* the pressing need to build and strengthen the capacities of uprooted populations to ensure full exercise of their rights established in national legislation as well as in International Refugee Law, International Human Rights Law and International Humanitarian Law. The Meeting also urged States and civil society to reinforce the education, accompaniment, and information-sharing processes in favor of those populations.

47. *Urged* States to provide training in the areas of human rights, International Humanitarian Law and International Refugee Law to the armed forces and the police, as well as to other state officials who

assist uprooted populations. In addition, the Meeting recognized the need to train judges and judicial officials, institutional control agencies, Ombudsmen and local authorities in the aforementioned areas with the possible participation of UNHCR, the Inter-American Institute of Human Rights, universities and other civil society organizations.

48. *Expressed* its concern for the application of programmes for the return of displaced populations not complying with the principles of voluntariness, eligibility, security and dignity. The Meeting also urged the governments to observe these principles as well as the Guiding Principles on Internal Displacement.

49. *Urged* States to respect the principle of voluntariness in the context of repatriation, emphasizing that voluntary repatriation is a strictly humanitarian and non-political act. This principle requires the free and individual will of the person. Repatriation must take place under conditions of security and dignity, and preferably, and at the will of refugees, it must take place in the area of origin or previous residence, with due respect for all human rights, particularly personal integrity, freedom of movement and free election of the place of residence. To this end, the Meeting underlined the principles elaborated by the Inter-American Commission in cases of precautionary measures.

50. *Agreed* to promote holding meetings between civil society organizations and each of the governments from this sub region, prior to the commemorative event in Mexico, with the purpose of fostering constructive dialogue on the issues proposed in the recommendations and conclusions of the Meeting of government representatives of the Andean region and Panama, and the recommendations and conclusions resulting from this Meeting.

51. *Suggested* convening an International Humanitarian Conference within the framework of the application of the Plan of Action to be adopted in Mexico, in which governments, civil society organizations of the region and international organizations address in depth the humanitarian and human rights crisis in Colombia and promote an Agenda for Protection for finding appropriate and durable solutions for the affected persons and to provide opportunities to reach a political and negotiated solution of the armed conflict.

52. *Recommended* that UNHCR consider the participation of refugees and internally displaced persons in the commemorative process of the Cartagena Declaration on Refugees.

III. Papers prepared by the regional experts of the commemorative process

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CONTRIBUTIONS OF THE CARTAGENA PROCESS TO THE DEVELOPMENT OF INTERNATIONAL REFUGEE LAW IN LATIN AMERICA

Leonardo Franco (*)
Jorge Santistevan de Noriega (**)

CONTENTS

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INTRODUCTION♦

The crisis of Central American Refugee

a) Background

1. Towards the late seventies, the massive presence of refugees in Central America reached unprecedented dimensions. Host countries and communities were not familiarized or prepared for this kind of unparalleled migratory trend in Latin America,[1] characterized by inclusion of the most underprivileged sectors of the population with a significant presence of indigenous populations such as the Mayas from Guatemala in Mexico and the Miskitos from Nicaragua in Honduras.

2. During the eighties, over two million people were uprooted as a result of fierce civil wars waged in El Salvador, Guatemala and Nicaragua. Those most touched by these conflicts were mainly poor rural communities. All of Central America was affected by such refugee flows, which were caused not only by the conflicts themselves but also exacerbated them. Aside from the three countries involved directly in the conflict, Belize, Costa Rica, Honduras, Mexico and the United States were also implicated in the refugee situation as hosts to a considerable number of refugees as well as asylum-seekers and migrants.[2]

3. According to CIREFCA's analyses, the uprooted population was composed of a particularly vulnerable group of nearly 150,000 who were recognized as refugees and received assistance. The second group was the returnees who, having been refugees in the past, decided to return to their country of origin voluntarily and who also needed assistance to achieve durable solutions.[3] The conflict and the crisis also caused the displacement of a third group, the internally displaced persons, who stayed within their own countries having been expelled from their homes for the same reasons as the refugees and being deprived means of subsistence. Even though this group was subject to the jurisdiction and protection of the authorities of their own countries, they also required special assistance. Among the population affected by the crisis, another group existed outside of their own country,[4] so-called externally displaced persons who, not having been recognized as refugees, also required special assistance in view of their uprootedness and the additional burden that they represented for the communities where they settled.

♦ The authors express their gratitude to Laura Gianelli from Buenos Aires, Argentina, and to Alfredo del Prado-Ramos from Lima, Peru for their contribution in the documentation and preparation of this document.

1 CIREFCA/89/10, International Conference on Central American Refugees (Guatemala City, May 29-31, 1989), *Report submitted to the International Conference on Central American Refugees by the Office of the United Nations High Commissioner for Refugees (UNHCR),* April 1989, Paragraph 129.

2 UNHCR, *La situación de los refugiados en el mundo 1995: En busca de soluciones (The State of the World's Refugees 1995: In Search of Solutions),* Alianza Editorial, Madrid, 1995, page 50.

3 According to the figures provided by the corresponding governments, there were 13,500 Guatemalans, 35,000 Nicaraguans and 13,000 Salvadorans in the region. CIREFCA/89/13/Rev. 1, Paragraph 5.

4 Denomination that refers to persons who have been compelled to abandon their homes and seek shelter in a neighboring country. Regardless of whether their lives, security or freedom may have been affected or not by the conflict, the crisis has made it impossible for these persons to be guaranteed sustenance and lead a normal life. CIREFCA/89/13/Rev.1, Paragraph 7.

4. The grave nature of the drama was also measured in terms of the complexity and depth of the social problems that displacement entailed for the host countries. However, the most relevant issue was the consequences caused by serious protection problems faced by refugees including the violation of the principle of *non-refoulement*, the mistreatment of refugees, the incursion of regular armies into refugee camps in the territory of another State and the resulting tension among States.

5. The problems were intensified by conflicts inherent to the Cold War period, since the aforementioned conflicts could be considered as "North-South" social conflicts and "East-West" conflicts at the geopolitical level. In addition, the refugees sometimes settled in territories that were under dispute, particularly on the border of Honduras and El Salvador. There were frequent violations of the basic principles of International Humanitarian Law, of the principle of neutrality and of the non-political nature of humanitarian assistance. Refugees were also concentrated in closed camps usually located near the borders, a dynamic that simplified the provision of some assistance and protection. However, such camps caused at the same time the isolation of those populations, which were differentiated from the local communities and were subject to abuse of a different kind and complexity. The most evident example of this situation occurred in the Colomoncagua camp in the western region of Honduras near the border of El Salvador.

6. For these reasons, the Central American conflict of the eighties and its impact on the protection of international refugees were major concerns for the international community, considering the difficulty in finding medium and long-term solutions to those problems. This was the situation that framed the Cartagena Colloquium held in the historic city in November of 1984.

b) Document Methodology

7. The objective of this document, prepared for the commemoration of the 20th anniversary of the Cartagena Declaration, is to analyze the Cartagena process. It explores the circumstances leading to the colloquium itself and the impact of the Cartagena Declaration resulting from that meeting and culminating in the "CIREFCA Process", the peace settlement in the region, and in the end of the drama of Central American refugees.

8. The first question that we will try to answer is: what institutional legal instruments were accessible to the countries of the region and the international community to solve the crisis? A more in-depth analysis will be made of the following issues: a) the crisis of the Latin American system of territorial and diplomatic asylum; b) the slow incorporation of International Refugee Law established by the 1951 Convention on the Status of Refugees and its 1967 Protocol. At the institutional level, we will analyze the situation in light of the establishment of the United Nations High Commissioner for Refugees (UNHCR).

9. We will also analyze the impact and the lessons learned from the serious crisis that derived from refugees in Latin America: the crisis generated by the systematic violations of human rights in some countries of South America where UNHCR exercised its international mandate to protect Latin American refugees for the first time.

10. As an antecedent of Cartagena, particular importance will be given to the first colloquium convened by UNHCR to address the regional problems of refugees held in Tlatelolco in 1981. This meeting and subsequent action were aimed at promoting refugee law in the region, especially through the

cooperation project between the OAS and UNHCR. They also addressed the work done by the Inter-American Commission on Human Rights relating the protection of the rights of refugees in the continent.

11. The critical work of the Contadora Group (Mexico, Venezuela, Colombia and Panama) is analyzed as a first step toward solving the problem of Central American refugees in an effective and durable manner. The efforts of the Contadora Group were visionary as they linked the refugee problem to peace building. An analysis is made of the contributions of the Cartagena Declaration itself and the progress made within the "Cartagena process" while reaffirming the objectives proposed within the CIREFCA framework and the Inter-American Colloquium leading to the San Jose Declaration in 1994 resulting later in significant regional legislative and judicial developments.

CHAPTER ONE

The issue of International Refugee Law: The existing legal limbo

12. The Cartagena Declaration finds its roots in: 1) a long world and regional history of refugee protection and the use of asylum as a practical tool (the use of the old notion of asylum, conceived of as the protection provided by the State to persons persecuted for political reasons in the world and in Latin America); 2) the search for the convergence of International Refugee Law and International Humanitarian Law and the linkage of these with International Human Rights Law;[5] 3) informal methodology aimed at successfully reaching consensus, promoted by the UNHCR in the region with the participation of governments, regional and world organizations, academics, and the civil society in Latin America to promote the development of International Refugee Law.

13. The major legal challenge for Cartagena was providing guidelines relating to legal principles and criteria in the face of such a significant refugee crisis with open borders[6] on the basis of the principles of refugee law grounded in human rights. At the opening ceremony of the 1984 Colloquium, Belisario Betancur, the President of Colombia, said: "the Cartagena Colloquium must be considered as an action to raise universal awareness on the situation of Central American refugees in order to support the efforts made thus far, and particularly the hosting countries as well as the regional

5 In this field, there is a remarkable presentation by the Brazilian jurist, Antonio Cançado-Trindade, on the convergence of human rights, humanitarian law and refugee law. See CANÇADO TRINDADE, Antonio, "Derecho Internacional de los derechos humanos, derecho internacional de los refugiados y derecho internacional humanitario: aproximaciones y convergencias" *(International human rights law, international refugee law and international humanitarian law: points of agreement and convergence)* in *10 years of the Cartagena Declaration on Refugees, Report of the Annual Colloquium*, San Jose, Costa Rica, 1994, pp. 79-168.

6 The expression "open borders" is used to describe the regional situation in which the countries did not resort to restrictive policies nor to a formal "sealing off" of the border as a means of containing refugee displacement.

countries where refugees come from. We hope that this meeting will contribute, within its sphere of action, to making a theoretical and practical analysis with the goal of finding solutions to build peace at all levels, abandon violence and pursue equitable development with freedom".[7]

14. Cartagena and its later evolution was the crucial moment when International Refugee Law was incorporated in Latin America, revitalizing the Latin American tradition of asylum as expressed in the document "Principles and criteria for the protection and assistance of refugees, returnees, and Central American displaced persons in Latin America" (Guatemala, 1989). This concept reached was fully recognized in the generous efforts "made by hosting countries of Central American refugees despite the enormous difficulties that they have faced, particularly within the context of the present economic crisis".[8] As a result, asylum ceased to be perceived as a privilege for politicians as it began to be extended to all persons really needing it regardless of their social or economic status.

15. To appreciate the importance of the Cartagena Declaration, it is necessary to go back to the precarious preexisting juridical situation, in our view, caused by two main reasons: a) the crisis of the Latin American traditional asylum system, b) reluctance of most countries in the region to resort to international refugee protection instruments. In addition to these two reasons, which will be examined in detail later, we must add the challenge posed by completely new scenarios for which no previous experience or a specific response existed in the region within the context of International Law. There were no precise responses to such International Law challenges or institutions able to implement protection and assistance to refugees.

a) The inadequacy of the Latin American Conventions on Asylum

16. The longstanding Latin American tradition of providing humanitarian treatment to those seeking protection and asylum is widely known. As a result of the political instability of the region during the 19th and 20th centuries, asylum gained prestige in Latin America as an institution created to protect victims from political persecution.[9] The practice of granting asylum translated into the need of incorporating it into international instruments.[10]

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7 BETANCUR, Belisario, "Speech by the President of the Republic of Colombia", in *Colloquium on the international protection of refugees in Central America, Mexico and Panama: legal and humanitarian problems. Report of the Colloquium of Cartagena de Indias, November 1984,* edited by UNHCR, Regional Center of Third World Studies, University of Colombia, Bogotá, Colombia, 1986, Page 33.

8 *The Cartagena Declaration on Refugees,* 1984, Part I, Paragraph III.

9 The geographical conditions of the Americas, civil wars, coups d'état, revolutions and frequent political movements in our countries, in conjunction with the changing circumstances of the Latin American governments and institutions during the past century and the beginning of the XX century, have forced regional lawyers and politicians to establish sound protection actions against persecution and mechanisms to ensure that such actions are not subject to arbitrary temporary criteria. See MAEKELT, Tatiana B. de, *Instrumentos regionales en materia de asilo. Asilo territorial y extradición. La cuestión de los refugiados ante las posibilidades de una nueva codificación interamericana (Regional instruments on asylum, territorial asylum and extradition. The issue of refugees in view of the possibilities of a new Inter-American codification),* in Asylum and International protection of refugees in Latin America, Universidad Autónoma de Mexico (UNAM), Mexico, 1982, pp. 141-142. See also DÍAZ CISNEROS, Cesar, *Diplomatic and territorial asylum law in the Americas,* en Derecho Internacional Publico, pp. 530 and ss. Cited in GIANELLI DUBLANC, Maria Laura, *Políticas de regulación y de incorporación de refugiados – Los instrumentos de protección internacional a los refugiados y el régimen jurídico vigente en la República Argentina*, (*Refugee Regulatory and Incorporation Policies – international refugee protection instruments and the legal system currently in force in the Republic of Argentina),* Thesis, Master of Science in International Migration Policies, CEA-UBA-OIM, Buenos Aires, December 1998, pp. 34 and 36.

10 At the First South American Conference on International Private Law, the Treaty on International Criminal Law was signed in Montevideo on January 23, 1889.

17. On January 23 1889, on the occasion of the First South American Conference on Private International Law, the oldest conventional instrument was signed under the title "Treaty on International Penal Law". This Treaty, which was ratified by Argentina, Bolivia, Peru and Paraguay, in addition to establishing extradition as inadmissible in cases of political or common related crimes, contains a chapter stating that: "asylum is inviolable for those persecuted for political crimes". The 1939 Treaty on Political Asylum and Refuge contains a similar provision related to diplomatic asylum, adopted at the Second South American Conference on Private International Law, also held in Montevideo (Chapter II, article 1, paragraph 1).[11]

18. The subsequent incorporation of the right to asylum into a conventional Inter-American instrument would take place within the context of the protection of human rights. This tradition continued with the American Convention on Human Rights, following the path initiated by the American Declaration of the Rights and Duties of Man in 1948 by recognizing the right to seek and receive asylum as a human right.[12] In addition, some of the national constitutions of the region contain provisions relating to asylum, particularly those of the Central American countries.[13]

19. During the first half of the 20th century, the practice of territorial and diplomatic asylum enabled Latin American countries to solve refugee situations without major obstacles (the authors believe that the history of this chapter still remains to be written). In real terms, the High Commissioner for Refugees of the League of Nations did not have to take any actions in this region. In addition, Latin American countries contributed significantly to hosting Spanish Republican refugees[14] and refugees from other European countries, including renowned political leaders such as Leo Trotsky, who sought asylum in Mexico at the time. The asylum practice for persecuted Latin American individuals was known as a system that generally favored political, union or cultural leaders.

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11 ESPONDA, Jaime, "La tradición latinoamericana de asilo y la protección internacional de los refugiados" (the Latin American tradition of asylum and international refugee protection) in *Asylum and the international protection of refugees in Latin America,* 1ª. Ed., Buenos Aires, UNHCR-UNLA-Siglo XXI Ed. Argentina, 2003, p. 77, paragraph 12.

12 See Article 22 (7), ACHR, and Article XXVII, ADRDM. Article 22 (7) of the CADH provides that: "every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes." Article XXVII of the ADRDM establishes that: "every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements". See MANLY, Mark. "El asilo y la protección internacional de los refugiados en América Latina: Análisis crítico del dualismo "asilo – refugiado" a la luz del Derecho Internacional de los Derechos Humanos" *(Asylum and the international protection of refugees in Latin America: critical analysis of the 'asylum-refuge' dualism from the perspective of Internacional Human Rights Laws*), in FRANCO, Leonardo (coordinator) in *El asilo y la protección internacional de los refugiados en América Latina*, 1ª. Ed., Buenos Aires, UNHCR-UN La-Siglo, XXI Ed. Argentina, 2003.

13 Following are the Latin American countries that have incorporated the right to asylum at the constitutional level: Brazil (Article 4); Colombia (Article 36); Costa Rica (Article 31); Cuba (Article13); Ecuador (Article 29); El Salvador (Article 28); Guatemala (Article 27); Honduras (Article101); Nicaragua (Article 42); Paraguay (Article 43); Peru (Article 36); and Venezuela (Article 69). For a comparative analysis, see GIANELLI DUBLANC, María Laura, "Estudio Comparativo de las legislaciones nacionales", (Comparative Study of Domestic Legislations), in *El asilo y la protección internacional de los refugiados en América Latina*, 1ª. Ed., Buenos Aires, ACNUR-UNLa-Siglo XXI Ed. Argentina, 2003, page 214 and following.

14 Saavedra Lamas, Argentinean Ministry of Foreign Affairs and jurist, at the peak of the Spanish civil war--and convinced that "the international community has reached a level of legal awareness capable of making such an instrument viable"--submitted a Convention Project on the Right to Asylum to the League of Nations in 1937, which included territorial and diplomatic asylum. His proposal was not supported by the European countries but it was adopted at the regional level. Exposition of motives for the Draft Convention on the Right to Asylum, cited by ZÁRATE, Luis Carlos, page 70, IMAZ, Cecilia, page 58 and REALE, Egidio, page 580 in ESPONDA, Jaime, op. cit., page. 90, paragraph 48.

20. The meaning of the right to asylum as a means to protect other human rights was underlined in the report of the Inter-American Commission on Human Rights entitled "Haiti and the right to asylum"[15] of April 1968. The report clearly outlined the scope Haiti had attached to its denunciation of the Convention on Territorial Asylum-- together with the rest of the conventions on asylum also denounced by the Haitian government in 1967-- when it stated that "the Commission, considering the existing connection between the right to asylum and fundamental human rights, estimated that the denunciation of such conventions would affect the respect for human rights embodied in the American Declaration of the Rights and Duties of Man".[16] The asylum conventions, the effects of which ceased in Haiti a year after the denunciation, that is, on August 1, 1968, marked the crowning of the efforts made by the Latin American countries to ensure the effective protection of the right to asylum, which is considered to be a deeply-rooted legal institution in the nations of the continent. The purposes of asylum "...are to protect the life, freedom and security of persons persecuted for political crimes and to embody the long-existing aspiration of the Continent to ensure respect for fundamental human rights".[17]

21. "Asylum is the first right considered by legal agreements among the governments of the Americas and its incorporation into the American Declaration of the Rights and Duties of Man (Article XXVII) was due to the conviction that its defense and observance is as important as any of the other rights embodied herein". Unfortunately, the absence of an international conventional framework for the protection of human rights at the time and the lack of adequate mechanisms to ensure the legal protection of territorial asylum filed this case in the archives of the international legal system of the Americas as one of the most evident manifestations of the ineffectiveness of some of our international instruments aimed at protecting the human rights of refugees.[18]

22. The protection system of the Inter-American conventions on asylum experienced its first crisis in the sixties when it was incapable, in various countries, of responding to large refugee influxes coming mainly from Caribbean countries, particularly Cuba, as evidenced in the 1965 Annual Report of the Inter-American Commission on Human Rights.[19]

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15 OAS/Ser. L/V/II. 19, doc. 6, in the Inter-American Yearbook on Human Rights (1968), page 215 and following.

16 The IACHR stated that "although any of the Member States, in the lawful exercise of their rights, may denounce the aforementioned conventions, as established in its own provisions, (...) the Commission considered the fact that the government of Haiti had denounced such conventions when the existing insecurity in its territory had forced several citizens to seek asylum, which led the Commission to believe that denouncing such conventions was closely related with the situation of human rights in that country".

17 At the exposition of motives of the Draft, which laid the groundwork for the Convention on Diplomatic Asylum signed in Caracas during the Tenth Inter-American Conference in 1954, the Inter-American Juridical Committee expressed the following: "diplomatic asylum is a humane institution practiced by the States and recognized by international law, although the extension and forms of its exercise have regional variations. Such institution has particular characteristics in Latin American countries given the political, historical, legal and geographic conditions inherent to the countries of the Continent. International practice has established the name of "right to asylum" for this institution as it may not be identified with the rights of a State. It differs from said rights in that the State and the diplomatic agents that exercise the right to asylum do not act to their own benefit, for this right is a lesson of brotherhood, an elevation of customs and a calling for generosity. Its aim is to maintain and affirm the highest principles of respect for the human person and exaltation of the universal and everlasting natural justice over the temporary and local accidents of social and political organization". Cited by MAEKEL T, Tatiana B. de, op. cit., pp. 156-157.

18 MAEKELT, Tatiana B. de, op. cit, p. 157.

19 The 1965 report of the Inter-American Commitssion revealed this new reality and also underlined the inadequacy of the conventional Latin American instruments to provide effective solutions to the situation. The report indicated that, up to 1960, the political exiles of Latin American countries moved with relative ease to neighboring countries where asylum was

23. The massive exodus of Cubans beginning in 1959 had challenged up to then the existing premises concerning smooth local integration of refugees and the absording capacity of the countries in the region. Few countries had adequate resources to provide care and assistance to refugees or had created institutions and adopted adequate legislation to handle refugee situations simultaneous with social and legal problems arising from the sudden mass influx of asylum seekers.[20]

24. In addition to the thousands of Cubans who left their country (approximately 700,000 who settled in the United States during the sixties), the IACHR also observed the difficult situation posed by thousands of exiles from Haiti, Paraguay and Bolivia as well as hundreds of them from the Dominican Republic, Nicaragua, Honduras and other countries. A report issued by the IACHR in 1965 warned that: "the problem of political refugees in Latin America has changed substantially during the past years. These are not refugees of the past, who were generally few in number and mainly leaders having access to financial resources. At present, the problem lies in the large numbers of persons, most of them without possessions of any kind, moving to the territory of other Latin American republics as a result of persecution, the political movements occurring in most countries, and the lack of democratic stability in some of them. This situation, which is aggravated by extended periods of exile, has not been adequately considered either by international law[21] or the domestic legislation of the States and, consequently, political refugees are subject to distressing situations in Latin America".[22]

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usually granted in accordance to domestic legislation and the provisions of the international conventions that were in force at the time. The IACHR emphasized that the efficiency of this process was due to the following factors: 1) a long tradition of displacement of exiles for political reasons from one country to another; 2) common language, culture and traditions facilitating adaptation; and 3) the fact that political exiles frequently belonged to the wealthiest and most educated sectors, who usually invested and owned property in their countries of origin and who, consequently, did not become an economic burden to the hosting State. OAS, "The situation of political refugees in the Americas: report prepared by the Secretariat of the Inter-American Commission on Human Rights", in D'ALOTTO, Alberto, in *El asilo y la protección internacional de los refugiados en América Latina,* 1ª. Ed., Buenos Aires, ACNUR-UNLa-Siglo XXI Ed. Argentina, 2003, pp. 157-174.

20 The ICHR stated in 1965 that "modern times have changed the nature of refugee problems in the hemisphere. Today, the new problems in Latin America are dramatized in the extreme by the developments in Cuba and by the larger number of political refugees of all kinds that have fled the island. Other less dramatic cases have begun to make history as well, and although the problem is expected to cease in Latin America, the advent of the Cold War in the hemisphere justified the concern for taking adequate measures to solve such situations. In VARGAS-CARREÑO, Edmundo, "El régimen de asilados y refugiados y su protección por el sistema interamericano" (*The asylum and refugee regime and their protection by the Inter-American system*), in *Seminar on political asylum and the situation of refugees held in La Paz, Bolivia from April 19-22 of 1993, organized by the Ministry of Foreign Affairs and Culture of Bolivia and the United Nations High Commissioner for Refugees* published by Universo, La Paz, 1983, page 68.

21 It is surprising that a rigorous text such as this makes reference to "international law" that found its expression in the 1951 Convention Relating to the Status of Refugees. Evidently, the ICHR's approach refers to Inter-American law, but it is also true that the legal and diplomatic circles of 1965 considered that the 1951 Convention applied mainly to European refugees.

22 "The 1965 report of the IACHR finally summarized the most salient problems affecting the rights of refugees in the region in the following manner: 1) a lack of domestic legislation in Latin American countries that would recognize and adequately determine the situation and status of the political refugee; 2) the inexistence of an Inter-American convention including and regulating the situation of political refugees; 3) the lack of an agency within the Inter-American system entitled with the pertaining powers to provide assistance to political refugees; 4) traveling difficulties faced by refugees; 5) economic problems aggravated by work prohibitions or the lack of employment opportunities causing refugees to become an economic and social burden for the hosting country". In IACHR, *"Refugees and the Inter-American system",* in *the Annual Report of the Inter-American Commission on Human Rights 1981-82,* Chapter VI (b), areas where measures must be taken, OAS/Ser.L/V/II/57, doc. 6 rev. 1, Washington, U.S.A., September 20, 1982.

25. Consequently, the Second Special Inter-American Conference, held in Rio de Janeiro in 1965, recommended that the Inter-American Juridical Committee formulate a Convention draft on Refugees. The Inter-American Juridical Committee prepared a convention draft on refugees that was never adopted.[23] However, the idea of solving refugee problems in Latin America by means of regional instruments and autonomous institutions persisted up until the Cartagena Colloquium in 1984 as evidenced in the 1984-85 IACHR Annual Report.[24] In view of newly emerging problems, the countries of the region persevered in drafting regional instruments when the 1951 Convention relating to the Status of Refugees was already in force and only a few months from adopting the 1967 Protocol that would extend the scope of such Convention without limits.

26. The capacity of the Latin American asylum system to solve refugee problems was put to test once again by events occurring in South America in the seventies and the pressing protection needs arising from a situation marked by life threatening circumstances and given the overruling national security doctrine that made reliable protection in a neighboring country a risky endeavor.[25] In fact, the seventies, which began with the massive escape of politically persecuted persons in South America and resulted in mass refugee flows, mainly farmers, in Central America, posed an even more serious problem. Since then, the phenomenon of mass influx has forced governments to abandon the asylum tradition and apply the universal system more extensively with the aid of UNHCR.[26] The change in scale and characteristics of the new refugee situation made it impossible in practice to carry out individual refugee status determination to grant individual refugee status.[27]

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23 SAN JUAN, César and MANLY, Mark, Informe General dela Investigación. El asilo y la protección internacional de los refugiados en América Latina: análisis crítico del dualismo "asilo-refugio" a la luz del Derecho Internacional dr los Derechos Humanos (*General research report. Asylum and the international protection of refugees in Latin America: critical analysis of the "asylum-refugee" duality from the perspective of International Human Rights Law),* in "El asilo y la protección internacional de los refugiados en América Latina", 1ª. Ed., Buenos Aires, ACNUR-UNLa-Siglo XXI Ed. Argentina, 2003, Page 24, paragraph 14.

24 "The reports submitted by the Commission to the Assembly referred to the fact that the international instruments currently in force within the OAS framework relative to asylum and refuge such as the Convention on Asylum (1928); the Convention on Political Asylum (1933); the Convention on Diplomatic Asylum (1954) and the Convention on Territorial Asylum (1954) are not adequate instruments for the present conditions under which displacement influxes are taking place in the continent, particularly in Central America and the Caribbean. (...) The preceding recommendations were reiterated in the 1982-1983 and 1983-1984 Annual Reports, particularly with regard to the creation of an Inter-American authority aimed at addressing refugee problems, without implying the need to create a body parallel to the existing agency in the United Nations, that is, the UNHCR, "as this would duplicate efforts and would not recognize the outstanding work done thus far by the Office of the High Commissioner for Refugees". On the contrary, as stated in the aforementioned reports, the objective is to create an authority within the purview of the OAS that would support and contribute to UNHCR's objectives that seek to ensure respect for the basic rights of refugees and displaced personas. In IACHR, "Human displacements in the region and the protection of refugees", in IACHR, *1984-85 Annual Report of the Inter-American Commission on Human Rights,* Chapter V, OEA/Ser.L/V/II.66, Doc. 10 rev. 1, Washington, USA, October 1, 1985.

25 SAN JUAN, César and MANLY, Mark, op. cit., page 24, paragraph 14.

26 OAS, Estudio comparativo entre los instrumentos internacionales de las Naciones Unidas y los del Sistema Interamericano aplicables al regimen de asilados, refugiados y personas desplazadas. (*Comparative analysis of the United Nations instruments and those of the Inter-American System applicable to the regime of asylees, refugees and displaced persons),* Undersecretary of Legal Affairs, General Secretariat of the OAS, Washington, April 19, 1984.

27 OAS, El Derecho Internacional de los Refugiados y su aplicación en América Latina (*International Refugee Law and its application in Latin America),* 1982 Inter-American Juridical Yearbook, Organization of American States, Washington, 1983, page 208.

27. In response to the phenomenon of the mass exodus of asylum seekers, Latin America began to supplement international instruments with efforts tending to protect such persons and find appropriate solutions for that particular situation. In this way, in keeping with the asylum tradition of the region, UNCHR's activities and the international instruments on refugees came on the scene to supplement the efforts that those countries had made to face the needs expressed by refugees. Towards the end of the sixties, Regional UNHCR Offices were opened in this part of the world and States began to adhere to or ratify the 1951 Convention and the 1967 Protocol relating to the Status of Refugees as of 1962 throughout Latin America.[28]

28. Years later, the IACHR affirmed that "the OAS has the responsibility to contribute to the resolution of the problems arising from the displacement of persons, particularly in view of the new refugee situation that has emerged over the last years". According to the Commission, the events of the seventies and at the beginning of the eighties "have modified the old tradition of granting political asylum".[29]

29. The Committee also added that "these refugees are predominantly civilians who have not committed criminal acts or political acts of terrorism. Many of them, perhaps the majority, have suffered violations of fundamental human rights in their countries of origin as well as in the course of their search for safe refuge". In virtue of these new considerations, the IACHR believed that the OAS should adopt measures to mitigate the situation of hundreds of thousands of Latin American refugees in the region, who were displaced from their homes without any possibility of obtaining protection from any government.[30]

b) The slow incorporation of International Refugee Law[31]

30. Esponda argues that "the Latin American countries which had been pioneers since the thirties in promoting the positive recognition of asylum at the international level, adopted a distant attitude during the entire process conducive to the 1951 Convention on the Status of Refugees"[32] but developed an autonomous discussion which culminated in the 1954 Conventions of Caracas. It is worth noting that only four Latin American countries – Brazil, Colombia, Cuba and Venezuela- sent delegations to the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons in which

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28 SANTISTEVAN, Jorge, *La protección internacional a los refugiados en México, Centroamérica y Panamá: Problemas jurídicos y humanitarios* (*The international protection of Refugees in Mexico, Central America and Panama: legal and humanitarian problems)* Working Document. *Colloquium on the international protection of refugees in Central America, Mexico and Panama: legal and humanitarian problems. Report of the colloquium of Cartagena de Indias, November 1984,* edited by UNHCR, Regional Center of Studies of the Third World, Universidad Nacional de Colombia, Bogotá, Colombia, 1986, page 42.

29 IACHR, "Refugees and the Inter-American System", in *Annual Report of the Inter-American Commission on Human Rights 1981-82,* Chapter VI (b), areas where measures must be taken, OAS/Ser.L/V/II/57, doc. 6 rev. 1, Washington, USA, September 20, 1982, paragraph 9.

30 Ibidem, paragraph 10.

31 On this issue, we agree with the argument presented by Jaime Esponda in his chapter, La tradición latinoamericana de asilo y la protección de los refugiados ("the Latin American asylum tradition and the international protection of refugees") in *El asilo y la protección internacional de los refugiados en América Latina,* 11ª. Ed., Buenos Aires, ACNUR-UNLA-Siglo XXI Ed. Argentina, 2003. Study undertaken within the UNHCR-UNLA project research framework.

32 ESPONDA, Jaime, op. cit, paragraph 93.

the preparatory work for the 1951 Convention took place. The limited participation evidenced an anticipated lack of interest in such work and contrasted sharply with the active participation of the regional governments, the largest regional block in the United Nations, in drafting the Universal Declaration on Human Rights.[33]

31. After analyzing delegates' interventions from these four countries, it is clear that there were certain underlying reasons explaining their lack of interest.[34] The following reasons stand out: a) the reticence of Latin American States to be subject to the control or supervision of an international organization; b) the idea that the Convention would be applicable only to Europeans and that Latin America had no need for it arguing that its customary practice constituted full evidence of respect for asylum; and c) the conviction that the domestic legislation in Latin American countries sufficed to guarantee the rights of refugees, and it was therefore not necessary for them to become parties to the Convention.[35]

32. As to their reticence towards being controlled or supervised by an international organization, the delegate from Venezuela expressed his reservations to Article 35,[36] which establishes the obligation to cooperate with the UNCHR Office in the exercise of its responsibilities and which, to some degree, restricts the discretion of governments in granting protection to refugees.[37] Five years later, according to an official document, the government of Chile believed that "the eventual adherence of Chile to the Convention would not improve in any way the current legal situation of the government or the situation of potential refugees; and it would have the disadvantage of leaving the government subject to the control of foreign authorities in the application of principles that had been applied so far by our authorities without the need for international control".[38]

33. The idea that the Convention would be applicable only to Europeans arises from the fact that a significant number of the State parties to the 1951 Convention believed that such an instrument would only resolve refugee situations occurring in Europe and prior to 1951. However, one clause addressed the possibility of applying the Convention to other parts of the world. The temporal limitation was lifted by the 1967 Protocol after which the 1951 Convention gained universal validity without temporal limits. It was this broad scape of application that was delayed in being accepted in Latin America.

34. The notion that Latin America did not need the Convention because its customary practice already constituted full respect for asylum was expressed by the representative from Colombia at the Conference of Plenipotentiaries. He stated that his government had attended the conference with the

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33 MANLY, Mark, *Notas sobre la consagración del asilo a nivel universal y regional americano* (*Notes on the embodiment of asylum at the universal level and in the Latin American region).* Document resulting from the research conducted by UNLA-UNHCR. "Asylum and the international protection of refugees in Latin America", San Jose, Costa Rica, August 2001.

34 UNHCR, *Travauax préparatoire*s, records of the 1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Geneva, Switzerland.

35 ESPONDA, Jaime, op. cit., paragraph 96.

36 The numbering of the articles corresponds to the approved text of the Convention.

37 UNHCR, *Travaux préparatoires,* op. cit.

38 Juridical Department, *Report No.382/ g52,* Ministry of Foreign Affairs, Santiago, Chile, October 10, 1956 in ESPONDA, Jaime, op. cit., footnote N° 118 and paragraph 97.

purpose of contributing to the work of the United Nations in the interest of European refugees, but that he did not think that this conference would try to solve the problems of Latin American refugees arguing that no such problems actually existed.[39] The weight of this idea persisted throughout and was one of the reasons why the Convention was so slowly adopted by Latin American countries.

35. In brief, international instruments could not be invoked and they were not in effect in Latin America[40] during the crisis in South America or during the first stage of the Central American crisis, except for the case of Chile that we will examine later.[41] However, the 1951 Convention was gradually accepted thanks to the UNHCR and its direct protection and promotion conducted based on its Statute (Resolution 428 of the V General Assembly of the United Nations). Considering the limited participation of Latin America at the Conference and the arguments expressed by the delegates, the extremely slow process of adherence to the Convention should not therefore come as a surprise. A decade after its approval, only four Latin American States had become party to the 1951 Convention –only one of them did so without geographical reservations.[42] This limited the application of the instrument to events occurring before January 1, 1951 and did not cover the situation of Latin American refugees described in this document.[43]

36. It is true that despite the distance and reticence of Latin American governments towards the 1951 Convention, the document itself was clearly influenced by previous Latin American efforts. However, for many, the Convention was a European creation emerging from the European context. In fact, its origin was with those individuals considered refugees under the agreements signed in the twenties and the conventions approved by the League of Nations in 1933 and 1938. Thereafter, the Convention defines refugee as a person who has a fear of persecution as a result of the events taking place before January 1, 1951 in that continent, although it grants the States the possibility of applying the definition to events occuring outside of Europe.

37. Additionally, from a historical perspective, it could be considered that the Latin American tradition of asylum always referred specifically, since the adoption of the 1889 Treaty, to those persecuted for

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39 UNCHR, *Travaux préparatoires,* op. cit.

40 The Inter-American Juridical Committee stated that the 1951 Convention "constitutes considerable progress in the field". However, it affirmed that "due to the fact that its scope of action is limited in time and space for the tactical reasons that conditioned its adoption, it is not possible to extend it without making the corresponding adaptations to the Latin American context..." adding that until that moment [1965] "only five Latin American countries have ratified such an instrument and its regulations are not therefore applicable to all the countries of the Inter-American system". See Inter-American Juridical Committee, Official Documents, Vol. IX, page 338.

41 Chile ratified the 1951 Convention and the 1967 Protocol on January 28, 1972.

42 Between 1951 and 1961, the following countries ratified the 1951 Convention: Ecuador on August 17, 1955; Brazil on November 1960; Colombia on October 1961 and Argentina on November 15, 1961. Only Colombia ratified the 1951 Convention without geographical reservations. Ecuador lifted the geographical reservations on February 1, 1971. See GIANELLI DUBLANC, María Laura, *Políticas de regulación y de incorporación de refugiados (...) (Refugee Regulatory and Incorporation Policies),* op. cit., pp. 56-57.

43 From 1951 until the end of the seventies, another seven countries ratified the Convention (Peru, Paraguay, Uruguay, Chile, Costa Rica, the Dominican Republic and Panama). During the eighties and nineties, six more countries joined the Convention (Nicaragua, Bolivia, El Salvador, Guatemala, Haiti and Honduras). Mexico ratified the Convention in the year 2000. In addition, in the period between the adoption of the Convention and the 1967 Protocol, the nations signed on to the convention in general "with geographical reservations, that is, they limited its scope strictly to refugees from Europe". Even though all of the countries party to the Convention have also ratified the 1967 Protocol, the second process of accession was as slow as the first one.

the exercise of their political rights. This tradition was later embodied in subsequent instruments. In contrast, the 1951 Convention confronted the need to respond, under the terms of Article 1, to forced migration originating from a well-founded fear of persecution "for reasons of race, religion, nationality, membership in a particular social group or political opinion". These characteristics are wider than the limited scope of persons persecuted for political reasons.

38. Nevertheless, the most valid explanation for the skepticism of Latin America towards the Convention and its slow adherence to it was the resistance of the governments to be subject to any kind of international supervision (or "foreign supervision" as it was colloquially stated by some representatives), which was linked to some degree to the idea that the Convention was a "European" instrument. This complaint was a more relevant factor than the belief that domestic legislation and the Latin American tradition of asylum were strong enough. With this in mind, had the Latin American governments believed that the domestic laws were insufficient to address refugee problems, they would not have developed a simultaneous debate that culminated in the Conventions of Caracas of 1954.[44]

39. In fact, in 1950, while the Statute of the Office of the High Commissioner for Refugees was being approved in Geneva, the Council of the Organization of American States solicited the the Inter-American Council of of Jurisconsults to undertake a study on the juridical asylum regime, which began the preparatory work of the Caracas Conventions. Soon after the approval of the 1951 Convention, the Inter-American Juridical Committee, without making any reference to this international instrument, issued a draft Convention on the Regime of Asylees, Exiles and Political Refugees.[45] All indicators suggested that the indifference towards the 1951 Convention was premeditated. This autonomous process continued in 1952 with the draft Convention on Political Asylum and, in 1953, with the draft Convention on the Regime of Asylees, Exiles and Political Refugees, both drafted by the Inter-American Juridical Committee, ending between March 1 and 28 of 1954, when both conventions were approved at the X International Inter-American Conference of the OAS. This debate, requiring time, professional capacity and political will, was held by the governments without consulting Geneva. During the discussions of the drafts, the 1951 Convention was never mentioned.[46]

40. Based on the product of these discussions, for the Latin American governments and jurists the 1954 Caracas Conventions represented a continuity in the tradition embodied in the 1889 Treaty and the subsequent regional instruments, mainly inspired in the exercise of sovereignty to protect individuals who were victims of political persecution. As to diplomatic asylum, the governmental

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44 "The Mexico Colloquium (1981) warned that one of the major deficits of asylum and protection of refugees were the gaps in international law as well as in the internal legal order of the Latin American States", in FRANCO, Leonardo, *International Refugee Law and its Application in Latin America,* Inter-American Juridical Yearbook, 1982, Organization of American States, Washington 1983, page 184. See also ESPONDA, op. cit., paragraph 113 and footnote 135.

45 Inter-American Juridical Committee, *Report submitted for the consideration of the Secretary General of the OAS from the second meeting of the Inter-American Council of Jurisconsults,* Report of the Ministry of Foreign Affairs, Santiago, Chile, 1952, page 329 and following.

46 Inter-American Council of Jurisconsults, shorthand version of the meeting of May 4, 1953, Ministry of Foreign Affairs of Chile. See ESPONDA op. cit., paragraph 114.

representatives considered that the Caracas Convention perfected and extended significantly the norms contained in the previous conventions of Havana (1928) and Montevideo (1933).[47]

41. However, the governments and jurists themselves viewed the 1951 Convention as a European response to the mass displacements of persons resulting from armed conflicts, a phenomenon absent, up to that moment, in Latin America. This led the governments and jurists to think that the continent "did not need either the 1951 Convention or the aid of the international community to resolve isolated internal persecutions",[48] which could be addressed through diplomatic asylum. This vision is shared by the renowned Mexican jurist, César Sepúlveda, who argues that "in Latin America, the refugee phenomenon (victims of mass displacement) is more recent and did not become relevant until the seventies".[49] It is only in recent times that some countries have begun to consider the application of the 1951 Convention and request the services of UNHCR, although only in relation to the reception and integration of European refugees. By the end of this decade, "some Central American governments also turned to UNHCR for cooperation in providing assistance to refugees of Nicaraguan origin (around 100,000) who had abandoned their country between 1978 and 1979".[50]

CHAPTER TWO

UNHCR's role with respect to Latin American refugees: The refugee crisis in South America (during the sixties and seventies)[51]

42. Aside from the reasons described by the IACHR in 1965 to explain the crisis of the Inter-American system and its inadequacy for new situations, the crisis of the Southern Cone of South America added an important ideological element. This arose in light of the national security doctrine and its relationship with Plan Condor, which translated into a real threat to the life and security of refugees.

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47 The Caracas Convention on Diplomatic Asylum is in effect in and among Brazil, Costa Rica, Ecuador, El Salvador, Haiti, Mexico, Panama, Paraguay and Venezuela, while the Convention on Territorial Asylum is in effect in and among Costa Rica, Ecuador, El Salvador, Haiti, Panama and Venezuela.

48 ARBOLEDA, Eduardo, *El ACNUR, las migraciones internacionales y el derecho de asilo y refugio (UNHCR, international migration and the right to refuge and asylum),* Revista Mexicana de Política Exterior, Instituto Matías Romero de Estudios Diplomáticos, México, Spring 1994, page 144 and following.

49 SEPÚLVEDA, César, "Manual de derecho internacional público" *(Public International Law Handbook)*, Porrúa, México, 1998, page 541, cited by FRANCO, Leonardo, *La cuestión 'asilo' y 'refugio' (The 'refuge' and 'asylum' issue) in Cesar Sepúlveda*. UNHCR-UNLA Research Project. Compiled in a book by FRANCO, Leonardo (coordinator). Op cit. It is also worth mentioning that the Inter-American Juridical Committee, in its special meeting of April 1966, drafted the so-called Inter-American Convention Project on Refugees, in *Inter-American Legal Committee, reports and recommendations,* Vol. IX, pp. 337-351.

50 FRANCO, Leonardo, *El derecho internacional de los refugiados (...)*, op. cit., page 210.

51 Laura Gianelli contributed with the research input for this chapter.

43. The presence and activities of UNHCR in Latin America started in 1952 and focused mainly on the situation of European refugees resettling in this region following the second World War. UNHCR promoted local integration and provided limited material assistance to those affected by the socioeconomic situation of the countries where they settled[52]. UNHCR did not play an active role in the crisis of the Caribbean refugees of the seventies.

44. The military coup d'états were followed by a strong repression of political opposition in the Southern Cone countries resulting in an unprecedented influx of refugees and exiles for political reasons, first from Chile and then from Uruguay and the Argentina.[53]

a) Chile

45. In 1971, at the request of the Government of Chile, and mainly as a consequence of the events in Bolivia in the wake of the overthrow of the government, UNHCR's services were required to provide material assistance to refugees of Latin American origin.[54] Chile's president, Salvador Allende, requested UNHCR's aid directly to address the situation of Bolivian refugees in Chile. For this reason, the Allende administration adhered to the 1951 Convention and the 1967 Protocol in 1972 without reservations.

46. The 1973 coup d'état in Chile shook the world and its international outlook. UNHCR's response was quick, energetic and creative. Two days after the coup, High Commissioner Sadruddin Aga Khan sent a note to the Chilean government calling on it to observe the Convention and the Protocol. In the following months, UNHCR took actions, many of them in conjunction with the International Committee for European Migration (ICEM)[55] and other agencies of the United Nations. They also worked along with Chilean NGO's mandated to aid refugees from other countries of the region fleeing from military dictatorships and hosted in Chile, among which were Brazilians leaving their country after the coup d'état in 1963. To that end, an initial solution was proposed in line with the Latin American tradition of diplomatic asylum, which consisted in opening up "sanctuaries" which would also welcome Chilean relatives.

47. The coup d'état perpetrated in Chile and the events that followed posed serious challenges for UNHCR. Chile had already hosted thousands of refugees and political exiles who had sought refuge in that country in previous years. By mid 1972, the Allende administration estimated there were about 5,000 refugees. Many had arrived after Allende's election in 1970, either fleeing from Rightist

52 This population included migrants from Armenia and Russia, refugees of the Spanish civil war granted asylum in Mexico, to later refugees of other European nationalities who were welcomed by many Latin American countries. See MOUSSLLI, Michel, Declaration of the Colloquium on asylum and the international protection of refugees in Latin America, Mexico City, May 11 to 15, 1981, pp. 25-26.

53 "Many persons left Brazil in exile after the 1964 coup and even larger numbers left between 1969 and 1973; from Uruguay, before and after the military took power in 1973; in Chile, as of the coup in September of 1973; and from Argentina even before the military revolt in 1976 and in larger numbers thereafter. Paraguayans have been in political exile continuously since 1974, and most of Bolivia's political exiles left in two waves of 1971 and 1980". VARGAS-CARREÑO, Edmundo, op. cit., page 70.

54 Franco, Leonardo, *El Derecho Internacional de los refugiados (...) (International Refugee Law),* op. cit., page 209.

55 The Inter-governmental Committee for European Migration (ICEM) changed its name in 1989. It is currently known as the International Organization for Migration (IOM).

governments or in support of what they considered a unique socialist experience. On September 20 1973, UNHCR opened an office in Santiago, Chile. That same month, the government authorized the creation of a National Refugee Aid Committee (CONAR, for its acronym in Spanish).[56]

48. From the beginning, Pinochet's regime used local exile as part of his strategy to redefine Chile's political map while seeking to eliminate previous political and democratic experiences. The number of arrested persons was such that the Santiago's main soccer stadium became a provisional mass detention center. The ICEM, the International Committee of the Red Cross and UNHCR, in conjunction with local non-governmental organizations, played an important role by allowing thousands of people to leave the country.[57]

49. Many embassies in Santiago turned to the deeply-rooted Latin American practice of offering diplomatic protection to those found within their territories. A few days after the coup, more than 3,500 Chileans had requested asylum from embassies in Santiago, mainly from the embassies of Argentina, France, Italy, Mexico, the Netherlands, Panama, Sweden, and Venezuela. The UNHCR, in its capacity as intermediary, provided assistance to asylum seekers. By mid October, with UNHCR's assistance and the government's consent, safe-conduct passes were granted to 4,761 asylum seekers, mainly Chileans. In May 1974, the Ministry of Foreign Affairs had granted approximately 8,000 safe-conduct passes.[58]

50. The decree-law No. 1308 of October 3, 1973 was an important innovation in the modern international practice of asylum as it created in Chile the "temporary refuge" concept for foreign refugees. Such status was granted by the government of Chile itself. In total, there were six temporary refugee centers in the Santiago area. UNHCR's operation in Chile starting in 1973 was a landmark in the history of the organization as it was its first significant operation in Latin America. Although there are no exact figures as to the number of persons going into exile during the years when Pinochet was Head of State, the Inter-governmental Committee for European Migration alone allowed the exit of 20,000 persons in 1980. Other sources estimate that the total number of persons who fled from the regime, either voluntarily or expelled, was no less than 200,000 people.[59]

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56 The churches and volunteer organizations composing the committee created 26 refugee reception centers, 15 in Santiago and 11 in the provinces. These centers provided assistance to "mandate refugees" by handling all document procedures and procuring their relocation to resettlement countries. By the end of September, 600 refugees had registered in these centers, and on October 23, this figure increased to 1,022. Several additional hundreds of refugees were sheltered at different times in a house protected by the Swiss Embassy with the consent of the Chilean government. The Swiss home provided asylum to hundreds of refugees under UNHCR's mandate who had been released from prison and against whom expulsion orders had been issued and who were waiting to be resettled in other countries. Most of them were Brazilians, Uruguayans and Bolivians. See UNHCR, *La Situación de los Refugiados en el Mundo, 2000: Cincuenta años de acción humanitaria (The Situation of Refugees in the World, 2000: fifty years of humanitarian action),* Icaria Editorial, Spain, 2000, page 140.

57 UNHCR also received significant support from other UN organizations, particularly from the International Labor Organization (ILO), the United Nations Development Program (UNDP) and the United Nations Education, Science and Culture Organization (UNESCO). UNHCR also asked Eastern European countries to resettle Chilean refugees. Around one thousand of them went spontaneously to the Democratic Republic of Germany (Eastern Germany) and a similar number went to Romania with the assistance of the UNHCR. A smaller number of refugees moved to other Eastern European countries such as Bulgaria and Yugoslavia, the only country of the Eastern block that had maintained significant relations with UNHCR until then. UNHCR's call for action in these countries was innovative at a time when the Soviet Union still showed open resistance to the organization. See UNHCR, *The Situation (...) 2000,* op. cit., pp 140-141.

58 UNHCR, *The Situation (...)* op. cit., page 141.

59 Ibidem.

b) Other countries of the Southern Cone

51. After the coup in Chile, State terrorism in Uruguay and Argentina included as part of its practice the elimination of all kinds of opposition to the regime. As such opposition was considered "subversive" according to the "national security" doctrine implemented at the time.[60] The main concern was then to ensure the security, freedom and life of thousands of asylum seekers.[61]

52. In March 1974, as a result of the arrival of refugees from bordering countries in Argentina, the government requested assistance from the UNHCR to project those persons[62]. For this reason, and with the government's approval, the various Churches in Argentina and their voluntary agencies created a Social Service Coordinating Commission under the auspices of the UNHCR.[63]

53. UNHCR also cooperated in protecting and assisting the Chilean refugees who fled toward bordering countries, particularly Peru and Argentina. Later, UNHCR also assisted refugees from Argentina, Bolivia and Paraguay through its offices in other countries.[64]

54. A large number of persons who had not requested protection or assistance from the UNHCR but who met the conditions to be considered refugees settled in various Latin American countries during those years, particularly Mexico and Venezuela, and Spain in Europe. The refugees of this period came mostly from urban sectors, including a considerable group of political and union leaders.

55. Several reports, mainly from the Southern Cone, brought to light various incidents threatening the life, freedom and physical integrity of refugees, particularly in Argentina. Over time, aspects of the sinister Plan Condor gradually came to light, due to the efforts of security services of several southern countries, something which would ultimately directly affect refugees' security. UNHCR's protection task was a highly sensitive one because on several occasions it touched aspects that were considered by the authorities of the hosting nation relevant to national security. To overcome these serious problems, UNHCR resorted to the extreme measure of resettling large numbers of refugees

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60 MARMORA, Lelio and GURRIERI, Jorge, *El entorno en el Río de la Plata (Las respuestas sociales frente al retorno en Argentina y Uruguay) (The environment in Río de la Plata – social responses to repatriation in Argentina and Uruguay)*, Latin American Migratory Studies, Buenos Aires, December 1988, page 469.

61 Claiming reasons of national security, the military governments of the countries of Southern Cone did not always observe the regional tradition of asylum and corresponding agreements. CIREFCA/89/10, paragraph 9.

62 From late 1973 through June 1979, 15,849 persons were recognized as refugees by the UNHCR in Argentina. Of the total registered population, three quarters were from Chile; 18.24% from Uruguay; 2.2% from Bolivia; 1.42% from Paraguay and the rest from other countries. The largest influx of Chilean refugees to Argentina occurred in 1975 (40% of the year's total); in 1976 the largest refugee population was Uruguayan (36%). Paraguayans were the most numerous in 1978-79 (27%) and the Bolivian contingents (46%) accounted for the largest population in 1974. Taking into account the four nationalities above, it was between 1974 and 1975 when the largest number of refugees were concentrated in Argentina: 71% of the total; in 1976 they accounted for 17.74%, 6.85% in 1976, and 4.12% in 1978-79. The Catholic Immigration Commission of Argentina has provided assistance to the largest number of refugees from the total registered population (15,849). In LETCHER, Jorge, *Refugiados Latinoamericanos en Argentina (Latin American Refugees in Argentina),* CCAM, Migrations Annex No. 22, Buenos Aires, March 1981, pp. 11-12.

63 The Commission was approved by Resolution No. 1853 of the Ministry of the Interior on April 26, 1974. In LECTCTHER, Jorge, op. cit., page 7.

64 FRANCO, Leonardo, *El Derecho Internacional de refugiados (...),* op. cit., 1983, page 209.

in third countries. Most of these third countries were located in Europe, which responded with the same generosity as Latin America previously when it welcomed persons from the Old Continent.[65] In view of the situation in the Southern Cone, the UNHCR was forced to act on its mandate since the countries involved had not assumed the contractual obligations of the Convention and the Protocol.

56. According to the IACHR, the events that occurred during the seventies and the beginning of the eighties modified the old tradition of granting political asylum for the following reasons: a) the number of persons in need of political asylum was much larger then than at any other moment in the history of the region; b) the composition of the groups seeking political asylum changed from individual political leaders to large groups of persons with a well-founded fear of persecution due to conditions of generalized violence and their participation in politically vulnerable sectors of the society, even when they had not participated in individual political acts; c) while the former exiles generally had adequate economic and educational levels, asylum seekers in the more recent years were mostly persons lacking financial resources, education and work capacity; d) From the countries that have traditionally offered refuge to political exiles, some not only refused to accept Latin American refugees but were also the main refugee generating sources in the region; e) domestic legislation and the regional conventions relating to refugees and asylees were inadequate to solve situations of mass asylum; f) generally poor economic conditions in most of the hemisphere hindered the resettlement of thousands of additional foreigners; and g) many governments in the region did not shown a willingness to receive refugees for ideological or political reasons since they were considered a national security threat.[66]

57. For the purpose of this study, it may be useful to share some of the lessons learned from this major operation, which included very painful and tragic events such as the disappearance of more than 300 refugees in Argentina.

58. The international response to the serious refugee crisis in the Southern Cone revealed the coordination and pragmatic convergence of various kinds of efforts: a) the application of the Inter-American Asylum System, particularly in the case of Mexico for Chileans and some Argentines and Uruguayans, in addition to the experience of the "sanctuaries" in Chile; b) the recognition of refugee status by the UNHCR, in virtue of its mandate, which required painstaking negotiations with the corresponding governments to ensure stability and protection. An office was created in Rio de Janeiro where the petitions for refugee status were examined as a pre-screening step to resettlement; c) resettlement in third countries from the first country of asylum. The generous response of several countries must be especially mentioned, mainly European countries, Australia

65 In addition to the countless number of refugees who spontaneously resettled, particularly in Costa Rica, Mexico, Spain and Venezuela, 18,000 persons were resettled under the UNHCR's auspices between 1973 and 1985. CIREFCA/89/10, paragraph 11. See also FRANCO, Leonardo, *El derecho Internacional de los refugiados (...),*op. cit., 1983, page 210 and note Nº 55, page 225.

66 MONROY CABRA, Marco Gerardo, *El sistema interamericano y la protección de los refugiados (The Inter-American system and the protection of refugees),* Expert papers, in Colloquium on the international protection of refugees in Central America, Mexico and Panama: legal and humanitarian problems. Report of the Colloquium of Cartagena de Indias, November 1984, edited by UNHCR, Regional Center of Third World Studies, Universidad Nacional de Colombia, Bogotá, Colombia, 1986, page 248.

and Canada; d) also, the generous migratory policy of various Latin American countries should be noted as a more extensive solution, undoubtedly inspired by the old asylum tradition; e) and finally, UNHCR, in cooperation with ICEM, made intense efforts to facilitate the voluntary repatriation of all refugee groups, including those who had not requested or obtained refugee status. In these cases, individual *post facto* determinations were applied.

59. In addition to the challenges posed by the new refugee situation, UNHCR's modified protection policy was influenced considerably by the dedication and vision of a new generation of officers in the region led by Oldrich Haselman. Haselman was the UNHCR's regional representative throughout the Chilean crises and he helped opened unprecedented channels facilitating asylum and refugee protection in Latin America.

60. This first experience of international refugee protection in Latin America witnessed many valuable contributions. It was the first attempt to incorporate a more modern approach based in nascent International Human Rights Law in contrast to that traditionally supported by the Inter-American asylum system. The following are some of the major contributions:

    1) Direct refugee protection and prevention of *non-refoulement*.

    2) The recognition of refugee status on a declarative instead of a constitutive basis in contrast with the formal nature of the Inter-American System in granting asylum.

    3) Resettlement of refugees in third countries, particularly outside of Latin America (Europe, USA, Canada and Australia) as a protective mechanism.

    4) The opening of UNHCR offices in several regions of the continent.

    5) The crucial role played by NGOs in protecting refugees, for example: the Solidarity Vicariate in Chile, FFCAM and CAREF in Argentina, Cáritas in Brazil and the Catholic Commission in Peru.

    6) The application of *pro homine* criteria relating to refugee repatriation such as the admission of sponsored return of non-recognized refugees through the *post facto* recognition of refugee status, and the repatriation of those with double nationality through the predominance of the nationality of origin (sociological criterion) over another nationality that may have been acquired in the country of asylum (formal criterion).

    7) Specific arrangements for refugee protection such as the aforementioned "sanctuaries" in Chile.

61. To evaluate this experience, UNHCR organized the "First Seminar on International Protection in Latin America" held in Mexico in 1979. Among the participants was the late Sergio Viera de Mello, who was the Regional Representative in Lima at that time. Among the issues discussed at the seminar were the Latin American tradition of political asylum, its relevance for refugees under the competence of UNHCR; the application of the 1951 Convention and the 1967 Protocol[67] and refugee status determination. The most relevant contribution was a proposal aiming to organize a colloquium on asylum and international refugee protection in Latin America.[68]

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67 At this moment, the countries that had signed on to such instruments without reservations were Ecuador, Costa Rica, the Dominican Republic and Panama.

68 This Colloquium would take place in Mexico in 1981.

CHAPTER THREE

The 1981 Mexico Colloquium and the role of regional organizations

a) Organization

62. At the beginning of the eighties, it was evident that in order to solve the situation of South American and particularly Central American refugees it was necessary to address the issue from a different perspective. "The mass increase in displacements and increasing number of asylum seekers" made it imperative to "overcome the inadequacies of the Universal System as well as of the Inter-American System and the legal order of the States".[69] It was also necessary to "harmonize the protection principles, norms and mechanisms of asylees and refugees in Latin America".[70] For these reasons, the Colloquium on Asylum and International Protection of Refugees in Latin America was convened in Mexico in June 1981.[71] The colloquium examined the main problems affecting the Inter-American asylum system and sought to reach conclusions and recommendations to ensure the full effectiveness of the institution and improve conditions of asylees and refugees.[72]

63. At the Mexico Colloquium, distinguished specialists and well-renowned experts in the field from Latin America and the United Nations[73] stated in their opening speeches that "the political and social events have been occurring more rapidly and current law seems to have lagged behind in adequately addressing the serious problems arising from the demographic trends we are witnessing today".[74] To that end, it was added that "asylum, a difficult concept to understand, was originally applied to individuals. Today, however, refugee problems are characterized by affecting a large number of persons."[75]

64. Among the main conclusions reached at the Colloquium was the reaffirmation that "the Universal System as well as the regional system of protection to asylees and refugees recognizes *non-refoulement* as a fundamental principle of international law, which includes the prohibition of rejection at the borders".[76] Emphasis was put on "the humanitarian and non-political nature of granting asylum...",[77] and the need to make efforts "to combine the most favorable aspects of the

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69 The Colloquium revealed the convergence of two valuable traditions to face the new problems: the Latin American tradition embodied in a series of conventions on asylum and extradition, and the universal refugee tradition based mainly on the 1951 Convention and the 1967 Protocol Relating to Refugee Status. See FRANCO, Leonardo, *El derecho internacional de los refugiados (...)*, op. cit., pp. 172-173.

70 Conclusions and recommendations of the *Colloquium on Asylum and International Protection of Refugees in Latin America,* edited by the Legal Research Institute of UNAM and the Matías Romero Center of Diplomatic Studies, Mexico, 1982.

71 In May 1981, the Matías Romero Center of Diplomatic Studies of the Ministry of Foreign Affairs of Mexico and the Legal Research Institute of the National Autonomous University (UNAM) sponsored a Colloquium on the Right to Asylum and the International Protection of Refugees in Latin America. The Colloquium, also sponsored by the UNHCR included renowned jurists and officials of the Inter-American System and the United Nations.

72 Speech by César Sepúlveda, *Colloquium on Asylum (...)*, op. cit., page 18.

73 Among them, there were renowned jurists from the Inter-American Court of Human Rights and distinguished commissioners from the Inter-American Commission on Human Rights.

74 Statement by Mr. Micthel Moussalli, *Colloquium an Asylum (...)*, op. cit., page 25.

75 Statement by Mr. Paul Hartling, *Colloquium on Asylum (...)*, op. cit., page 23.

76 Conclusion Nº 1, *Colloquium on Asylum (...)*, op. cit.

77 Conclusion Nº 2, *Colloquium on Asylum (...),* op. cit.

Inter-American tradition with elements of the Universal System of protection of refugees and asylees".[78] The participants also underscored the importance of "promoting the systematization of the principles and criteria contained in each system with the purpose of perfecting their application and formulating the norms that are later to be adopted by the internal system of the States",[79] and "promoting the coordination and institutional cooperation of the appropriate agencies of the Organization of American States with the United Nations High Commissioner for Refugees in issues relating to international protection".[80]

65. In 1981 a need was felt to develop a definition that would include persons who fled as a result of generalized violence and the violation of human rights, and not only those fleeing for political reasons or crimes (Inter-American System), or because of a well-founded fear of persecution on the basis of religion, nationality, membership in a particular social group or political opinion (Universal System). Therefore, the Colloquium considered that "it is necessary in Latin America to extend the protection granted by the universal and Inter-American instruments to refugees and asylees and to all those persons fleeing their countries due to foreign aggression, occupation or domination, massive human rights violation or events seriously disturbing public order in part of or in the entire territory of the country of origin" (Conclusion No. 4).[81] With some minor changes, this conclusion would become the extended definition of the refugee term of the Cartagena Declaration on Refugees in 1984.[82]

66. The recommendations of the Colloquium referred to the need of the States to ratify fundamental instruments such as the 1951 Convention and the 1967 Protocol relating to Refugee Status, the 1954 Convention of Caracas on Territorial Asylum, the 1969 American Convention on Human Rights, and the 1981 Convention of Caracas on Extradition.

b) Cooperation between the United Nations High Commissioner for Refugees and the Inter-American Commission of Human Rights

67. A special recommendation was made to intensify the collaboration between the Organization of American States and the UNHCR, and to conduct a comparative study of internal regulations in Latin American States on asylees and refugees. Non-governmental organizations were also urged to continue their actions in favor of asylees and refugees.[83] A call was made to "use the competent agencies and mechanisms of the Inter-American System with greater intensity, in particular the Inter-American Commission on Human Rights and, whenever appropriate, the Inter-American Court of Human Rights within its advisory competence with the purpose of supplementing the international protection of refugees and asylees".[84]

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78 Conclusion Nº 3, *Colloquium on Asylum (...)*, op. cit.
79 Conclusion Nº 5, *Colloquium on Asylum (...)*, op. cit.
80 Conclusion Nº 9, *Colloquium on Asylum (...)*, op. cit.
81 Without doubt, inspiration for this consideration can be found in the Convention of the Organization of African Unity which regulates specific aspects of refugee problems in Africa (1969). This Convention also contains an extended definition of the refugee term which reads: "The term *refugee* shall also apply to every person disturbing who, due to external aggression, occupation, foreign domination, or events seriously 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 other place outside his country of origin or nationality (Article 1, paragraph 2).
82 GALINDO VELEZ, Francisco, *Protección y Asistencia de refugiados en América Latina (Refugee Protection and Assistance in Latin America)*, Regional Documents 1981-1999, pp. 22-23.
83 Recommendations No. 1, 2, 3 and 6, *Colloquium on Asylum (...),* op. cit.
84 Recommendation No. 5, Colloquium on Asylum and the International Protection of Refugees in Latin America. Galindo Vélez states that "this is an important recommendation because it is reiterated in the conclusions and recommendations of other colloquia and seminars that have been part of this process", GALINDO VELEZ, Francisco, *Protección y Asistencia* (...), op. cit., page 24.

68. The 1980-81 report of the Inter-American Commission on Human Rights recommended that the OAS establish adequate mechanisms for the competent OAS agencies to formulate sufficent measures for the assistance and protection of refugees, including the Inter-American Commission on Human Rights. To justify this recommendation, the Commission argued, among other issues, that the Continental epidemic of violence produced a secondary effect of truly alarming scale. On that occasion, the Commission added that "the phenomenon of mass displacement has turned ten percent of the population in some countries into refugees. In others, the lack of political participation has caused massive flights of thousands of persons on ships and boats (boat people). Such remarkable migrations have posed a challenge to the countries of the hemisphere that were not prepared to assimilate so many persons in a permanent fashion".[85]

69. Additionally, the 1981-82 report of the Inter-American Commission on Human Rights proposed a series of measures to the OAS Assembly, some of which were based on the recommendations made by the Colloquium on Asylum and the International Protection of Refugees in Latin America (Mexico, May 11-15, 1981). Among such recommendations were: a) to reaffirm the obligation of member States to recognize and respect the principle of *non-refoulement* and that this principle be observed not only in bordering areas but also in the entire territory; b) to reaffirm the humanitarian and non-political nature of granting asylum, which does not constitute an unfriendly act from one State towards another under any circumstance; c) to urge member States to ratify the United Nations Convention and Protocol on Refugee Status and to expand their domestic legislation dealing with asylum and refugees; d) to include in the refugee definition the recognition of those persons fleeing their countries because their lives have been threatened by violence, aggression, foreign occupation, mass human rights violation, and any other circumstances disturbing public order and for which no domestic remedies exist; e) to urge member States, where exiles have sought political asylum, to fully cooperate with the UNHCR's efforts and its local affiliates and to contribute to the work of such institutions; f) to urge member States incapable of permanently resettling large groups of refugees to take measures so as to ensure the security of refugees in their territory until permanent resettlement is obtained.[86]

70. In addition to promoting the implementation of the aforementioned recommendations, the Commission proposed considering the possibility of establishing an Inter-American authority responsible for assisting and protecting refugees in the Continent. Such an authority would work in close collaboration with the United Nations High Commissioner for Refugees. In this regard, the IACHR stated that: "the establishment of an Inter-American authority does not require a conventional instrument. It may be established through a resolution issued by one of the OAS political organs, preferably by the General Assembly. For instance, the Inter-American Commission on Human Rights was created through a resolution resulting from a Consultative Meeting of Ministries of Foreign Affairs and it worked effectively without conventional grounds until it was incorporated by the Buenos Aires Protocol into the OAS Charter. The formulation of the resolution project, specifying the authority's responsibilities in providing assistance and protection to refugees, as

85 IACHR, "Refugees and the Inter-American system", in *Annual Report of the Inter-American Commission on Human Rights 1981-82,* Chapter VI (b), areas where measures must be taken, OEA/Ser.L/V/II/57, doc. 6 rev. 1, Washington, USA, September 20, 1982, paragraph 8.

86 Ibidem, paragraph 11 (note by the authors: the Commission's statement is cited indirectly by Recommendation III of the Cartagena Colloquium).

well as its relations with the United Nations High Commissioner for Refugees, could be entrusted to the Inter-American Juridical Committee in conjunction with the Inter-American Commission on Human Rights, seemingly the most natural body to be called upon to exercise such authority. Should the creation of the authority be accepted, it would be important to furnish it with the required funds and resources to help refugees and assist countries in resettling refugees".[87]

c) OAS-UNHCR joint cooperation program

71. In March 1981, Mr. Poul Hartling, the United Nations High Commissioner for Refugees, requested from Mr. Alejandro Orfila, the Secretary General of the Organization of American States, his cooperation in conducting studies in member States relating to the legal situation of asylees, refugees and displaced persons in similar conditions. The Secretary General accepted the cooperation proposal and instructed the Under-Secretary of Legal Affairs to formulate a core project to that effect.[88]

72. On the basis of the 1981 Mexico Colloquium, in which several conclusions and recommendations were adopted to promote measures within the Inter-American System to address the legal dimensions of refugee problems, the Undersecretary of Legal Affairs drafted a list of topics that could serve as a working document to prepare a future Joint Cooperation Program between the OAS and UNHCR to analyze those issues. In January 1982, UNHCR invited the Secretary General of the OAS to hold a meeting in Geneva, at UNHCR headquarters. As a result of that meeting, a UNHCR/OAS Cooperation Project was adopted and approved by the Secretary General of the OAS and the United Nations High Commissioner for Refugees. The objectives of the project were the following: 1) to teach subjects related to refuge, asylum and extradition; 2) to conduct a comparative study on the legal situation of asylees and refugees in the member countries of the OAS, including an analysis of the United Nations international instruments and those of the Inter-American System applicable to the asylum and refugee regime and related areas (human rights and extradition) as well as to compile and analyze the constitutional and legal norms of OAS member States related to asylum and refugee issues. Such analysis should be supplemented with information of the jurisprudential and administrative practice on the matter.[89]

73. The comparative study led to conclusions related to the principles arising from the conventions on asylum and which are currently in effect in the Inter-American sphere and the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. Following are some of the most relevant conclusions:

87 ICHR, "Refugees and the Inter-American System", in *Annual Report of the Inter-American Commission on Human Rights, 1981-82,* Chapter VI (b), areas where measures must be taken, OEA/Ser.L/V/II/57, doc. 6 rev. 1, Washington, USA, September 20, 1982, paragraph 12.

88 OAS, Preliminary Note, Ser/Ser.D/5.2 OEA/ACNUR/doc.2, rev. 1, April 19, 1984.

89 OAS, Preliminary Note, Ser/Ser.D/5.2 OEA/ACNUR/doc.2, rev. 1, April 19, 1984, pp. ii and iii.

1) In the Inter-American sphere, the terms *asylum* and *refuge* are used synonymously to designate the admission of a person into territory under the jurisdiction of the hosting State and to specify the protection that such a State must guarantee in compliance with the inter-American conventions. At the United Nations level instead, a distinction must be made between the concept of asylum and refugee status. The term *asylum* is used to describe the simple physical admission of one or more persons into the territory of a State while the State examines and decides on the refugee status.[90]

2) The Inter-American instruments do not have a definition of asylee duly stated in a written text. The asylee condition is determined through the interpretation of the aforementioned instruments and through the exclusion of the common criminal element from the events motivating asylum. Contrary to this situation, the 1951 Convention specifies the persons to be protected and determines the refugee status under the terms of the Convention.[91]

3) The Inter-American system must consider the new situation derived from human displacements in the region in order to address the issue in an effective manner, namely, the situation of displaced persons: "Displaced persons in refugee-like situations shall be conceived as those who are granted protection by UNHCR in virtue of the mandate bestowed upon the High Commissioner by the General Assembly of the United Nations. They are either persons who come from countries with politically sensitive situations or who experience situations of generalized violence, and who are therefore deprived from adequate protection in their own countries. Such persons may be entitled to international protection in virtue of UNHCR's extended mandate".[92]

4) Territorial asylum is embodied in various instruments of the Inter-American System (declaratory and conventional). The right to territorial asylum (under the terms of the American Convention) may be enforced through the same means as the other rights embodied in this instrument and before the organs created therein to safeguard and exercise protection such as the Inter-American Commission and the Inter-American Court of Human Rights. The right to asylum is also embodied as a human right in the Universal Declaration of Human Rights (Article 14) of the United Nations System but no protective mechanism is applicable to situations in which such a right is violated with the exception of UNHCR's action under the 1951 Convention and its Protocol, which obviously does not have the same characteristics as the mechanism established under the American Convention.[93]

74. One characteristic of Refugee Law in Latin America has been its celebration of various colloquia since 1981, as a means of brining together various human rights experts, governmental representatives, civil society representatives, judges of the Inter-American Court of Human Rights and commissioners of the Inter-American Commission on Human Rights, among others. It is essential to study the conclusions reached at these events in order to understand the spectrum of problems faced by

90 Ibidem, First Conclusion, p. 143.
91 Ibidem, Second Conclusion, p. 144.
92 Ibidem, Third Conclusion, p. 46.
93 Ibidem, Fourth Conclusion, pp. 147-148.

refugees in Latin America over the course of history and to verify development of legal thinking on the matter. For Antonio Cançado-Trindade, it is possible to affirm that the declarations on refugee issues reflect prevalent *opinio iuris* in our continent today on the matter,[94] which does not preclude the possibility of proving that such declarations have also been incorporated into internal regulations or crystallized into customary practice.

CHAPTER FOUR

The issue of protection of large-scale influxes

a) The inadequacy and the territorial limbo generated in refugee camps

75. Mass influxes of asylum seekers, due to the proliferation of internal armed conflicts and generalized violence, gave way to large refugee agglomerations, generally admitted under precarious conditions. In such places, living conditions were in line with internationally recognized humanitarian regulations of minimum standards for the treatment of refugees, even in the case of exceptional or emergency situations.[95] Set up during emergency situations, these camps were initially very useful to new arrivals, providing them emergency aid, shelter, food and basic health services. However, with the passage of time, such camps became independent social centers subject to two forces: one pulling the entire camp life inward and the other being the international emergency aid provided by UNHCR and NGOs. In many cases, this situation leads them to conceive of themselves as "territorial islands" or "spatial limbos" in which life and authority are organized independently, subject to particular rules that are not necessarily in line with the territorial law of the country where they are located. In addition, the national authorities of the contries where the camps were settled constitute a second force considering refugees as foreigners temporarily tolerated in the country and therefore, not entitled to the limited public services avaible to nationals and outside the direct authority of the State. The generalized belief was that the situation would improve if UNHCR and the refugees themselves established their own regulations for their camps and distinguished themselves from the legislation of the country that hosts them in such precarious conditions.

76. Such was the situation in Central America and Mexico in the eighties, particularly in the camps of Salvadorian refugees in Honduras (Colomoncagua, Mesa Grande and La Virtud) and in the scattered camps established in Mexico along the Guatemalan border in the State of Chiapas, from the Montebello lakes to the interior of the Lacandona jungle. There were also camps in the Honduran Moskitia and in Costa Rica although, in the latter, they neither settled on the border nor shared the territorial limbo character under analysis.

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94 CANÇADO-TRINDADE, Antonio, "Foreword" in *10 years after the Cartagena Declaration on Refugees, Report of the Annual Colloquium*, San Jose, Costa Rica, 1994, page 114.

95 SANTISTEVAN, Jorge, op. cit., paragraph 63, page 59.

77. The resulting situation inside these camps during the eighties was at the core of the Cartagena Declaration and included the following:

    - Refugee children born inside camps were not recognized or registered as nationals in the country where the camp was located. Their parents were not even allowed to seek help from the consulates of their country of origin in their attempt to register their children. The UNHCR had to organize a temporary birth record in conjunction with refugee organizations and with the support of non-governmental organizations. Later, the validity of these records would become part of the negotiations achieved within the context of the Tripartite Commissions. The negotiations led to the agreement that voluntary repatriation taking place in the late eighties would ensure definitive registration in the birth records of El Salvador, Guatemala or Nicaragua and the corresponding identification documents would be provided.

    - Deaths not only were registered in provisional records, like births, but burials took place in *ad hoc* cemeteries for refugees whose civil status was not governed by any law.

    - Basic police, justice and educational services for children and other basic services were not extended to refugee camps. The country of origin did not allow either the sending of their teachers, police officers or judges – nor would this have been allowed by the asylum country either – to the camps. For this reason, all refugees had to organize themselves on an *ad hoc* basis with the support of UNHCR and non-governmental organizations. Refugees were frequently helped by teachers, who fled along with the entire community to save their life, freedom and security by crossing a border. In these cases, provisional records were also kept of the education received by children living in the camps in Costa Rica, Honduras and Mexico. These records would help later certify the education received to the sectoral authorities of the country of origin within the context of voluntary repatriation.

    - More flexibility existed in terms of health services. In some cases health services were planned on an *ad hoc* basis through NGOs such as Doctors Without Borders. In other cases, health services were shared with local services such as initially with the Comotán Hospital and the Mexican Health Institute in Chiapas and later in Campeche and Quintana Roo.

    - Essential legal acts such as marriages, adoptions, family separations, transactions and the precarious market organization within the camps took place with the same inadequate legal grounds described above. A pragmatic application of customary law and developed customs, together with the law of the country of origin that was used as reference, comprised the framework enabling refugees to keep precarious records of such acts and later acquiring validity. In fact, upon return to their country of origin and within the conceptual framework later developed by the Cartagena Declaration aimed at normalizing the life of refugees and their families, the acts and contracts somehow recorded were validated on legal grounds in spite of the territorial limbo characterizing the refugee camps.

78. Asylum seekers, who are part of large-scale influxes, usually face serious difficulties in finding durable solutions through voluntary repatriation, local settlement, or resettlement in a third country. Large-scale influxes frequently cause serious problems to the States. Even when they wish to promote such movements, State authorities have considered allowing them into their territory under conditions of minimum tolerance, that is, without committing themselves upon admission to

provide permanent settlement within their borders.[96] At the international level, there are minimum standards essential to ensure humanitarian treatment to those forced to seek asylum. Conclusion No. 22 (XXXII) of the UNHCR Executive Committee on the protection of asylum-seekers in situations of large-scale influx[97] constitutes a minimum regime to be applied during the temporary period of asylum as a provisionary step put in place until a durable solution can be found to put an end to this situation.[98]

b) Prima facie recognition under conditions of large-scale influx

79. During the crisis that hit Central America in the eighties, the countries of the region, with the cooperation of the international community, faced large-scale refugee influxes from El Salvador, Guatemala and Nicaragua by frequently resorting to the *prima facie* recognition of the refugee status. This process had many problems and difficulties and was very complex in some cases. The first influxes of refugee populations into the territory of other countries of the region resulted in rejections at the frontier followed by deaths. In addition, there was widespread denial of the problem which led to serious security risks in this population comprised mostly of women, children and senior adults. Nevertheless, these negative events yielded a positive outcome in that the Cartagena Declaration and CIREFCA examined their evolution and devised ways to solve such problems. In most cases, these persons received *de facto* the treatment of the 1951 Convention and the 1967 Protocol despite the fact that refugee status recognition was never formally verified; in other cases, the persons received the minimum treatment standards established in Conclusion 22 of the Executive Committee[99], which was later updated by the Cartagena Declaration. In spite of the serious difficulties caused by these mass displacements after overcoming the initial incidents a general respect for the *non-refoulement* principle was reached, and no subsidiary elements were necessary with protection standards inferior to those recognized for refugees by international law.[100]

80. The process beginning with the Cuban refugee crisis in the sixties was followed by the problems in South America during the seventies, and Central America in the eighties, posed new challenges since refugee issues began to obtain unprecedented dimensions and a character theretofore unseen

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96 UNHCR Executive Committee: Conclusion No. 22, *Protection of asylum-seekers in situations of large-scale influx (XXXII),* adopted in 1981, in *Conclusions on international protection of refugees approved by the Executive Committee of the UNHCR program,* published by the Delegation of the United Nations High Commissioner for Refugees, Madrid, December 1998, paragraph 2.

97 This conclusion was approved by the Executive Committee of the High Commissioner upon recommendation of the Sub-Committee of the Whole on the International Protection. It establishes that: in situations of large-scale influx, asylum-seekers should be admitted to the State in which they seek refuge in the first place. If this State cannot admit them for a long time, it must admit them at least temporarily; they must not be punished or be exposed to unfavorable treatment on the simple grounds that their presence is considered illegal in the country, nor should their freedom be subject to other restrictions except for those that are necessary in the interest of health and public order. They must be entitled to the same fundamental internationally-recognized civil rights; they must not be subjected to cruel, inhuman or degrading treatment; and they must be considered persons by the law with the right to access to justice and to other competent administrative authorities. It also establishes that the location of refugees must be determined on the basis on their security and well-being and the security needs of the hosting State; that they must be treated without discrimination as to race, religion, political opinion, nationality, country of origin, or physical disability. It also states that refugees must be allowed to send and receive correspondence.

98 SANTISTEVAN, Jorge, op. cit, paragraph 70, pp. 62-63.

99 UNHCR Executive Committee, Conclusion Nº 22*,* op. cit.

100 JACKSON, Ivor: *The refugee concept in group situations*, Kluwer Law International, 1999.

at the same time and revealed evidence of the advantages offered by the United Nations system. The protection of refugees by UNHCR in Latin America started in the seventies in South America. Since then offices have been opened throughout Latin America. There was a strong international presence in the Central American crisis of the eighties, leading many States to ratify and adhere to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. This instrument is virtually universal in the region today.[101]

81. The conceptual framework developed by the Cartagena Declaration, its subsequent evolution through CIREFCA and the Central American experience after the eighties demonstrated that a large-scale influx of refugees may evolve. From an initial state of crisis and inadequacy a consensus can lead not only to a qualitative increase in the level of protection, but also if States show sufficient political will, efforts can be joined along with the international community. In fact, such response has been possible thanks to coordinated efforts, resources and political will. On the one hand, governments of the region demonstrated progressive tolerance and understanding and, on the other hand, the UNHCR played a major role through its efforts to promote principles of International Refugee Law with the valuable support of non-governmental organizations. In sum, the international consensus achieved was aimed at seeking solutions within the context of peace building in Central America, two of the most important results being the Cartagena Declaration and CIREFCA.[102]

c) Conclusion No. 22 of the UNHCR Executive Committee

82. Conclusion No. 22 of the UNHCR Executive Committee of 1981 made significant contributions to raising protection standards, which were consolidated to a large degree by the Cartagena Colloquium. In the working document *"The international protection of refugees in Mexico, Central America and Panama: juridical and humanitarian problems"*, Jorge Santistevan addresses the following issues: a) freedom of movement; b) access to assistance and satisfaction of vital needs; c) status under the law, the administration and courts of the country of asylum; d) protection of minors and families; e) access to minimum standards of education, work, self-employment and sources of subsistence; f) humanitarian treatment and g) possibility of achieving durable solutions.

CHAPTER FIVE

The political and military crises in Central America and the peace efforts: Contadora

83. During the eighties, when over two million persons were uprooted as a result of the fierce civil wars raging in El Salvador, Guatemala, and Nicaragua UNHCR intervened for the first time in Central America. In these countries, the insurgence and counterinsurgence movements caused a

101 All Latin American countries except for one are party to the 1951 Convention Relating to the Status of Refugees and/or its 1967 Protocol. See SAN JUAN, César and MANLY, Mark, op. cit, paragraph 125.

102 Regarding CIREFCA's contribution to International Refugee Law, see CIREFCA/89/9, op. cit. See also, SAN JUAN, César and MANLY, Mark, op. cit., paragraph 126.

considerable number of deaths and large-scale displacements. In all, more than two million persons were expelled from their homes. During the previous decades, there had been violent conflicts in the region between the poor landless farmers demanding social and land reforms and the elite landholders whose lands were protected by the military. The successive administrations of the United States had supported Rightist governments in the region in an effort to stop what they considered the spread of communism near their borders as well as to protect their economic interests in the region. The rebel movements were under influence and support of the Cuban communist regime.[103]

84. The majority of the two million persons who fled their homes as a result of the armed conflicts in Nicaragua, El Salvador and Guatemala became internally displaced persons or undocumented foreigners in other countries of Central or North America such as Honduras, Mexico, Costa Rica, Belize and Panama as well as the United States and Canada. Of all the refugees in Central America and Mexico, only around 150,000 were formally recognized as such. Likewise, of the hundreds of thousands of persons fleeing to the United States, only a relatively small number were recognized as refugees. Most of them did not have the opportunity to request refugee status or did not do so out of fear of being expelled in the case the status would be denied.

85. Of the more than 500,000 Central Americans that fled to the United States, the majority did not receive refugee protection. The response of US authorities to the Central American refugees was heavily influenced by political reasons. Nicaraguans were generally well received and were granted asylum while asylum was denied to a large number of Guatemalans and Salvadorans who were expelled from the country, although some groups' expulsion was postponed. Costa Rica, Honduras and Mexico also received several hundreds of thousands of Central Americans of which only 143,000 of them were officially recognized as refugees.[104]

86. Two of the largest concentrations of officially recognized refugees were in Honduras and Mexico. In 1986, Honduras received around 68,000 refugees. About 43,000 of them came from Nicaragua and some 46,000 were Salvadorans, and a small number were Guatemalans, while in Mexico there were about 46,000 Guatemalan refugees and many others who were not formally registered.[105]

87. The efforts to provide international protection and assistance to the two refugee groups in Honduras (the Salvadorans in the western camps and the Nicaraguan Miskitos) were hindered by Cold War policies and other political reasons. The government of Honduras, which depended on the aid from the United States, welcomed the Nicaraguan refugees who fled from the Sandinista government but was reluctant to receive the Salvadoran refugees. The Honduran authorities' unequal treatment of both refugee groups posed major challenges for the UNHCR. Although the majority of the officially recognized refugees lived in camps run by the UNHCR, the conditions of the camps varied considerably. While the Nicaraguan refugees were allowed to enter and exit the camps freely, the Salvadorans were forced to remain in locked camps guarded by the Honduran armed forces.

103 UNHCR, *The Situation (...) 2000*, op. cit., page 135.

104 ZOLBERG, A. R., SUHRKE, A. AND AGUAYO, S. *Escape from violence: conflict and the refugee crisis in the developing world*, Oxford University Press, Oxford, 1989, page 212.

105 UNHCR Statistics Unit, Geneva.

88. The multiple Central American conflicts seriously challenged attempts to provide humanitarian and non-political protection. On numerous occasions, not only were the principles and norms of humanitarian law violated but specialized agencies lacked necessary "humanitarian space", a concept of the time, to carry out their tasks. In conflicts where few seemed neutral, UNHCR was forced to take actions at all levels, including conversations with leaders of the guerrilla movements to try and ensure respect for humanitarian criteria such as preventing the recruitment of minors and arbitrary arrests.

89. The express interest of the governments of Mexico, Panama, Venezuela and Colombia in reaffirming their support for solutions consolidating peace, democracy and development amidst the Central American turmoil was crystallized in the 1983 Contadora Declaration.[106] This declaration recognized the importance of solving conflicts with the aid of neighboring countries and without foreign intervention. This also entailed the aspiration to not mix Central American conflicts with the East-West confrontation. On the contrary, the objective was to focus on addressing the internal problems and proposing solutions by seeking the cooperation of other Latin American countries.

90. The so-called Contadora Group (Mexico, Venezuela, Panama and Colombia) played a key role in the peace process and negotiations in Central America by pursuing coordinated actions and support from and to the Latin American countries. The Contadora Act,[107] a peace proposal, included a highly advanced chapter drafted with the collaboration of UNHCR, later endorsed by the Cartagena Declaration.

91. This is how the foundations were laid for establishing a series of key commitments to the advancement, management and improvement of the present and future situations of refugees from countries in conflict. For example, the Contadora Act contained commitments to ensure a precise application of the provisions of the 1951 Convention and the 1967 Protocol on refugees; to support the work of UNHCR and coordinate efforts among countries with UNHCR offices; to ensure respect for principles of voluntary repatriation by establishing specific rules to promote and apply those principles via Tripartite Commissions; and to achieve greater coordination among host countries and the countries of origin of the refugees, among other commitments.

92. Some of the commitments relating to refugees stated in the Declaration are worth citing:

> "65. All refugee repatriations must be voluntary, individually expressed, and must be conducted with the collaboration of UNHCR.
>
> 66. In order to facilitate the refugee repatriation, tripartite Commissions must be established and integrated by representatives of the State of origin, the hosting State and UNHCR.

106 Accepting the invitation extended by Juan José Amado III, the Ministry of Foreign Affairs of the Republic of Panama, the Ministers of Foreign Affairs of Colombia, Dr. Rodrigo Lloreda Caicedo; Bernardo Sepúlveda Amador from Mexico; and Dr. José Alberto Zambrano Velasco from Venezuela met on the Contadora Island in the Republic of Panama on 8-9 January of 1983. The dignitaries also met with the President and Vice President of the Republic, Mr. Ricardo de la Espriella and Dr. Jorge Illueca, respectively. The Contadora Declaration can be accessed at www.minugua.guate.net.

107 Available at www.minugua.guate.net.

67. To strengthen protection and assistance programs for refugees, particularly in the areas of health, education, work and security.

68. To establish programs and projects seeking the self-sufficiency of refugees.

70. To request immediate aid from the international community for Central American refugees either directly, through bilateral or multilateral agreements or through UNHCR and other agencies and organizations.

73. That once the basis for voluntary and individual repatriation has been settled with full guarantees for refugees, the hosting countries should allow official delegations of the country of origin to visit the refugee camps together with a representative from UNHCR and the hosting country.

74. The hosting countries shall streamline the exit procedures of refugees in cases of voluntary and individual repatriation in coordination with UNHCR.

76. To consider as displaced persons those who have been forced to abandon their habitual residence, their property and means of subsistence as a result of prevailing conflicts, and who have moved to another location within their own country in search of personal protection and security, as well as assistance in meeting their basic needs.

77. To coordinate with the international community, at the request of the interested party, to obtain the necessary cooperation for the programs undertaken by each Central American country on issues relating to displaced persons."

CHAPTER SIX

Characteristics of the Cartagena Declaration and the resulting process

a) A process and not just a document

93. As previously mentioned, the Colloquium on Asylum and International Protection of Refugees in Latin America, held in Tlatelolco, Mexico in 1981 stated that "at the beginning of the eighties, it was evident that to face the situation of refugees coming from South America, and particularly from Central America, a new approach was required to address the problem". Cartagena, which was closely linked to the Mexico Colloquium, responded to that need. A new approach based on human dignity and protection needs was necessary to enhance the traditional Latin American vision of asylum focused on the interests of the States.

94. The increasingly wide phenomenon of displacements and the rising numbers of asylum-seekers, as stated by the IACHR, called for a solution to address the inadequacies of the Universal and the Inter-American Systems. At first, there was the belief that it would also be necessary to harmonize

the principles, standards and protection mechanisms of asylees and refugees in Latin America.[108] Later, during the following-up process to the Cartagena Declaration, a humanitarian regime based on the refugee status was clearly defined, its inadequacies noted and ways of reaching solutions not interfering with the Latin American Asylum System were articulated.

95. In order to effectively analyze Cartagena, it is necessary to look at the context in which the 1984 Colloquium emerged and the nature of the Declaration adopted at that moment. The significant precedents of the 1981 Mexico Colloquium and the Seminar held in La Paz in 1983[109] must therefore be taken into consideration since they contributed to the philosophic school calling for a reformed refugee treatment regime. Such contributions would reach their peak in Cartagena in 1984.

96. Additionally, the value of the Cartagena Declaration does not necessarily come from its existence as a historical document stemming from the conflicts 1984. Its value lies instead in the *continuum* leading to the subsequent developments clearly defined in:

    i. The *"Principles and Criteria for the International Protection of Refugees"* document drafted within the framework of CIREFCA[110] (known as the CIREFCA document);

    ii. the progress achieved in the implementation of the follow-up program of the conference, particularly with regard to the normalization of the life of refugees in the country of voluntary repatriation;

    iii. the contributions by the tripartite Commissions created for the voluntary repatriations;

    iv. the local integration of refugee settlements and camps with the neighboring communities;

    v. the 1994 San Jose Declaration proclaiming the convergence of International Refugee Law, International Human Rights Law and International Humanitarian Law with a clear focus on the application of such branches of law to the problems of refugees and internally displaced persons;

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108 *Colloquium on Asylum and Protection (…),* op. cit.

109 "Seminar on political asylum and the situation of refugees", La Paz, Bolivia, April 19-22, 1983, organized by the Bolivia Ministry of Foreign Affairs and Culture and the UNHCR.

110 CIREFCA/89/9, *Principles and criteria for the international protection and assistance of Central American refugees, returnees and displaced persons in Latin America,* International Conference on Central American Refugees (CIREFCA (for its acronym)), Guatemala City, May 29-31, 1989. This document was presented at the meeting celebrated in Antigua, Guatemala on January 25-26, 1989, to the Preparatory Committee of the International Conference on Central American Refugees, and was prepared by the expert group comprised of Dr. Hector Gros-Espiell, vicepresident of the Inter-American Court of Human Rights; Dr. Sonia Picado, Judge of the Inter-American Court of Human Rights and Executive Director of the Inter-American Institute on Human Rights; and Dr. Leo Valladares-Lanza, member of the Inter-American Commission on Human Rights. The Preparatory Committee decided to present the document to the International Conference on Central American Refugees, which at its meeting held in Guatemala on April 12-14, considered that "it may serve as a frame of reference and guidance for the States in addressing the problems of Central American refugees, returnees and displaced persons".

vi. the preparatory meetings for the commemoration of the 20th anniversary of the Cartagena Declaration (held in San Jose, Costa Rica, Brasilia and Cartagena de Indias) which revealed an important process of incorporation of the Declaration's principles into domestic legislation and constitutional guarantees developed by Latin American countries as part of their democratization processes. During these processes, the countries adopted legal measures from the Spanish Constitution of 1978 related to the observance of fundamental rights and freedoms and the creation of institutions such as the Ombudsman.[111]

The resulting document is not just a document with particular value but also a process that was able to consolidate significant achievements in the region relating to national and international protection of refugees. Its commemoration must focus not so much on the text itself (in spite of its undeniable contributions) but on the process initiated since its creation and the responses that it has generated at the national and international level.

- *A Declaration based on legitimacy rather than formality*

97. It has been cautioned on several occasions that the Cartagena Declaration is not in itself a binding instrument for States. In fact, this non-binding nature *per se* is recognized at the legal level. However, this does not mean that Cartagena has not acquired a persuasive force that may have surpassed many other kinds of legally binding documents. It can be affirmed then that the value of the Declaration itself lies in the legitimacy it has achieved in matters relating to International Law. Its *opinion juris* validity is out of question. In addition, many of its conclusions incorporate and develop norms of full validity and of a binding nature from other instruments or from international customary practice. But Cartagena has gone even further not only by contributing to the doctrine of international refugee protection in the rest of the world but also by spreading its influence to internal State legislation and/or practice. It is in its legitimacy where its value lies. Consequently, it is worth analyzing the reasons of such success within the commemoration of its 20th anniversary.

- *Much more than a broader definition*

98. It is also worthwhile to clarify that the Cartagena Declaration goes beyond merely a broader definition. The value of the Declaration as a whole has been frequently confused with the definition of refugee resulting from it. That is not the case. Its flexible approach of promoting a humanitarian space to benefit refugees, its quest for durable solutions from a pragmatic perspective to support voluntary repatriation, (without failing to acknowledge the basic principles of individual protection and security) and its efforts to seek the integration of local communities, are all contributions of the Cartagena Declaration as unique as the broader definition itself. Therefore, the Cartagena Declaration is, in spite of its non-binding nature, one of the major contributions of the region to

111 Using different denominations (Ombudsman, Solicitor, Commissioner or Human Rights Commission), the Scandinavian institution of the Ombudsman has been created in all Latin American countries with the significant exceptions of Brazil, Cuba and Uruguay, with the mandate of defending and promoting human rights. The creation of such an institution is still pending in Chile as part of the process of constitutional amendments. In the meantime, there is a Presidential Committee for the Defense of the Rights of the Persons. More recently, the denomination "National Institutions for the Promotion and Defense of Human Rights" is being preferred over the traditional term in an attempt to standardize the name of this public counsel in the region.

the progressive development of International Refugee Law. It is in virtue of this Declaration that all efforts, initiatives and new regulatory instruments must be grounded and inspired. This includes domestic legislation and practice adopted by the States to duly protect refugees and to find effective solutions to their problems in Latin America.

- *Essential systematic approach for analyzing the contents of the Declaration*

99. The foregoing reflections highlight the utility in clarifying the manner in which the Declaration was adopted at the Colloquium in such a way as to integrate into Cartagena the contributions UNHCR had been able to include in the Contadora Act. Instead of trying to produce one text that would include the entire approach for addressing and resolving refugee problems (as agreed upon at the event), the principles in Chapter II from the previous document were respected and the new aspects not covered by the peace efforts taking place before the colloquium were recorded in Chapter III of the Declaration. However, the Cartagena Declaration is in fact the sum of Chapters II and III and must be read as a whole. The new achievements of Contadora (Chapter II), particularly those relating to the design of voluntary repatriation and the creation of tripartite commissions, were integrated with the same value as the new elements added by the Colloquium and they appear as such in Chapter III.

b) The refugee definition of the 1951 Convention as a baseline

100. The virtue of the international refugee protection system, regulated by the instruments inspired in the 1951 Convention on the Status of Refugees adopted in Geneva on July 28 of 1951, lies in its ability to represent, for the first time, a definition for determining refugee status at the international level. However, this definition was not free from from controversy. It is well known that the United States supported a restricted definition in view of the legal obligations that a more general definition would imply. The Western European states, on the other hand, proposed a more ample definition, though not without certain disagreements.

101. Since the Convention was adopted amidst the Cold War the Eastern European countries led by the Soviet Union considered that the instrument in the making would turn into something that would drain human resources from the socialist democracies. As inferred from the *travaux préparatoires,* it was thought that such human capital would instead go towards the benefit the capitalist system promoted by the Marshall Plan in Western Europe. An agreement was finally reached on a general definition of "refugee" based on the "well-founded fear of persecution" that the person might have.[112]

102. Although the 1948 Universal Declaration of Human Rights enshrined the right of all persons to seek and enjoy asylum, States gave priority to the preservation of their sovereign right to authorize entry into their territory. The States drafting the Convention reacted by "not being willing to recognize an unconditional and legally binding right to asylum" which ended up being one of the most discussed issues in later decades.[113] Although the 1951 Convention relating to the Status of Refugees mentions the need to promote asylum in a generous manner, it is worth noting that the Conference of Plenipotentiaries on Territorial Asylum would only be called years later, in 1967, and unfortunately with unsuccessful results.

112 UNHCR, *The Situation (...) 2000*, op. cit., page 28.
113 Ibidem, page 29.

103. The limitations that the States themselves wished to impose on the application of the 1951 definition are also widely known, among these: a temporal limitation with reference to events occuring in Europe prior to January 1, 1951 and a geographical limitation restricted to those events occurring within the European continent. It is not until 1967, when the General Assembly of the United Nations adopted the Protocol, that both geographical limitations were to be lifted if the States, as they did, signed onto this new instrument and would withdraw their previously imposed reservations. Various experts in the field believe that the Protocol made two major contributions. One was the extension of the refugee definition by eliminating the aforementioned temporary and geographic limitations. The second one was requiring the States that had either signed, adhered to or ratified the Convention to commit to applying Articles 2 through 34 of the 1951 Convention. This commitment would even apply to those States that had not signed, ratified or adhered to the Convention. No less relevant is the provision contained in the Protocol that seeks to reaffirm the States' responsibility to cooperate with United Nations High Commissioner for Refugees (UNHCR). In this way, the 1967 Protocol greatly contributed by clarifying the situation and significantly improving the provisions of the 1951 Convention. For this reason many authors consider this document to be the only existing instrument of a universal character, due to the fact that it was ratified by more than 140 States.

104. In this context, it is necessary to analyze the three general objectives of the States determining their adherence to the aforementioned instruments[114]:

a.- relations with other States on the basis of clear provisions (rights and obligations) to all States adhering to such instruments.

b.- the application of the provisions of those treaties in national territory.

c.- the need to recognize the relationship between the States and the United Nations.

105. Aside from this definition, the Convention establishes the rights and duties of refugees as well as the obligations of States towards refugees. It articulates principles promoting and safeguarding labor rights, education, residence, freedom of movement, access to Courts of Law, naturalization and security in the case of refoulement in a country where they could be victims of persecution. It contains a supervisory clause for the UNHCR relating to the observance of the Convention. However, the UNHCR's recourse to such a measure has been limited as it raised particular concern among Latin American participants at the international conference when the 1951 instrument was created.

- *Other developments after the 1951 definition: the convention of the Organization of African Unity*

106. The refugee definition contained in the 1951 Convention was shaped by the wars occurring at that historical moment. For this reason, the protection system it created responded to the particular needs of the time. The subsequent international situation, as stated by various authors such as Flor

114 GALINDO VELEZ, Francisco, op. cit., pp. 74-75.

de María Valdez,[115] particularly the ubiquitous decolonization process in Africa during the sixties, foretold the expansion of the migratory phenomenon generated by new and diverse causes.

107. However, the refugee definition contained in the 1951 Convention, grounded in the "well-founded fear of persecution", was further developed in Africa, something that cannot be overlooked. During the sixties, as a consequence of the independence movements of the old European colonies, the number of refugees increased considerably around the world. The 1951 Convention relating to the Status of Refugees as well as the 1967 Protocol are the most important existing instruments of international law to address humanitarian concerns. However, the Convention of the Organization of African Unity (OAU), adopted in Addis Abbeba in 1969, was obliged to further develop the eminently subjective reasons ("well-founded fear") in order to incorporate more objective elements, just as was done in the making of Cartagena.

- *The 1951 definition and its limited application in Latin America*

108. The events of the sixties and seventies demonstrated Latin America's scant experience in applying the 1951 Convention relating to the Status of Refugees and the 1967 Protocol. As seen in paragraph 25 and the following paragraphs of this document, its limited application and functionality surfaced at the Second Special Inter-American Conference in Rio de Janeiro, the same conference that recommended the Inter-American Juridical Committee formulate a draft convention on refugees to more effectively address the new forced displacement situations in the Americas. The experience of the mass displacements of the seventies taking place in the Caribbean revealed the inadequacy of the existent regulatory instruments. That reality worsened with the exodus of refugees in South America during the seventies. It is equally important to mention the need for finding a regulatory, coherent, flexible and pragmatic framework to provide protection to those in need was equally stated by the Tlatelolco Colloquium (Mexico 1981) as well as by the 1981-1982 annual reports of the Inter-American Commission on Human Rights.

109. On this issue, it is important to consider that the application of the Inter-American instruments on Human Rights in the region, particularly Article 22 of the American Convention through the Commission and the jurisdiction of the Court, were recent instruments when the Cartagena Declaration was adopted in 1984. The American Convention on Human Rights came into effect in 1978 with the creation of the Court itself. With this the existing inadequacies and gaps evident in the "legal limbo" noted in Chapter I of this document should be emphasized, not only because of the limited application of the international normative instruments relating to refugee situations in Latin America but also because of the incipient activity of the supranational organizations, particularly those within the Inter-American sphere responsible for protecting and promoting Human Rights.

- *The contribution of non-governmental organizations in the Cartagena process*

115 VALDEZ ARROYO, Flor de María, *Ampliación del concepto de refugiado en el Derecho Internacional Contemporáneo (Extensión of the refugee concept in Contemporary International Law),* Pontificia Universidad Católica del Perú, Fondo Editorial, Lima, 2004.

110. The eighties witnessed the beginning of increasing civil society activity in the domain of the protection of human rights and refugees. Their activity significantly strengthened the need to advance the creation of a new normative framework to protect refugees in situations of mass influx resulting from the conflicts in Central America. The active participation of NGOs in the region, through consensus and dialogue with national governments and under the auspices of international organizations strengthened their activities and contributions to the elaboration of a system based on greater respect for human rights. The work of civil society organizations greatly contributed to the process leading up to the Cartagena Declaration and the development of its principles based on the search for durable solutions to the problems affecting refugees in Central America and other Latin American countries.

- *Analysis of the fundamental aspects of the definition proposed by the Cartagena Declaration*

111. In essence, the definition proposed by the Cartagena Declaration, known as the broader definition of the refugee concept, may be subject to the following commentaries:

- The difference lies in the incorporation of objective elements without accounting for the subjective aspects related to the "well-founded fear" concept articulated in the 1951 Convention.

- It also leaves aside any reference to the element of "persecution" that might lead to rejection or objection by the State of the country of origin.

- Instead, and in line with the OAU Convention, reference is made to those "persons who have fled their countries because their life, security or freedom has been threatened by generalized violence, foreign aggression, internal conflicts, mass violation of human rights and other circumstances seriously disturbing public order". This refers mainly to factual situations stemming from conflicts or serious disturbances of public order which can be objectively verified and which may be found to be the cause of the flight of the persons mentioned under the definition.

- Particular attention must be made to the reference to mass violations of human rights, which is not contained in the definition of the African Convention. Its inclusion in the Cartagena Declaration confirms the linkage between the protection of refugees promoted by Cartagena and International Human Rights Law at the same time that it accounts for the contributions consistently made by the Inter-American Commission on Human Rights as well as the advisory opinions and rulings issued by the Inter-American Court of Human Rights, which, as we already mentioned, dealt thoroughly with refugee problems during the year preceding the Cartagena Colloquium and in subsequent developments (paragraph 35 of the CIREFCA Document).

- Having established the causal relationship between the factual situation and the justified need to flee in order to save lives, security or freedom--be it on the individual, family, group or community level--the legal right of such persons is applicable not only in seeking protection as refugees on the basis of the *pro homine* principle but also in the immediate application of the principle of *non refoulement*.

- Consequently, the Cartagena definition seeks to ensure those rights pertaining to core human rights (life, security, freedom) without necessarily having to identify each one of the persons entitled to such rights and without forcing them to prove their subjective fear.

- The scope of protected rights has been widened under the framework of the CIREFCA Document (paragraph 28), providing that refugees may not be subject to detention, arbitrary arrest or torture. To this we must add the protection provided by the *non-refoulement* principle by which no person may be subject to discrimination on the basis of gender or subject to human trafficking.[116]

- Developments in the wake of Cartagena will be extended under the framework of protection and solutions to the problems of internally displaced persons, particularly with regard to conditions of return to places of origin inside the same country as embodied in the 1994 Declaration of San Jose.

- *Present and future of the refugee definition proposed by the Cartagena Declaration*

112. At present more than ten countries in the region have incorporated the definition proposed by the Cartagena Declaration into their domestic legislation. Today, however, twenty years after its adoption, even greater efforts are necessary for the States and UNHCR to achieve a coherent interpretation of such a definition. However, the Cartagena definition has raised concerns in some States regarding the possible interpretations in terms of security that may result. This is evidence of the utility of a handbook for implementing the Convention and a guide to counsel authorities on its interpretation either as domestic legislation or as a predominant criterion in administrative decisions made in cases of those countries that have not incorporated the definition into their domestic legislation.

113. The greatest challenge with respect to the broader definition, considering the current situation of the Andean countries, is most likely its relationship with the dispersion phenomenon of the Colombian exodus. This dynamic has resulted in the invisibility of refugees described in the preparatory meetings of the Commemoration of the 20th anniversary of the Cartagena Declaration. This causes refugees to be present within migratory flows originating in the region, making it more difficult to identify them and provide them with due protection. We may ask then whether the definition proposed by the Cartagena Declaration responds to such a reality. In light of the foregoing analysis, elements of the definition cover all of the aspects in general legal terms. This is particularly true if an effort is made to draw on the series of principles and legal values that have been brought together since the Cartagena Declaration was adopted in 1984 and the progressive development achieved through the CIREFCA Document and the 1994 San Jose Declaration. This statement, however, does not override the importance of the consensus reached at the time of adopting the definition and applying the interpretation that best meets the present needs.

c) Contributions of the Cartagena Declaration beyond its definition

114. The Cartagena Declaration is an innovative and creative regional approach that ensures the protection of the fundamental rights of refugees. The Declaration is characterized by its integrity and flexibility in finding solutions without undermining the respect for the essential rights and principles while at the same time incorporating the contributions of CIREFCA and the 1994 San Jose Declaration on refugees and displaced persons:

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116 Convention on the Elimination of all Forms of Discrimination Against Women (1979); Protocol to prevent, suppress and punish trafficking, particularly women and children, which is supplementary to the United Nations Convention Against Transnational Crime (2000); Inter-American Convention on the Prevention and Punishment of Torture (1985); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *"Convención de Belem do Pará"* (1994).

a. Cartagena incorporates the protection of refugees within the converging framework of the 1951 Convention and the 1967 Protocol as well as the American Convention of Human Rights so that States may apply both instruments as they relate to refugees and the solutions required by their situation (eighth and ninth Conclusions).

b. It promotes a more intensive use of the competent agencies of the Inter-American system, particularly the IACHR.

c. The culminating issue would be crystallized in the converging vision of protection grounded in International Refugee Law, International Human Rights Law and International Humanitarian Law developed by jurist Cançado- Trindade and adopted by the 1994 San Jose Declaration.[117]

d. It ratifies the peaceful and exclusively humanitarian nature of asylum and refugee protection by reiterating the need to locate the presence of refugees within a security context prohibiting military attacks and reducing the vulnerability in which they normally live when they are located in litigious bordering regions. This is in turn embodied in greater depth in the document and the application process of the CIREFCA Plan of Action in paragraphs 36 and 43 through 45.

e. It develops the concept of the *non-refoulement* principle as *ius cogens* within the purview of international law. CIREFCA points to its relevance in conclusion V and in paragraphs 46 to 48.

f. It extensively develops the voluntary nature of refugee repatriation and the return of displaced persons to their places of origin under conditions of security and dignity as emphasized in the CIREFCA document (paragraphs 57 through 64). Beginning in Cartagena (Chapters II points n) f) and g) and the twelfth conclusion), a description is made of the procedures aimed at promoting, regulating and executing the voluntary repatriation of refugees with the contribution of the tripartite commissions composed of representatives of the authorities of the country of asylum, the country of origin and UNHCR with the specific purpose of ensuring the return of refugees under conditions of security and dignity.

g. The implementation of the CIREFCA Plan of Action would require the integration of a fourth party into these commissions, that is, the most interested party: the refugees and their representatives to foster dialogue with the return communities.

h. It establishes the commitment to carry out programs and projects aimed at seeking the self-sufficiency of refugees and studying the possibilities of integrating them into the economic life of the host country to ensure their economic, social and cultural rights while giving priority to the assistance of refugees in terms of health, education, employment and security. All these aspects were widely developed by the Declaration in the eleventh conclusion and in Chapter II, points h) and i), which, as mentioned before, contains the contributions of the Contadora Act. CIREFCA addresses the issue in paragraphs 65 and 66 where the needs of the local communities sharing their lives with refugee populations are incorporated.

117 See footnote No. 5 in this document.

i. The Cartagena Declaration recognizes the important task of non-governmental organizations, both national and international, so that they may continue with their painstaking efforts of cooperation with UNHCR and the corresponding national authorities. Their relevance is stated in conclusion XIV of the Declaration and in paragraphs 71 and 72 of CIREFCA. In addition, their contribution has developed significantly and is easily evident in the application of the CIREFCA Plan of Action and in the development of protection and assistance to refugees throughout Latin America, especially in the countries of the Andean Community of Nations.

115. In analyzing the progress made by the Declaration, the historical context in which it was adopted must be underscored. The Declaration emerged at a moment when most of the countries of the region had not adhered to international refugee instruments or, in any case, was a recently emerging issue. It is therefore easy to assume that normative deficiencies or legal limbo existed in various States and translated into a pattern of a lack of State action to address refugee issues.

116. It is equally important to analyze Cartagena's flexible approach as it enabled States to harmonize their legitimate security and national protection needs with those related to humanitarian assistance of those persons in urgent need of protection. It is also necessary to point out two issues of particular importance regarding the comprehensive approach to which the protection system should aspire: recognition of the social, economic and cultural rights of those with refugee status, and the proposals seeking durable solutions to ensure the dignity and security of persons.

117. Several studies have emphasized three areas requiring special attention not only because of their contributions but also because of the challenges they pose to the States regarding refugee assistance:

- First, it is of paramount importance to consider the call made by the Declaration to the States urging them to sign on to international refugee instruments without reservations and to adopt mechanisms and practices ensuring their effective implementation and application. From this perspective, the non-political and strictly humanitarian nature of refugee recognition and of asylum therefore is as significant as the observance of the basic standards in issues relating to refugee protection and assistance, particularly in areas of health, education, employment and security.

- As to the *non-refoulement* principle, the Declaration places particular importance on the criteria applicable in cases of voluntary repatriation, local integration and resettlement by establishing a series of principles that are to be observed and developed by the States as they contribute to the assistance and eradication of the causes that generate forced displacement. It is for these reasons that the document places special emphasis on the location of refugee settlements.

- The recommendation articulated by the Declaration is even more important within the context of globalization in which States must promote and sponsor consensus and international cooperation in an effort to respond more effectively to the international refugee protection system. For this reason, the Declaration mentions the need to foster a spirit of solidarity and responsibility-sharing. According to the document, this principle-based statement must translate into reality through the creation of consultation and dialogue mechanisms among the States adhering to the integral approach of supranational regulations relating to refugee

matters and to the assistance that must be provided to those who have migrated against their will from their place of origin for the justified reasons as admitted under International Law.

- The relevance of the 1984 Cartagena Declaration is evident in its impact on two principles of vital importance for refugee matters: international solidarity and responsibility-sharing. To this end, the Declaration calls attention to the need to provide minimum treatment standards so as to put an end to the precarious situation of many groups of refugees throughout the region and to provide them with at least minimum means to lead a dignified life in the country of asylum, all of this framed within the context of respect for human rights contained in the existing regulatory instruments. This approach has been reiterated during preparatory consultations for the commemoration of the 20th Anniversary of the Cartagena Declaration held in San José, Brasilia y Cartagena.

CHAPTER SEVEN

Relevant aspects of the post-Cartagena process

a) From the minimum treatment standard framework to durable solutions

118. Chapter four states that the Cartagena Declaration had access to Conclusion No. 22 approved by the UNHCR's Executive Committee on the *Protection of asylum seekers in large-scale influx situations*. These regulations were adopted as the minimum legal regime to be applied during the temporary period of asylum as an initial step to obtaining a durable solution putting an end to the situation of displaced persons.

119. Minimum humanitarian treatment standards have significantly developed during the past years. Previous studies have underlined seven aspects[118] with which hosting States must comply:

- Freedom of movement: it is understood that asylum seeks to preserve the right to life and freedom of persecuted persons and may not entail restrictions to freedom of movement unless it is strictly necessary for reasons of health or public order.

- Assistance and satisfaction of vital needs: the material assistance of refugees to ensure their subsistance cannot be subject to limitations, particularly food, health, housing and sanitary services. International solidarity is of particular importance in this matter to ensure the minimum means of subsistance.

118 SANTISTEVAN, Jorge, op. cit., pp. 62-66.

- Legal situation: the admission of refugees into the territory of a particular country, even under temporary conditions, must imply the recognition of rights and duties of those persons before the law, the state administration and particularly the justice administration services of the State. It is therefore necessary to avoid the application of exceptions that would exclude them from the legal regime currently in force in the country so as to avoid potential legal abandonment and situations of defenselessness.

- Family protection: it is evident that migratory groups are mostly constituted by women, minors and senior adults. Family reunification must therefore be promoted by facilitating services to reunify disintegrated families, to respect the unity of those families arriving together in the country of asylum, and to provide means to locate the whereabouts of disappeared family members.

- Access to sources of subsistance: this sphere gives priority to the access to minimum levels of education. In ensuring minimum treatment standards, hosting States must provide, within their possibilities, work opportunities by softening labor regulations to allow their inclusion into the labor market.

- Humanitarian treatment: minimum humanitarian treatment standards imply giving refugees a treatment in accordance with human dignity while prohibiting any kind of cruel, degrading or inhuman treatment. It is equally necessary to exclude any kind of discriminatory practice inconsistent with the respect for individuals.

120. However, the process resulting from the Cartagena Declaration went beyond the minimum framework described above. It assumed a definitive commitment to achieving durable solutions by addressing possibilities for voluntary repatriation, considered to be the solution *par excellence* by the CIREFCA Document. This was to be part of the protection regime during the refugee's stay in the country of asylum and by promoting self-sufficiency as a means of integration and economic development. The Cartagena Declaration considered all this as part of the necessary protection during the permanence of refugees in the country of asylum or in the place of reception of those fleeing from generalized violence or man-made disasters. This forced States to promote options for durable solutions that would put an end to the temporary nature of the refugee's situation, thus normalizing their lives and favoring the full exercise of their fundamental rights. Years later, this led to the adoption of innovative approaches in border programs in the countries adjacent to Colombia.

121. Significant progress was made regarding the observance of minimum humanitarian treatment standards, which laid the protection framework on the basis of respect for human rights and the dignity of the individual (the *pro homine* principle). The compliance by the States of this principle is essential to relieve the impoverishment of those who have been uprooted from their place of origin. This was deemed necessary to highlight the repatriation or integration possibilities of refugees into the hosting communities.

b) CIREFCA and the progress of its Plan of Action

122. One of the major achievements of the process undertaken by the UNHCR in Central America was the ability to transcend Conclusion No. 22 by seeking durable solutions through bold actions promoting repatriation with the support of tripartite commissions constituted on the basis of

recognizing a shared humanitarian space over States differences. The top priority was guaranteeing protection and adequate treatment of refugees and returnees and to benefit those staying in the country of asylum by enabling their integration through projects and actions aimed at providing work, education and decent living conditions. In short, UNHCR sought to correlate group treatment to the situation of refugees and the search for peace in the region while surpassing the minimum internationally established conditions.

123. The 1984 Cartagena Declaration has ensured its endurance as a result of the legitimacy that it earned in Latin America in spite of its non-binding nature. The Cartagena Declaration represents the consolidation of a process that is still under way and was of particular relevance at the International Conference on Central American Refugees (CIREFCA) held in Guatemala City in 1989. In fact, the Conference was motivated by the need to evaluate the progress achieved in terms of protection and assistance to refugees as well as issues relating to voluntary repatriation with the purpose of disseminating the Declaration and ensuring its compliance.

124. CIREFCA contributed, among other things, to the need to elucidate and articulate the displacement concept as well as the need of consolidating a more formal response by each State regarding the coalitions or groups comprising them. It is worth pointing out that the problems of Central American refugees during the eighties resulted from the political, social and economic circumstances experienced by several countries at that time. The legal norms used to address such problems were originally closely linked to the social and economic reality of the countries generating consecutive migrations as well as of those countries offering refuge to significant groups of the Central American population. Notwithstanding the above, and according to various research findings and studies conducted later, there has been consensus affirming that CIREFCA's contributions lie mainly in its ability to articulate joint mechanisms to assist refugees within the execution of its Plan of Action more than in the appeals and conclusions contained in the document itself. It particularly contributed to implementing procedures and practices that would ensure the operational capacity of the conceptual developments resulting from the Cartagena Declaration. For these reasons, fifteen years later, it must be conceived as an opportunity to consolidate the individual and collective action of the States. CIREFCA states the urgency to intensify the putting into action of the provisions contained in the various normative instruments, particularly in the Cartagena Declaration.

125. The Plan of Action adopted by the Conference held in Guatemala in 1989 was based on a comprehensive approach aimed at addressing the problems of Central American refugees. The approach was capable of responding to the most immediate needs and focused its actions on refugee camps and settlements. It was adopted as the most effective and concrete manner to contribute to peace building in the region. The Central American peace process, beginning with the efforts of the Contadora Group and its emblematic Declaration of Commitments for Peace and Development, was a milestone in the Esquipulas II Agreement (Guatemala 1987) which consolidated the efforts--with no intermediaries this time--of the Central American countries to put an end to the conflicts, to recover democracy and its institutions, and to promote economic and social development. Within this context, the States included actions conducive to achieving durable solutions to the problems of refugees and displaced persons in the region conceived in Cartagena and developed by CIREFCA and its Plan of Action.

126. Consequently, linkages existed between CIREFCA and its Plan of Action and regional peace efforts which were supported by the United Nations and the crucial role played by its Secretary General, Javier Pérez de Cuellar. The dynamics among the different actors was consolidated in the special United Nations missions (ONUSAL in El Salvador and MINUGUA in Guatemala) and the OAS (CIAV in Nicaragua). An analysis of the support of international organizations to peace efforts does not fall within the objectives of this document and would be the subject of additional research. For now, it is important to underline the simultaneous contribution made towards peace building by the UNHCR and the CIREFCA process through various milestones which are directly related to the international refugee protection.

c) Refugee return and the tripartite commissions

127. The Cartagena Declaration addressed the issue of voluntary repatriation at the beginning of the eighties when mass refugee influxes began to be processed by the authorities and societies of Central American countries. Mexico experienced without a doubt one of the most advanced results of the event of Cartagena de Indias in 1984. There was criticism at the moment against addressing the issue of repatriation. Opponents argued that talking about repatriation could undermine the foundations of international protection considering the precarious conditions of the refugee camps in bordering regions. However, Cartagena was flexible enough to consider voluntary repatriation as part of the responsibilities related to protection. Although Cartagena's approach was principle-based at first, it was also pragmatic in an effort to address both the possibility of voluntary repatriation and the need to maintain humanitarian spaces under conditions of security and dignity in the country of asylum. It was questioned at the moment whether repatriation was possible even when the conditions in the country of origin had not changed substantially. Was it viable to create Tripartite Commissions to promote repatriation when secure and dignified living conditions could not be guaranteed so that refugees would want to return voluntarily? Was it admissible to organize visits to the country of origin when the causes that justified the exit were still active and present? Thanks to the Cartagena approach, known as the "Cartagena spirit", progressive steps were taken toward effective repatriation thereby turning initial generalized rejection (the "no to repatriation" of the Colomoncagua camp in Honduras, for example) into organized return years later. This return was based on voluntary repatriation of refugees, a process that freed thousands of persons from the fences of closed camps and enabled them to begin new lives in their country as they, at the same time, contributed to peace building.

128. The Tripartite Commissions accomplished their mission. They were organized by Costa Rica-UNHCR-El Salvador; Honduras-UNHCR-Nicaragua; Costa Rica-UNHCR-Nicaragua; Mexico-UNHCR-Guatemala; Belize-UNHCR-El Salvador, all of which found their *raison d'être* and regulatory framework in the Cartagena Declaration. In their own style, literally making headway as they worked, the Tripartite Commissions worked on implementing Cartagena. The Cartagena Declaration and subsequent CIREFCA Document provided them with the regulatory framework to conduct substantial voluntary repatriation operations, known as organized repatriations, leading thousands of Salvadoran, Guatemalan and Nicaraguan refugees to finally return to their country of origin.

d) The incorporation of communities of origin into voluntary repatriation efforts and quick-impact projects

129. Based on the ruling principle established in the Cartagena Declaration and developed in the CIREFCA Document, stating that the best solution to refugee problems is to normalize their lives. Thus, voluntary repatriation activities were forced to consider the situation of the communities of returning populations. No matter whether they remained there during the years of hardship, whether they moved within the territory of their country of origin, or whether they had fled to a neighboring country as refugees, repatriation forced States to considered the needs of all persons and to help normalize their lives without differentiating among categories, something that would necessarily lead to discrimination among persons with the same needs.

130. The quick-impact projects implemented by UNHCR under this approach to aid communities deserve special attention. Examples of those projects are a badly needed road that was never built, a missing bridge to bring products to the market, a school that the local children always needed, water and sewage system that everyone called for. The quick-impact projects focused on these kind of public works with the purpose of facilitating the reception of returnees and improving the security conditions and dignity demanded by repatriation. Under similar principles, this comprehensive approach is applied today in other places such as the Andean countries in order to address the needs of poor communities and to meet the humanitarian requirements of refugees and returnees in the neighboring countries to Colombia. Efforts are also made to alleviate the situation of those who have been forced to abandon their homes in that country and to seek protection either outside of it or in remote and safe locations within Colombia.

131. It could be argued that quick-impact projects are a core component of assistance programs and are not necessarily related to refugee protection. However, from the perspective inaugurated by the Cartagena Declaration in Latin America, these projects are essential to providing a dignified and safe solution demanded by the protection required and claimed by refugees themselves.

e) Local integration as an equally valid solution

132. Not everything in Cartagena was about voluntary repatriation. It also established the need to consider refugee self-sufficiency as an alternative to closed, problem-ridden camps in the bordering regions of Mexico and the Central American countries. This presupposed a first step toward solidarity from the authorities of the asylum countries- with the support of international cooperation- so that the States would benefit from refugee labor or creativity offered by the newcomers to the benefit of receiving communities.

133. However, the process charted by Cartagena reached goals that went beyond self-sufficiency, as important as self-sufficiency may have been. It set the course toward full integration of refugees into the economic life and future of the communities of the asylum countries with the aim of ensuring their future assimilation. The 1984 Colloquium did not address eligibility for acquiring new nationality in the country of asylum. Although such nationality was conceived as a right to be granted to refugees and was included as a cessation clause to the refugee status of the 1951 Convention, it set the course toward integration as had been previously established.

134. Repatriation was common in the camps of Honduras and for many Miskito refugees who returned to Nicaragua. However, air-lifts were organized and their security was guaranteed in spite of the fact that refugees had to go through zones of active combat. Such was the case of thousands of Guatemalans who returned voluntarily to their communities of origin. Local integration resulted

ideal to many of these refugees deciding on integration in Mexico once the self-sufficiency stage in Chiapas, Campeche and Quintana Roo was reached. These Guatemalan refugees and their offspring have been able to obtain the Mexican nationality. Similar integration has occurred in Belize with the inhabitants of Valle de la Paz (Valley of Peace) where many have found a new promising home there.

f) Integration of the principles of the Cartagena Declaration into human rights protection in the internal legal system of the States

135. Significant progress has been made regarding refugee protection within States. These achievements respond to a large extent to a series of constitutional processes currently adopted by Latin American Constitutions in an effort to bring human rights protection under the jurisdiction of the Courts, in addition to having recourse to international instances, once domestic remedies have been exhausted. This reality is known as an opening up to the legalization of protection and defense of human rights in which refugee problems not only cease to be alien but their importance increases at all levels. The Cartagena Declaration and its subsequent evolution are thus destined to accomplish a mission in this new fertile ground of internal protection of refugees, internally displaced persons, returnees and persons who share their destination with them.

136. Twenty years after the Declaration of Cartagena, if one wishes to do justice to their professionalism and commitment to the legal defense and promotion of rights it is important to recognize the crucial role played by civil society and non-governmental organizations regarding protection matters. This does not mean, however, that their contributions twenty years ago were not acknowledged as revealed by the difficulties faced during the Cartagena and CIREFCA processes. However, their actions are more widely accepted by States today and they have gained more experience and technical expertise over time. The preparatory meetings of the commemoration of the 20th Anniversary of Cartagena reveal that the Declaration has become part of the heritage of civil society and is destined to become part of the domestic instances for the defense of the rights of refugees, displaced persons and returnees. It will also safeguard the application of the principles and values incorporated by the Declaration into Refugee Law, particularly when its principles become fully incorporated into domestic legislation or they are adopted within the administrative practices applied to refugee populations.

137. With respect to the Andean region, it is worth mentioning that the Andean Charter of Human Rights will most likely play a more expanded role as it is called upon in considering the problems associated with uprootedness in the region and to incorporate the institutionalism of the regional community on such issues.

138. Finally, the leading role played by the national institutions of protection and defense of human rights (Ombudsman, Solicitors, Commissioners or Human Rights Commissions created in the region) must be considered in the future application of the Cartagena Declaration in Latin America. These institutions and their authorities will have to adopt the set of values and principles embodied therein in order to contribute to the protection of refugees, displaced persons and returnees within the national system and their corresponding mandate. Depending on the institutional design of these protective institutions, their authorities may resort--if necessary and once the domestic remedies have been exhausted--to international, regional or universal bodies either through the *amici curiae* channel or through the exceptional means of individual complaints.

g) Some final considerations on the Cartagena Declaration and the particular situation of refugees in the Andean countries and other countries affected by the presence of Colombian refugees

139. This "revisited" recount of the Cartagena Declaration, its impact and validity twenty years later could not be concluded without referring to the humanitarian crisis- often classified as "hidden" or "invisible"- experienced by the Colombian exodus in the member countries of the Andean Community of Nations and other countries such as Panama and Costa Rica. Are there any similarities between the situations leading to Cartagena in 1984 and those of today in Mexico in 2004 on the occasion of the 20th Anniversary? Are their contributions still valid in terms of principles, values, legal definitions and relevant treatment regime for the international protection and due treatment of refugees?

140. It may be argued that the differences are evident although the internal and continental security problems have always been of paramount importance in all refugee crises. We may also affirm today's Colombian exodus, taking place after the fall of the Berlin Wall, is evidence of a conflict older than the Cold War itself and present manifestations of the former have little to do with the latter. The events of September 11, 2001 did not influence the problems of 1984 and the world then was not as globally interdependent. The reality is that every refugee situation is special.

141. From this perspective, even though the migratory phenomenon was present in Cartagena 1984, it had not reached the current dimensions in Central America and the Andean countries.[119] Today States have generalized the policy of considering active citizens those who chose to live abroad but who continue somehow linked to their country of origin through traditions, family and cultural ties, and who make increasing contributions to the economies of the Latin American countries through their remittances.[120]

142. At the political level, the situation in 2004 differs from that of twenty years ago in that all the countries have formally elected governments and democratic regimes comprising constitutional states, with some variations among them, which expressly recognize the effective exercise of human rights. States have internal protection mechanisms and institutions for the defense and promotion of human rights, the effectiveness of which, although not uniform, is increasingly verifiable. Civil society is much more vigilant and non-governmental organizations have earned recognition as major actors in this endeavor as a result of their increasing participation in the protection of refugees, displaced persons and returnees both internally and at the international level.

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119 MURILLO, Juan Carlos, "La Declaración de Cartagena, el Alto Comisionado de Naciones Unidas para los Refugiados y las migraciones mixtas" *(The Cartagena Declaration, the United Nations High Commissioner for Refugees and mixed migration)* in IIHR, *Migraciones y Derechos Humanos: Reunión de personas expertas*, San José de Costa Rica, 9-11 de agosto de 2004.

120 OROZCO, Miguel, "Remesas hacia Latinoamérica y el Caribe: cuestiones y perspectivas acerca del desarrollo" *(Remmittances toward Latin America and the Caribbean: issues and approaches to development)* in IIHR, op. cit.

143. The consequences of the humanitarian crisis experienced by Colombia deserves special attention as it has forced an estimated three million persons to abandon their country as a result of the serious conflict affecting them. The coca problem is a singular aspect of this exodus as a residual residue-producing country: this traditional cultivation is perfectly legal for medical use and ancestral consumption in the indigenous populations of Peru, Ecuador and Bolivia; however, the illegal drug dealing business is organized from the territory of these populations (Colombia) leading to parallel security forces, their connection with guerrillas, organized crime, kidnapping as a funding source, arms trafficking, and generalized corruption. All of these problems result from the particularities and intricacies of Colombian uprootedness and its invisibility in most places and under most circumstances. We must recognize that nothing similar occurred during the Central American refugee crisis underlying the Cartagena Declaration and its subsequent development. The authors believe that this does not justify overlooking the significant contributions made by that instrument and the spirit leading to its creation and progressive development.

144. Is it appropriate to discuss the value of Cartagena in such a different and constantly changing environment? Should we doubt its contribution to the current situation? Those who have adhered to this document firmly believe its value is found in its character as the juridical groundwork enabling States to take advantage of its evolution basing refugee protection on human dignity and the gamut of rights deriving therewithin. Refugee protection has been incorporated into two convergent lines: refugee regimes, human rights and humanitarian law on the one hand; and protection within the national systems States supplemented with international protection at the regional or universal level, on the other hand. As to the evolution of International Law in Latin America, we must reaffirm that Cartagena incorporated two fundamental principles of International Refugee Law, allowing States to overcome the preexisting "legal limbo" described in previous chapters as well as the "territorial limbo" causing precarious living conditions for refugees, displaced persons and returnees, thus enabling authorities to guarantee decent living conditions.

145. We can therefore conclude, without overlooking the pertinent principles, that the Cartagena Declaration has adopted a pragmatic approach in its application and evolution. The increasing values, principles and criteria rooted in the Latin American tradition, expressed in Cartagena as well as in the CIREFCA Document and the 1994 Jose Declaration, make up a legacy that future generations must receive, renew and develop over time.

146. If that and only that has been the contribution of Cartagena in its efforts to find solutions to problems facing Latin America today; and if that contribution has helped alleviate the suffering and deep despair of thousands of persons who have been forced to abandon their homes for the reasons recognized in the Declaration, this commemoration process has been worthwhile.

CONCLUSIONS

FIRST

The 1984 Cartagena Declaration on Refugees, on the occasion of the commemoration of its 20th Anniversary, must be valued from an historic and legal perspective as a milestone in the treatment of refugees in the region. It is an instrument characterized by the legitimacy of its acceptance, the expansive force of its content and the persuasive nature of its conclusions that have contributed to International Law, the legislations of numerous Latin American States, and to the application of their internal regulations and practices.

SECOND

A serious analysis of the Cartagena Declaration must surpass the static vision that focuses exclusively on the content of the document adopted in 1984. Such analysis must necessarily incorporate a dynamic vision that accounts for the gradual process complemented by the contributions of the CIREFCA Document and the 1994 San Jose Declaration as well those of the regional preparatory meetings of the commemoration of the 20th Anniversary held in San Jose, Brasilia and Cartagena and that held by non-governmental organizations in Bogotá.

THIRD

Considering the Cartagena Declaration and its subsequent development relating to the international protection of refugees, its legacy is based on the following:

- The convergent approach of International Refugee Law, International Human Rights Law and Humanitarian Law applicable in guaranteeing the dignity of refugees and respect for their basic rights.

- The more extensive use of the Inter-American system, particularly the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

- At the jurisdictional level, the challenge posed by the use of effective remedies currently provided by Latin American constitutions to ensure the protection of human rights before the courts. At the non-jurisdictional level, the protection of rights within the institutions of promotion and defense of human rights thereby contributing to the complementarity between the protection offered by the national system of the States to further human rights and freedoms and their protection within the international, regional and/or universal system.

- The humanitarian treatment to be applied to international refugee protection upon enforcement of the *non-refoulement* principle in all its extension to the treatment regime seeking to meet their vital needs and the search for durable solutions that incorporate the needs of the local populations of the country of origin and the country of asylum who experience the same fate as refugees.

- The peaceful and exclusively humanitarian nature of asylum and refugee protection. It is for this reason that the Cartagena Declaration and its aftermath recognize the need to locate the presence of refugees within a context of security while eliminating military attacks and reducing their vulnerability, especially when they are located in contentious bordering areas.

- The *non-refoulement* principle as belonging to *jus cogens* under international law.

- The voluntary character of refugee repatriation and the return of displaced persons to their places of origin under conditions of security and dignity. This procedures aim to promote, regulate and execute the voluntary repatriation of refugees with the contribution of the tripartite commissions integrated by representatives of the country of asylum, the country of origin and UNHCR with the specific purpose of ensuring return under such conditions of security and dignity. The execution of CIREFCA's Plan of Action would require the integration of a fourth party into these commissions, namely, the most interested party: refugees and their representatives while promoting dialogue with the return communities.

- The commitment to carry out programs and projects aimed at achieving the self-sufficiency of refugees and studying the possibilities of intregration into the economic life of the host country in order to ensure their economic, social and cultural rights while giving priority to refugee assistance relative to health, education, employment and security and incorporating the needs of the local communities sharing their destination with refugee populations.

- The recognition of the key role played by non-governmental organizations, both national and international, so that they may continue their worthy efforts of cooperation with UNHCR and the corresponding national authorities. The increasing relevance and easy verification of the contribution of these organizations to the development of protection and assistance to refugees is also recognized in all Latin America, particularly in recent years with the contribution resulting from the experience of the Andean Community of Nations.

- The verification that it was only after the Cartagena Declaration and its later development that international refugee protection was consolidated and firmly rooted within a specific legal framework of the integral protection of persons in line with humanitarian law and human rights. This then surpassed the traditional approach of the System of Latin American Conventions on Asylum, which are essentially of an interstate and discretional nature.

FOURTH

The definition proposed by Cartagena has marked a point of no return in terms of the objective conditions justifying the flight of refugees from their homes in search of protection while assuming the progress of other international instruments and the human rights doctrines emanating from the protection organs of the Inter-American System.

Such a definition has been considered a model in other continents and has been adopted by the national legislation of many Latin American countries. In those cases where the definition has not been incorporated into domestic legislation, it is used as an interpretative criterion in determining refugee status and applying the *non-refoulement* principle.

In essence, the following conclusions can be derived from the definition proposed by the Cartagena Declaration:

- Its difference with the definition embodied in the 1951 Convention and the 1967 Protocol lies in the incorporation of objective elements without accounting for the subjective elements related to the "well-founded fear" of the 1951 Convention.

- The Cartagena Declaration discards any reference to the element of "persecution" that may lead to subjective assessments of the situation of the country of origin as well as the rejection or objection to such assessments by the State authorities of the country of origin.

- Instead, in line with OAU Convention, reference is made to those *persons fleeing their countries because their lives, security or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, the massive violation of human rights or other circumstances seriously disturbing public order"*. This alludes mainly to factual situations derived from conflicts or serious and objectively verifiable disruptions of public order motivating the flight of persons mentioned in the definition.

- The massive violation of human rights, which is not incorporated into the definition of the African Convention, confirms the fact that refugee protection is rooted in International Human Rights Law while accepting the consistent contributions of the Inter-American Commission on Human Rights as well as the advisory opinions and judgments pronounced by the Inter-American Court of Human Rights.

- Having established the causal relationship between verified facts and the need to justify the flight of persons to save their life, freedom or security-- either at the individual, family, group or community level-- such persons may exercise their legal right to demand protection as refugees on the basis of the *pro homine* principle and the immediate application of the *non refoulement* principle.

- Consequently, the definition of the Cartagena Declaration seeks to ensure core human rights (life, security and freedom) without necessarily identifying each person entitled to such rights and without scrutinizing their justifications or subjective feeling of fear.

- Following the adoption of the Cartagena Declaration, the realm of protected rights was extended within the context of the CIREFCA Document to ensure the following protection: refugees may not be subject to detention, arbitrary arrest or torture in addition to the protection of the *non refoulement* principle in effect today so as to ensure that no person is subject to discrimination, on the basis on gender, or subject to human trafficking.

- The later development of the Cartagena Declaration extended its realm of protection to include the problems of internally displaced persons, particularly with regard to conditions of return to places of origin within their own country as set forth in the San Jose Declaration of 1994.

FIFTH

In an effort to apply the definition, it is recommended that UNHCR prepare an interpretative guideline underlining contributions to the definition from the following sources: *(i)* the application of the legislation of the Latin American States as well as *(ii)* practices developed by those States, and *(iii)* the progress made by International Law based on the most recent international instruments supporting the application of the principle of *non-refoulement* and the protection of refugees, displaced persons and returnees.

SIXTH

The resettlement of refugees in third countries has evolved in an interesting manner in Latin America. It was used extensively as a preferential solution in the seventies as a means of responding to the exodus of refugees from the countries of the Southern Cone. During that period, the application by States of the national security doctrine demanded that those who had fled their homes be moved outside of bordering countries and outside the continent if possible. Under these principles, which were inconsistent with the Latin American tradition of asylum, a large resettlement movement of South American refugees took place to Eastern and Western Europe and to Latin American countries such as Costa Rica, Mexico and Venezuela.

During the refugee crisis affecting Mexico and Central America in the eighties, resettlement was conceived of as an option within the framework of the Cartagena Declaration. In practice, however, it was only used in exceptional cases that justified resettlement for personal security reasons. This became evident in documents in the wake of the Declaration within the scope of CIREFCA and the San Jose Declaration of 1994.

Despite the refugee crisis in Andean countries today, affecting both Costa Rica and Panama a new stage has begun within the framework of the commemoration of the 20th Anniversary of Cartagena favoring more democratic and supportive societies in the South. This stage has been marked by intra-regional resettlement with Brazil and Chile as the main destinations and providing new alternatives to durable solutions for those who have been forced to leave Colombia. This was reaffirmed in the conclusions of the regional meetings prior to the commemoration, particularly that of Brasilia which gathered the MERCOSUR countries and analyzed the proposal of the Plan of Action to be approved in Mexico, thus renewing the effectiveness of resettlement as a durable and cooperative solution for refugees in Latin America.

SEVENTH

The later development of the Cartagena Declaration through CIREFCA and the plans and programs implemented by UNHCR in the Andean region reveal that the protection of refugees in Latin America promotes the linkage between the minimum treatment standards contained in Conclusion No. 22 of the Executive Committee of UNHCR and the search for durable solutions based on self-sufficiency and development by incorporating the needs of local communities of the countries of origin and asylum sharing their fate with refugees, displaced persons and returnees.

EIGHTH

The principles and values contained in the Cartagena Declaration are meant to be introduced into the national legal systems of the States considering the development achieved by the constitutional reforms currently in effect in Latin America which support the protection of the fundamental rights and freedoms within the national legal system (including the constitutional process claiming protection from the Judiciary and the national institutions that promote and defend human rights such as the Ombudsmen, Public Solicitor, Commissioners or Commissions on Human Rights). More than a challenge to the international protection of refugees, the use of domestic remedies is a unique opportunity to strengthen the complementary nature of international protection with the national protection and the intense use of these remedies at the national level.

Civil society plays and should continue playing a key role in promoting and defending the rights of refugees, returnees and displaced person as well as those of the communities sharing their fate through their support and professional contribution to national and international protection of these categories of persons.

NINTH

The recent meetings held in various regions within the framework of the 20th Anniversary of the Cartagena Declaration have underlined the need to address new areas of study that could become part of the agenda of the regional bodies advocating human rights. Among those areas are the following:

- The linkage of refugee issues with other realms of forced displacement such as internally displaced persons, other movements of victims of poverty and migrants;

- The scope of the right to seek asylum set forth in Article 22 of the American Convention on Human Rights based on contemporary developments of International Human Rights Law.

- The clarification of the conceptual confusion and inaccuracies in the use of legal terminology applicable to refugee matters such as the true extent of the terms "asylum" and "refuge".

- The effectiveness of economic, social and cultural rights applicable to the problems of forced uprooting.

TENTH

Numerous references have been made throughout this analysis to the crucial role played by the Inter-American Commission on Human Rights and more recently by the Inter-American Court of Human Rights with respect to the protection of refugees. Therefore, it follows that we must conclude by calling the attention to the existence of a new system in the making, which has been inspired by the Cartagena Declaration. This system seeks to address the problems of national and international protection of the rights of refugees, displaced persons and returnees as well as those of the communities sharing their fate in Latin America from an integral perspective. This mission would justify the consolidation of efforts so that the Cartagena Declaration may gain explicit and autonomous recognition in the realm of international instruments relating to refugee matters.

ELEVENTH

The development of Refugee Law in Latin America has been characterized by the organization of several colloquia starting in 1981. These gatherings have brought together human rights experts, lawyers, university professors, government authorities, civil society representatives, judges of the Inter-American Court of Human Rights, and commissioners of the Inter-American Commission on Human Rights. These meetings have proved essential analyzing the various problems related to refugees in Latin America and verifying the status of legal thinking on refugee matters. Antonio Cançado-Trindade has affirmed that the conclusions reached in these colloquia reflect the *opinion iuris comunis* on the matter. For this reason, the authors of these documents urge all actors involved in the Meeting for the Commemoration of the 20th Anniversary of the Cartagena Declaration to promote the organization of future events of this nature.

Mexico City, November 15, 2004

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APPROACHES AND CONVERGENCES REVISITED: TEN YEARS OF INTERACTION BETWEEN INTERNATIONAL HUMAN RIGHTS LAW, INTERNATIONAL REFUGEE LAW, AND INTERNATIONAL HUMANITARIAN LAW*

(From Cartagena, 1984 to San Jose, 1994 and Mexico, 2004)

Antônio Augusto Cançado Trindade

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* The References to the decisions of the Inter-American Court of Human Rights have been translated by the editing committee.

I. The Continuing Consolidation of Convergences Between the Three Branches of International Protection for the Rights of the Individual

There could hardly be a better occasion to reexamine the central theme of the approaches and convergences between International Human Rights Law, International Refugee Law and International Humanitarian Law than the present Consultation Meeting in Mexico (November 2004), in commemoration of the 20th anniversary of the Cartagena Declaration on Refugees. Exactly ten years ago, upon presenting my original study of the matter at the Conference in Costa Rica (December 1994)—the ten year commemoration of the Cartagena Declaration, resulting in the San Jose Declaration on Refugees and Displaced Persons—I remarked that,

> "A critical review of the classic doctrine reveals that it suffers from a compartmentalized vision of the three major branches of international individual protection —International Human Rights Law, International Refugee Law and International Humanitarian Law—in large part due to an exaggerated emphasis on the distinct historical origins of the three branches (...). Perhaps the most notorious distinction resides in the scope of application—the *legitimatio ad causam*—by which International Human Rights Law has recognized the right of the individual petition (an entitlement of individuals), but for which there is no parallel in International Humanitarian Law or International Refugee Law. This does not exclude the possibility, now made concrete in practice, of the simultaneous application of the three branches of protection, or of two of them, precisely because they are complimentary. Furthermore, they are all guided by a fundamental objective: the protection of the individual in any and all circumstances. International practice supplies many examples of cases of simultaneous or concomitant operations of organs belonging to the three systems of protection."[1]

The common objective to safeguard the rights of the individual in any and all circumstances led to the distinct approaches and convergences of the three aforementioned branches of individual protection—identified in this 1994 study—and manifested at the normative, interpretive and operative levels, all of which increased and strengthened protection methods. With this, the compartmentalized vision of the past was overcome, and evolved into an interaction between the three branches, to the benefit of protected persons.[2] Now, a decade later, in 2004, there is no doubt that the normative evolution of these three systems for the protection of individual rights has definitively moved towards the benefit of all protected human beings.

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1 A. A. Cancado Trindade, "Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario: Aproximaciones y convergencias," UNHCR, *International Colloquium in Commemoration of the "Tenth Anniversary of the Cartagena Declaration on Refugees,"* (San José, 5-7 December 1994), San Jose, UNHCR/IIHR, 1995, pp. 79-80 (henceforth cited as "A. A. C. T., "*Aproximaciones y Convergencias*"). And Cf. also A. A. Cançado Trindade, "Aproximaciones o convergencias entre el Derecho Internacional Humanitario y la Protección Internacional de los Derechos Humanos," *Seminario Interamericano sobre la Protección de la Persona en Situaciones de Emergencia – Memoria* (Santa Cruz de la Sierra, Bolivia, June 1995), San Jose, ICRC/UNHCR/Gov. of Switzerland, 1996, pp. 33-88; A. A. Cançado Trindade, "Co-existence and Coordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)," 202 *Recueil des Cours de l'Académie de Droit International de La Haye* (1987) pp. 1-435; Ch. Swinarski, *Principals, Notions and Institutes of International Humanitarian Law as an International System of Individual Protection*, San Jose, IIHR, 1990, pp. 83-88; C. Sepúlveda, *International Law and Human Rights,* Mexico, National Commission of Human Rights, 1991, pp. 105-107 and 101-102.

2 Cf. A. A. C. T., *Aproximaciones y Convergencias*, op. cit. *supra* no. (1), pp. 80-84.

It is undeniable that the *basic considerations of humanity* underlie International Humanitarian Law as much as International Human Rights Law and International Refugee Law. In fact, I believe such considerations underlie *all* contemporary Public International Law in the new *jus gentium* at the beginning of the 21st century.[3] Successive resolutions adopted by the International Conferences of the Red Cross, beginning in the late sixties (more specifically, from 1969 on), have expressly linked the application of the norms of humanitarian law to the respect for human rights.[4] Furthermore, the influence of the norms of international human rights protection is fully recognized in the elaboration of the Additional Protocols (of 1977) to the 1949 Geneva Conventions on International Humanitarian Law. These Protocols are an eloquent expression of the fundamental guarantees consecrated in Article 75 of Protocol I and in Articles 4-5 of Protocol II,[5] common to both branches of protection of the rights of the individual.

Since the early eighties (from 1981 on) until now, UNHCR's Executive Committee Program has also, in its turn, adopted a series of conclusions expressly recognizing the direct relation between refugee movements, protection and human rights norms. It has widened its focus to include not only the intermediate stage of refugee protection but also the "prior" stage of prevention and the "subsequent" stage of durable solutions (voluntary repatriation, local integration, and resettlement).[6] In this way it gradually evolved from the application of,

> "*subjective* criteria of individual assessment, according to reasons leading them to abandon their homes, to an *objective* criteria more appropriately centered on protection needs".[7]

It went on to devote more attention to the preventative dimensions of individual protection, to which it could now include judicial recognition in international jurisprudence.[8] In sum, in Latin America, the 1984 Cartagena Declaration on Refugees addressed the matter in the framework of the universal concept of human rights. The "mass violation" of human rights was figured into the elements making up the broad refugee definition.[9] A decade later, the 1994 San Jose Declaration on Refugees and Displaced Persons stressed questions central to that period that were not well elaborated in the previous Cartagena Declaration.[10] The 1994 San Jose Declaration expressly recognized the convergences between branches of individual protection, given their complementary character consecrated in International Human Rights Law, International Refugee Law and International Humanitarian Law.[11]

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3 A. A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Ed. Renovar, 2002, pp. 1039-1109; A. A. Cançado Trindade, "La Humanización del Derecho Internacional y los Límites de la Razón de Estado," 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* - Belo Horizonte (2001) pp. 11-23.

4 Cf. A. A. C. T., *Aproximaciones y Convergencias*, op. cit. *supra* no. (1), pp. 116-121.

5 Ibid., pp. 117-118 and 121-122.

6 Cf. A. A. C. T., *Aproximaciones y Convergencias*, op. cit. *supra* no. (1), pp. 85-89.

7 Ibid., pp. 89-90, and Cf. pp. 91-93.

8 Cf. Ibid., pp. 93-97.

9 Third Conclusion.

10 Such as, e.g., forced displacement; economic, social and cultural rights; sustainable development; indigenous populations; the rights of the child; gender issues; and the right of asylum in full.

11 Preamble and third and sixteenth Conclusions (a). Cf. A. A. C. T., *Aproximaciones y Convergencias*, op. cit. *supra* no. (1), pp. 97-98.

Along the same lines, as I stated in my study presented at the International Colloquium in San Jose a decade earlier, the convergences between International Human Rights Law, International Refugee Law and International Humanitarian Law are also noted in the document of the International Conference on Central American Refugees (CIREFCA) titled "Principles and Criteria for the Protection and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America (1989)," and even more clearly, from the evaluation document of the 1994 document "Principles and Criteria."

The first document of the International Conference on Central American Refugees (CIREFCA), titled "Principles and Criteria for the Protection and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America (1989)", expressly recognized the existence of "a close and many-sided relationship between the observance of the relative norms of human rights, the movements of refugees, and the problems of protection."[12] Later, the second document on the applied practice of the provisions of the 1994 document "Principles and Criteria,"[13] on raising, in its conclusions, the achievements of the process of the cited Conference[14] went even further. It contained a section dedicated entirely to the observance of human rights,[15] and stated that,

> "CIREFCA favored and propelled the convergence between Refugee Law, Human Rights, and Humanitarian Law, always maintaining an integrated focus on the three branches of individual protection" (par. 91).[16]

In my previously cited study presented at the San Jose International *Colloquium* a decade ago, I referred to other manifestations in the same vein, namely: the *Report on Internally Displaced Persons* of the Representative of the Secretary-General on internally displaced persons (F. Deng) to the United Nations Commission on Human Rights, the role of the UNHCR in the preparatory process for the Second World Conference on Human Rights (Vienna 2003), and UNHCR's supervision of the World Conference.[17] I added that,

> "UNHCR's contributions at the World Conference, being duly recorded in the Vienna Declaration and Program of Action, has influenced the principle document adopted by the Second World Conference on Human Rights in Vienna (June 1993). In fact, this declaration recognized (...) that massive human rights violations, including armed conflict, are among the numerous and complex factors leading to human displacement.
>
> The Vienna Declaration maintained a similar focus by including the development of strategies that take into account the causes and effects of the movements of refugees and displaced persons, the strengthening of the mechanisms for emergency response, the granting of effective protection and assistance (taking into account the special needs of women and children) and the search for durable solutions (...)."[18]

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12 Paragraph 72 of the 1989 CIREFCA document, "Principios y criterios."
13 Evaluation document for the applied practice of "Principios y criterios," doc. CIREFCA/REF/94/1.
14 Par. 89-106 of the evaluation document for the applied practice of "Principios y criterios," doc. CIREFCA/REF/94/1. This document incorporated the contributions of the three members of the UNHCR Commission of Legal Consultants for the evaluation of the final process of CIREFCA, namely, Drs. Antônio Augusto Cançado Trindade, Reinaldo Galindo-Pohl and César Sepúlveda; Cf. Ibid., p. 3, par. 5.
15 Paragraphs 80-85 of the evaluation document for the applied practice of "Principios y criterios," doc. CIREFCA/REF/94/1; and Cf. also paragraphs 16-17 and 13-14.
16 Paragraph 91 of the document on the applied practice of "Principios y criterios," 1994, CIREFCA; and Cf. also paragraph 100. For a general study, Cf. A. A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en Siglo XXI*, Santiago, Editorial Jurídica de Chile, 2001, pp. 183-265.
17 Cf. A. A. C. T., *Aproximaciones y Convergencias*, op. cit. *supra* no. (1), pp. 98-105.
18 Ibid., pp. 105-106.

In the same study I also pointed out the participation of the International Committee of the Red Cross (ICRC) in the 1993 Second World Conference on Human Rights and its preparatory process: here the ICRC embodied the complimentary nature and convergence between humanitarian law and human rights.[19]

Since then, the interaction between International Human Rights Law, International Refugee Law and International Humanitarian Law has continued and intensified. A decade later, with the increase and intensification of internal conflicts in different parts of the world,[20] examples of this interaction have multiplied. The "Guiding Principles on Internal Displacement," the result of the *Reports* of F. Deng, concluded in Vienna in 1998 and noted by the United Nations Commission on Human Rights also in 1998, combine the norms of International Human Rights Law, International Refugee Law and International Humanitarian Law, in such a way as to apply and extend protection to those in need, whatever their circumstances, including conflicts, tensions or internal disturbances.[21]

The recognition of the *objective* character of protection obligations has impelled the corresponding *interpretation* of the international instruments of International Humanitarian Law, International Refugee Law and International Human Rights Law.[22] For most of the last decade the concomitant role of the organs of international human rights supervision, of the UNHCR and of ICRC, has continued on the operative level in successive conflicts (as in the cases of Haiti and the former Yugoslavia),[23] among others. However, on certain occasions (such as in Cambodia and Bosnia) this proceeded with difficulty.[24] In the case of Kosovo (1998-1999), the UNHCR and the ICRC coordinated to a certain degree, despite many difficulties,[25] and also kept in mind international human rights norms. For its part, the United Nations High Commissioner for Human Rights maintained this normative framework as well as that of refugee and humanitarian law, having been established since 1996 (in the cases of Colombia, Abjasia-Georgia and the Democratic Republic of the Congo, among others).[26]

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19 Ibid., pp. 160-165; and Cf. also, e.g., C. Sommaruga, "Os Desafios do Direito Internacional Humanitário na Nova Era", 79/80 *Boletim da Sociedade Brasileira de Direito Internacional* (1992), pp. 7-11.

20 Cf., e.g., J.-D. Vigny and C. Thompson, "Fundamental Standards of Humanity: What Future?," 20 *Netherlands Quarterly of Human Rights* (2002), pp. 186-190 and 198.

21 Cf. W. Kalin, *Guiding Principles on Internal Displacement - Annotations*, Washington D.C., ASIL/Brookings Institution, [1999], pp. 1-74, and Cf. pp. 79-276.

22 Cf. A. A. C. T., *Aproximaciones y Convergencias*, op. cit. *supra* no. (1), pp. 125-128. The problems of refugees and the right to asylum can only be adequately raised today from the vantage point of the convergences between International Human Rights Law, International Refugee Law and International Humanitarian Law; C. Ramón Chornet, "Los refugiados del nuevo siglo," in *Los retos humanitarios del siglo XXI* (ed. C. Ramón Chornet), Valencia, PUV/Univ. de Valencia, 2004, pp. 193-195.

23 Cf., e.g., A. A. Cançado Trindade, G. Peytrignet and J. Ruiz de Santiago, *Las tres vertientes de la Protección Internacional de los Derechos de la Persona Humana*, México, Editorial Porrúa/Univ. Iberoamericana, 2003, pp. 1-169; Y. Daudet and R. Mehdi (eds.), *Les Nations Unies et l'Ex-Yougoslavie* (Colloque d'Aix-en-Provence de 1997), Paris, Pédone, 1998, pp. 165-200.

24 Cf., e.g., U. Palwankar (ed.), *Symposium on Humanitarian Action and Peace-keeping Operations* (Geneva, 1994), Geneva, ICRC, [1994], pp. 18-98; D. Rieff, *Una cama por una noche - El humanitarismo en crisis*, Bogotá, Taurus, 2003, pp. 133-164 and 241-275.

25 Cf. Independent International Commission on Kosovo, *The Kosovo Report - Conflict, International Response, Lessons Learned*, Oxford, University Press, 2000, pp. 77, 142, 201 and 208-209.

26 Cf., e.g., J. L. Gómez del Prado, *Operaciones de mantenimiento de la paz - Presencias en el terreno del Alto Comisionado de las Naciones Unidas para los Derechos Humanos*, Bilbao, Universidad de Deusto, 1998, pp. 28-88.

The *Institut de Droit International*, upon examining in its 1999 Berlin session the issue of "The Application of International Humanitarian Law and of Fundamental Human Rights in Armed Conflicts in which Non-State Entities Participate," adopted a resolution taking into account, jointly and in a coherent manner, International Human Rights Law, International Refugee Law and International Humanitarian Law. Both the preamble and Articles II, III, VI, VII, X, XI and XII refer expressly to human rights and humanitarian law.[27] The resolution refers, in its preamble, to the question as a problem affecting the interests of the international community as a whole.

The narrator, M. Sahovic, emphasized the "interdependence" between respect for humanitarian law and human rights norms, and observed that the increasing presence of non-state entities in contemporary armed conflicts is evidence that we have gone beyond the strict inter-state dimensions of classic international law.[28] On pointing out the necessity of extending better protection to the victims of contemporary internal conflicts, he recognized the "legitimacy of control by the international community," as well as the necessity of disseminating the norms of humanitarian law and of human rights applicable to internal armed conflicts.[29] Today's internal armed conflicts have generated numerous victims[30] and presented new challenges for the development of the interrelation between International Human Rights Law, International Refugee Law and International Humanitarian Law.[31] He urges that we consider methods to assure new forms of protection for the numerous affected individuals bearing in mind their basic necessities from a broad perspective to safeguard all individual rights.

II. The Increased Convergences Between the Three Branches of Protection in International Jurisprudence

In my aforementioned study presented at the San Jose International Conference on the occasion of the tenth anniversary of the Cartagena Declaration, I referred to the convergences, manifested within the jurisprudential scope, of the norms of the three branches of individual protection. In this study I identified the first cases in which this phenomenon emerged at regional levels (the Inter-American and European systems of protection) as well as global (United Nations system of protection).[32] Since then, for the greater part of the past decade, these convergences in jurisprudential matters have increased and intensified.

Today's specialized references reveal the intensification of the connections between the three branches. For example, International Humanitarian Law and International Human Rights Law in the jurisprudence of the *Ad Hoc* International Criminal Tribunals for Rwanda[33] and the former

27 Institut de Droit International, *L'application du Droit international humanitaire et des droits fondamentaux de l'homme dans les conflits armés auxquels prennent part des entités non étatiques* (Résolution de Berlin du 25.08.1999), Paris, Pédone, 2003, pp. 7-12.

28 Ibid., p. 14.

29 Ibid., p. 16.

30 Cf., in general, e.g., *Human Rights and Ethnic Conflicts* (eds. P.R. Baehr, F. Baudet and H. Werdmölder), Utrecht, SIM, 1999, pp. 1-99.

31 On the normative *corpus* of the Geneva Conventions as a system of international human protection, Cf., in general, e.g., C Swinarski, *A Norma e a Guerra*, Porto Alegre/Brazil, S.A. Fabris Ed. 1991, pp. 23-49.

32 Cf. A. A .C. T., *Aproximaciones y Convergencias*, op. cit. *supra* no. (1), pp. 106-116.

33 Cf. S. Zappalà, "Le Droit international humanitaire devant les tribunaux internationaux des Nations Unies pour l' Ex-Yougoslavie et le Rwanda," *in Les nouvelles frontières du Droit international humanitaire* (ed. J.-F. Flauss), Brussels, Bruylant, 2003, p. 91: "On peut certes considérer le Droit international humanitaire et le Droit international des droits de l'homme comme des secteurs frères du Droit international contemporain, et on ne peut nier une évolution historique qui tend, de plus en plus, à éliminer les distinctions de départ."

Yugoslavia. The intensification of such an interaction is also illustrated by the recent jurisprudence of the Inter-American and European Human Rights Courts, which have taken into account International Humanitarian Law norms in their interpretation and application of the American and European Human Rights Conventions, respectively.[34] As to the Inter-American Court in particular, I will now examine such pertinent jurisprudence (cf. *infra*).

In Europe, confronted with the fear of an erosion of the right to asylum,[35] new forms of protection against inhuman or degrading treatment inflicted upon the uprooted have been sought out.[36] In recent years, under Article 3 of the European Convention on Human Rights, jurisprudence extending protection against *refoulement* beyond that of the 1951 Convention relating to the Status of Refugees has been developed.[37] Such jurisprudence has interpreted Article 3 of the European Convention in an unconditional manner, extending full protection to those threatened by expulsion, deportation or extradition, and elevating *non-refoulement* not only as a basic principle of International Refugee Law but also as a peremptory norm of International Human Rights Law.[38]

In a Colloquium co-sponsored by the UNHCR and the Council of Europe in Strasbourg October 2-4 1995, it was stated expressly that Article 3 of the European Convention (prohibition of torture and inhuman or degrading treatment) had been fully utilized by those petitioning protection from *refoulement*. In the same manner, Article 13 of the Convention (the right to effective recourse) has been invoked by refugees and asylum seekers.Thus, as detailed by a UNHCR representative in the referendum, refugee protection has been transformed into "a human rights plan."[39]

Because Article 13 of the European Convention is formulated in absolute or unconditional terms, it increases protection against *refoulement*, in this way avoiding risks of negative treatment.[40] This protective jurisprudence has been used in cases of expulsion, extradition and deportation.[41] Thus, Article 13's provision has been key to this jurisprudential construction. Sometimes Article 3 has been combined with Article 13 (*supra*), and other times with Article 8 (right to respect of private or family life) of the European Convention. In turn, Article 5 of the Convention has been interpreted as a guarantee against the arbitrary detention of asylum seekers.[42]

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34 Cf. J.-F. Flauss, "Le Droit international humanitaire devant les instances de contrôle des Conventions européenne et interaméricaine des droits de l'homme," *in Les nouvelles frontières du Droit international humanitaire* (ed. J.-F. Flauss), Brussels, Bruylant, 2003, pp. 117-133.

35 F. Crépeau, *Droit d'asile - De l'hospitalité aux contrôles migratoires*, Brussels, Bruylant, 1995, pp. 17-353; V. Oliveira Batista, *União Européia - Livre Circulação de Pessoas e Direito de Asilo*, Belo Horizonte, Ed. Del Rey, 1998, pp. 39-227.

36 For a general study see Cf. A. A. Cançado Trindade and J. Ruiz de Santiago, *La nueva dimensión de las necesidades de protectión del ser humano en el inicio del siglo XXI,* third edition, San Jose, UNHCR, 2004, pp. 27-127.

37 H. Lambert, "Protection against *Refoulement* from Europe: Human Rights Law Comes to the Rescue," 48 *International and Comparative Law Quarterly* (1999) pp. 515-516, and cf. pp. 520, 536 and 538.

38 Ibid., pp. 516-518 and 544.

39 UNHCR/Council of Europe, *The European Convention on Human Rights and the Protection of Refugees, Asylum-Seekers and Displaced Persons* (1995 Strasbourg Colloquy), Strasbourg, UNHCR (Regional Bureau for Europe), [1996], pp. 3-5 (intervention by D. McNamara).

40 See *supra* note 12, p. 5.

41 The UNHCR signed a cooperation agreement with the Inter-American Court of Human Rights in the year 2000 and a cooperation agreement with the Inter-American Commission on Human Rights in 2002.

42 See the full text of the 1984 Cartagena Declaration on Refugees in the legal database of the UNHCR's Spanish Web site at: www.acnur.org [also available in the UNHCR English Web site at www.unhcr.ch].

The same occurred under the United Nations Convention against Torture, in cases of the announced expulsion of individuals who had their asylum applications rejected (e.g., case of *Mutombo v. Switzerland*, 1993).[43] The aforementioned convergence intensified in jurisprudential matters, having been subject to a systemization of the material, in the form of an index of jurisprudence prepared by the UNHCR's Regional Bureau for Europe. The publication, entitled "UNHCR Manual on Refugee Protection and the European Convention on Human Rights," systematically classifies numerous decisions pertinent to the European Court of Human Rights (up until 2003) illustrating such connections.[44]

III. The 1984 Cartagena Declaration and the 1994 San Jose Declaration in Historical Perspective

At the time of its adoption, the 1984 Cartagena Declaration on Refugees, by concentrating on applicable law, addressed new individual protection needs by using a broad definition of those entitled to protection. During this period, due to the armed conflict in Central America, the collective qualification procedure was implemented, for protection purposes, when individual treatment was unviable or impossible. In this way, it took care of an apparent juridical limbo in establishing a regimen of minimum protection standards in situations of large flows, and transferred emphasis from the formal requirements for granting of asylum to an emphasis on the existential condition of the individual.

A decade later, the 1994 San Jose Declaration on Refugees and Displaced Persons, also a response to new protection needs, broadened the applicable law even more in order to extend protection, in particular, to the internally displaced (a new dimension of the problem of that epoch). The law continued to evolve, and the 1994 San Jose Declaration on Refugees and Displaced Persons deepened the relationship between Refugee and Displaced Persons Law and human rights, putting new emphasis on questions central to the current situation not fully elaborated in the previous Cartagena Declaration. These included, *inter alia*, questions of forced displacement and refugee law—examined under necessities for individual protection in any circumstances, based on the universal concept of human rights.

In San Jose in 1994, the approaches and convergences between International Human Rights Law, International Refugee Law and International Humanitarian Law were systematized, given their complimentary character,[45] to the benefit of all protected persons, in order to maximize the guarantee of their rights. The 1994 San Jose Declaration furthermore recognized that human rights violations are one of the causes of displacement. Therefore, the protection of such rights and the strengthening of democracy constitutes the best method in achieving durable solutions, as well as the prevention of conflicts, refugee exoduses and grave humanitarian crises.[46] From this point on, attention continued to be paid to the existential condition of the individual, as much as on International Refugee Law and International Human Rights Law (with gradual direct access of individuals to international human rights tribunals).[47]

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43 Ibid., p. 63 (intervention by N. Mole).

44 Cf. UNHCR, *UNHCR Manual on Refugee Protection and the European Convention on Human Rights*, Strasbourg, UNHCR, Regional Bureau for Europe, 2003, pp. 1-55.

45 Cf. its Preamble and the third and sixteenth Conclusions (a).

46 Cf. A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. I, Porto Alegre, S.A. Fabris Ed., 1997, pp. 328-331.

47 Cf. A. A. Cançado Trindade, *El acceso directo del individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104.

In my preface to the *Memoir* of the International Conference in Commemoration of the Tenth Anniversary of the Cartagena Declaration on Refugees, San Jose, 5-7 December 1994, I pointed out that the 1984 Cartagena Declaration "marked the issue of refugees, the displaced and the repatriated in the broader context of human rights and peace work (initially in the Central American region).[48] I also added:

> "The 1984 Cartagena Declaration and the 1994 San Jose Declaration are, individually, the product of particular moments in history. The first was motivated by an urgent need generated by a concrete crisis of great proportions; to the degree that this crisis was overcome, thanks in part to the Declaration, its legacy was projected to other regions and sub-regions of the continent. The second Declaration [...was] adopted in the midst of a different, more widespread crisis, marked by the deterioration of the socioeconomic conditions of broad segments of the population in different regions (...). In summary, Cartagena and San Jose are products of their times. (...) The *aggiornamento* of the San Jose Conference [placed] special emphasis on identifying individual protection needs. In place of subjective individual categorizations (in accordance with the reasons leading them to abandon their homes), today objective criteria have been adopted so as to encompass a considerably greater number of persons (including the internally displaced who are as vulnerable as refugees, or even more so). There is no place for *vacatio legis*."[49]

Both the Cartagena and San Jose Declarations articulate the protection needs of their époque and those envisioned in the future. In this way, the Cartagena Declaration confronted the great human drama of the armed conflicts in Central America, but also foresaw the aggravation of the problem of internally displaced persons. The San Jose Declaration, for its part, deepened protection for refugees as well as the internally displaced, but also foresaw the increased problem of forced migratory flows. I indicated this point in my closing speech at the San Jose, Costa Rica meeting, at the time of the adoption of the 1994 San Jose Declaration on Refugees and Displaced Persons, in the following terms:

> "The 1994 Declaration of San Jose [put] a special emphasis not only on the problem of internal displacement, but also, more aptly, on the challenges presented by the new situations of human uprootedness in Latin America and in the Caribbean, including the forced migratory movements created by more diverse causes than those foreseen by the Cartagena Declaration. The new Declaration recognized that human rights violations are one of the causes of displacement and, therefore, protection of these rights and strengthening of the democratic system constitute the best method in the search for durable solutions, as well as for the prevention of conflicts, the exodus of refugees and grave humanitarian crisis."[50]

48 UNHCR, *10 años de la Declaración de Cartagena sobre Refugiados - Memoria del Coloquio Internacional* (San José de Costa Rica, 05-07.12.1994), San José de Costa Rica, UNHCR/IIHR, 1995, p. 12.

49 Ibid., pp. 14-15.

50 Ibid., pp. 431-432.

In reality, if we stop to consider what the experience of the international community has been the past twenty years, it is difficult to avoid the impression that we are continually moving from one crisis onto another. From the Central American armed conflicts, which generated a great number of refugees at the time of the adoption of the Cartagena Declaration, we passed onto an exacerbation of the widespread socioeconomic crisis in various countries, with its disintegrating effects, amongst those the large flows of internally displaced at the time of the adoption of the San Jose Declaration.

The Conference producing the Cartagena Declaration twenty years ago included the participation of governmental delegates from ten countries,[51] fourteen experts and a team from the UNHCR.[52] A decade later, the Conference leading to the San Jose Declaration included the participation of governmental delegates from seventeen countries, fifteen experts and a team from the UNHCR.[53] The evaluation after ten years of the Cartagena Declaration included the participation of governmental delegates and experts from countries that had not participated in the elaboration and adoption process of the Declaration, but who had recognized and adopted its legacy, and expanded upon it. Increased public participation due to the lobbying campaign launched by the UNHCR resulted in the broadening, through the San Jose Declaration, of the applicable law, as much *ratione materiae* as *ratione personae*.

This is very significant for all of us who are participating in the current UNHCR consultations of 2004, which are even broader than those of the two previous decades, with three sub-regional meetings (San Jose, Costa Rica; Brasilia, and Cartagena) and two expert group meetings (Brasilia and Cartagena) in preparation for the Mexico Conference in November 2004. It is hoped that this practice of collective reflection, counting on full public participation, results in a new expansion of applicable law, to include an ever greater number of persons needing protection.

IV. New Challenges: The Deterioration and Aggravation of the Population's Living Conditions

What is the situation today? Currently, two decades since the adoption of the Cartagena Declaration, the number of refugees has diminished, but there has been a great increase in the number of migrants[54] and it has become impossible to study the refugee problem without also studying the phenomenon of migration. The increase in marginalization and social exclusion on a worldwide scale has also generated large forced migration flows in our time. That is to say, the causes of past conflicts regrettably continue to be present, along with the worsening of the regional and global situation. It is necessary to consider the causes and their new challenges in close relation to the requirements and justness of economic, social and cultural rights.

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51 Belize, Costa Rica, Colombia, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela.

52 Cf. UNHCR, *La Protección Internacional de los refugiados en América Central, México y Panamá: problemas jurídicos y humanitarios* (Memorias del Coloquio en Cartagena de Indias), Bogotá, Universidad Nacional de Colombia, 1986, pp. 16-19.

53 UNHCR, *10 Años de la Declaración de Cartagena sobre Refugiados - Memoria del Coloquio Internacional* (San José de Costa Rica, 05-07.12.1994), San José de Costa Rica, UNHCR/IIHR, 1995, pp. 471-476.

54 According to the International Organization for Migration (IOM), from 1965 to 2000 the total number of emigrants in the world more than doubled, elevating from 75 million to 175 million people, and future projections predict that this number will rise even more in the next several years; IOM., *World Migration 2003 - Managing Migration: Challenges and Responses for People on the Move*, Geneva, IOM., 2003, pp. 4-5; and Cf. also, in general, P. Stalker, *Workers without Frontiers*, Geneva/London, International Labor Organization (ILO.)/L. Rienner Publs., 2000, pp. 26-33.

Unfortunately, today there are far more people abandoning their countries of origin than there were twenty years ago during the Central American armed conflicts. In the past it was precisely the opposite: thanks to liberal and open migration policies, refugees became migrants in order to improve their situation. Today, due to recent migratory restrictions, it is the opposite. It can also be shown that today, at the same time as intolerance and xenophobia intensifies, there has been lamentable erosion in the right to asylum.[55] It is necessary to continue devoting attention to the existential condition of the person, in order to attend to his or her new protection needs.

Nowadays most countries are "transit zones" or "migrant-producing countries." Ten years ago the central theme was the internally displaced, now it has become migrants. From 1994 to 2004, new examples of the convergences between International Human Rights Law, International Refugee Law and International Humanitarian Law have occurred, as we will see further along (cf. *infra*). It is necessary to link the present concern with migration with both the value and imperative of justice. It is also necessary that the principle of *non-refoulement* prevail: if it has by now reached a certain degree of evolution, in legislation and protection treaties, later regression cannot be allowed. The major theme today is migrants, and the great pioneering legal breakthrough on this issue to date has been Advisory Opinion 18 of the Inter-American Court of Human Rights, from 17/9/2003, on the *Legal Condition and Rights of the Undocumented Migrants*.

The 1994 Conference of San Jose on the tenth anniversary of the Cartagena Declaration took place in the shadow of the revolutionary Declaration and the Program of Action of Vienna (1993), adopted by the Second World Conference on Human Rights. There was a certain optimism and animation, and it was still too early to evaluate the impact of the implosion in Yugoslavia and the USSR, in addition to new conflicts. Today, we live in a much more dangerous world, without traditional parameters, scourged by various conflicts, diverse forms of terrorism, an increase in poverty, and a crisis of values on a worldwide scale. The challenges are much greater in a mood of widespread apathy and despondency.

Despite some noted advances in recent decades for human rights protection (in particular, public liberties), serious and massive violations have persisted.[56] At the beginnings of the 21st century we are witnessing, more than a period of change, a change of period. The events that have dramatically altered the international situation since 1989 continue to be unleashed at an overwhelming rate, without allowing us time to predict what awaits us in the immediate future. For those victims of the current internal conflicts in numerous countries, they are joined by many others who are in search of their identity in these rapidly changing times. The growing concentration of income has brought in its wake a tragic increase in the marginalized and excluded in every part of the world.

The humanitarian responses to the grave contemporary problems affecting growing segments of the population in various countries have cured only the symptoms of the conflicts, but have proved incapable of removing, on their own, the causes and sources of such problems. Following the timely warning of the ex-United Nations High Commissioner for Refugees (Mrs. Sadako Ogata),

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55 Cf., e.g., F. Crepeau, *Droit d'asile - de l'hospitalité aux contrôles migratoires*, op. cit. *supra* no. (34), pp. 17-353; Ph. Ségur, *La crise du droit d'asile*, Paris, PUF, 1998, pp. 5-171.

56 To the "traditional" violations, in particular of certain civil and political rights (such as freedom of thought, expression and information, and due legal process), which continue to occur, there have unfortunately been added serious forms of "contemporary" discriminations (against members of minorities and other vulnerable groups based on ethnicity, nationality, religion and language), aside from violations of fundamental rights and Humanitarian Law.

the quickness with which capital investment enters and leaves regions today has contributed to the most serious financial crisis of the last decade, generating the insecurity movement of large populations.[57]

Along with the globalization of the economy, social destabilization has generated even greater impoverishment for the poor sectors of society (and with it, social marginalization and exclusion). At the same time such globalization has weakened State control over the flow of capital and goods and increased its incapacity to protect the weakest and most vulnerable members of society (e.g., immigrants, foreign workers, refugees and the displaced).[58] Those lacking the protection of public authority frequently leave or flee. In this way economic "globalization" generates a feeling of human insecurity along with xenophobia and nationalism, reinforcing border controls and potentially threatening all who seek entry into another country.[59]

The Habitat Agenda and Istanbul Declaration, adopted by the Second United Nations Conference on Human Settlements (Istanbul, June 1996), warned of the precarious situation of the more than one billion people in the world today who find themselves isolated, without adequate housing and living in sub-human conditions.[60] In the face of contemporary realities, the so-called globalization of the economy has revealed itself to be an inadequate and underhanded euphemism, which, in place of portraying the tragedy of social marginalization and exclusion in our times, seeks instead to hide it.

In fact, during the period of the economy's "globalization", borders are opened to the free circulation of goods and capital, but not necessarily to human beings. Advances achieved by the efforts and sacrifices of past generations—including those which were considered as definitive achievements for civilization, such as the right to asylum—are today going through a dangerous process of erosion.[61] The newly marginalized and excluded only have hope or recourse in the law.

The Secretary-General of the United Nations, in a June 1994 Note to the Preparatory Committee of the World Summit in Copenhagen, stated that unemployment today affects close to 120 million people in the world (700 million are underemployed) and indeed, "the working poor make up the best part of

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57 S. Ogata, *Los retos de la protección de los refugiados* (Statement of the Secretary of Foreign Affairs, Mexico, 29.07.1999), Mexico City, UNHCR, 1999, pp. 2-3 and 9 (typed version, limited distribution); S. Ogata, *Challenges of Refugee Protection* (Statement at the University of Havana, 11.05.2000), Havana/Cuba, UNHCR, 2000, pp. 4, 6 and 8 (typed version, limited distribution)

58 S. Ogata, *Los retos*..., op. cit. *supra* no. (57), pp. 3-4; S. Ogata, *Challenges*..., op. cit. *supra* no. (57), p. 6.

59 S. Ogata, *Los retos*..., op. cit. *supra* no. (57), pp. 4-6; S. Ogata, *Challenges*..., op. cit. *supra* no. (57), pp. 7-10. And Cf. also, e.g., J.-F. Flauss, "L'action de l'Union Européenne dans le domaine de la lutte contre le racisme et la xénophobie," 12 *Revue trimestrielle des droits de l'homme* (2001), pp. 487-515.

60 Cf. United Nations, *Habitat Agenda and Istanbul Declaration* (II U.N. Conference on Human Settlements, 03-14 June 1996), N.Y., U.N., 1997, p. 47, and cf. pp. 6-7, 17-17, 78-79 and 158-159.

61 Cf., e.g., F. Crépeau, *Droit d'asile - De l'hospitalité aux contrôles migratoires*, Brussels, Bruylant, 1995, pp. 17-353. As the author remarks, "depuis 1951, avec le développement du droit international humanitaire et du droit international des droits de l'homme, on avait pu croire que la communauté internationale se dirigeait vers une conception plus `humanitaire' de la protection des réfugiés, vers une prise en compte plus poussée des besoins des individus réfugiés et vers une limitation croissante des prérrogatives étatiques que pourraient contrecarrer la protection des réfugiés, en somme vers la proclamation d'en 'droit d'asile' dépassant le simple droit de l'asile actuel" (p. 306). Sadly, with the rise in contemporary migratory flows, the notion of asylum has gone back to being understood in a restrictive fashion and from the viewpoint of state sovereignty: the decision to grant asylum or not becomes affected by the functioning of "objectifs de blocage des flux d'immigration indésirable" (p. 311).

those in absolute poverty in the world, estimated to be one billion."[62] In his Note, the UN Secretary-General proposed a "rebirth of the ideals of social justice" to resolve society's problems, as well as for "the worldwide development of humanity."[63]

The Copenhagen Declaration on Social Development, adopted by the 1995 World Summit, duly stressed the urgent need to seek a solution to contemporary social problems.[64]

Migration and forced displacement in the nineties[65] was characterized, in particular, by disparities in living conditions between the place of origin and the destination of the migrants. There are several reasons for this: economic collapse and unemployment; erosion of public services (primarily education and health); natural disasters; armed conflicts generating flows of refugees and displaced persons; repression and persecution; systematic human rights violations; ethnic rivalries and xenophobia and violence in many forms.[66] In recent years, flexibility in labor relations, through economic "globalization," has also generated mobility, accompanied by personal insecurity and a growing fear of unemployment.[67]

Migration and forced displacement uproot many human beings and brings along with it trauma and suffering. The testimonies of migrants tell of the suffering of abandoning their homes, sometimes implicating the separation or disintegration of their families; the loss of personal possessions; of arbitrary and humiliating treatment on the part of the border authorities and security officials, generating a permanent sentiment of injustice.[68] As Simone Weil noted in the mid-20th century, "to be rooted is possibly the most important and the least recognized necessity of the human soul. It is one of the most difficult necessities to define."[69] At the same time Hannah Arendt pointed out the suffering of the uprooted (the loss of one's home and day-to-day life, profession and feeling of utility to society, the loss of one's maternal language and the ability to spontaneous express oneself), as well as the illusion of intending or being able to forget the past (given the influence of our ancestors and of preceding generations on every individual).[70]

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62 United Nations, document A/CONF.166/PC/L.13, of 03.06.1994, p. 37. The document adds that "more than 1 billion people in the world today live in poverty and close to 550 million go to bed hungry every night. More than 1.5 billion lack access to healthy, non-contaminated water, close to 500 million children do not have access to even primary education and approximately 1 billion adults never learn to read"; Ibid., p. 21. The document urges, moreover, for the necessity as "priority homework" of the reduction of external debt and of servicing the debt; Ibid., p. 16.

63 Ibid., pp. 3-4 and 6.

64 Particularly in pars. 2, 5, 16, 20 and 24; United Nations text, document A/CONF.166/9, of 19.04.1995, Report on the World Summit on Social Development (Copenhagen, 06-12.03.1995), pp. 5-23.

65 UNHCR, *The State of the World's Refugees - Fifty Years of Humanitarian Action*, Oxford, UNHCR/Oxford University Press, 2000, p. 9.

66 N. Van Hear, *New Diasporas - The Mass Exodus, Dispersal and Regrouping of Migrant Communities*, London, UCL Press, 1998, pp. 19-20, 29, 109-110, 141, 143 and 151; F.M. Deng, *Protecting the Dispossessed - A Challenge for the International Community*, Washington D.C., Brookings Institution, 1993, pp. 3-20. And Cf. also, e.g., H. Domenach and M. Picouet, *Les migrations*, Paris, PUF, 1995, pp. 42-126.

67 N. Van Hear, op. cit. *supra* no. (20), pp. 251-252. As it has been appropriately highlighted, "the ubiquity of migration is a result of the success of capitalism in fostering the penetration of commodification into far-flung peripheral societies and undermining the capacity of these societies to sustain themselves. Insofar as this 'success' will continue, so too will migrants continue to wash up on the shores of capitalism's core", p. 260.

68 Ibid., p. 152.

69 Simone Weil, *The Need for Roots*, London/N.Y., Routledge, 1952 (reprint 1995), p. 41.

70 Hannah Arendt, *La tradition cachée*, Paris, Ch. Bourgois Éd., 1987 (orig. ed. 1946), pp. 58-59 and 125-127.

In a notable book published in 1967 entitled Le retour de tragique, J.M. Domenach observed that there is no way of denying the roots of the human spirit, in the very same way that knowledge acquisition for every individual—and consequently their manner of seeing the world—is in great part conditioned by factors such as place of birth, maternal language, religious beliefs, family and culture.[71] The drama of the uprooted in general can only be effectively treated by means of true solidarity with the victimized.[72] Finally, only the firm determination to reconstruct the international community,[73] upon the foundation of human solidarity,[74] can overcome the tragic paradoxes mentioned earlier.

V. Relevance and Precedence of Basic Principles

Despite the deterioration in living conditions (cf. *supra*), the aforementioned series of crises on a worldwide scale have also generated a prompt reaction in global awareness, the material source of all law.[75] This is evidenced in the increasing convergences between International Human Rights Law, International Refugee Law and International Humanitarian Law. To me, these three major sources of international individual protection interact and intermingle today more than ever to benefit all human beings. Driven by human conscience, such precepts have confronted each crisis and come away strengthened in their common objectives of protection, precisely due to their connections.

It is important today in the face of an alarming upsurge in the use of force in violation of the United Nations Charter (and the crisis it has triggered in the three branches of protection as for International Law e.g., Kosovo, Guantánamo, Iraq) to remember the fundamental principles inspiring them. The *corpus juris* must be continually revived and reaffirmed and transmitted to new generations, as it expresses an intergenerational manifestation of faith in the primacy of law over force. Furthermore, while the revolution in communication has led us to a more transparent world, we also run the risk of homogenization and of the definitive and irremediable loss of values. Humanity can only truly progresses when it moves in the spirit of human emancipation.[76]

It should not be forgotten that the State was originally conceived of to realize the common good. No State can consider itself above the law, whose norms are intended for the benefit of all human beings. In short, the State exists for human beings and not *vice versa*. The full dimension of the current world crisis, with millions of uprooted (refugees, internally displaced, documented and undocumented migrants),

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71 J.-M. Domenach, *Le retour du tragique*, Paris, Éd. Seuil, 1967, p. 285.

72 Jaime Ruiz de Santiago, "Derechos humanos, migraciones y refugiados: Desafíos en los inicios del nuevo milenio," *Actas del III Encuentro sobre movilidad humana: emigrantes y refugiados*, San José de Costa Rica, UNHCR/IIHL, 2001 (at press).

73 Cf., e.g., A. A. Cançado Trindade, "Human Development and Human Rights in the International Agenda of the XXIst Century," *in Human Development and Human Rights Forum* (August 2000), San José of Costa Rica, UNDP, 2001, pp. 23-38.

74 For the importance of the latter, cf., in general, L. de Sebastián, *La Solidaridad*, Barcelona, Editorial Ariel, 1996, pp. 12-196; J. de Lucas, *El Concepto de Solidaridad*, 2nd edition, Mexico, Fontamara, 1998, pp. 13-109; amongst others.

75 A. A. Cançado Trindade, "Reflexiones sobre el desarraigo como problema de Derechos Humanos frente a la conciencia jurídica universal," *in La nueva dimensión de las necesidades de protección del ser humano en el inicio del siglo XXI* (editors A. A. Cançado Trindade and J. Ruiz de Santiago), 3rd edition, San José de Costa Rica, UNHCR, 2004, pp. 27-86.

76 J. Maritain, *The Rights of Man and Natural Law*, Buenos Aires, Ed. Leviatán, 1982 (reprint), pp. 12, 18, 38, 43, 50, 94-96 and 105-108. For Maritain, "the human person transcends the State," by having "a destiny superior to time"; Ibid. pp. 81-82. On the "human objectives of power," Cf. Ch. de Visscher, *Théories et réalités en Droit international public*, 4th revised edition, Paris, Pédone, 1970, pp. 18-32 and following.

makes it difficult to predict the consequences of conflicts and current population flows affecting the international community as a whole. It is therefore essential to emphasize the *universal vocation* of International Human Rights Law, International Refugee Law and International Humanitarian Law, and their observance as the last hope of the primacy of law and reason over force.

In recent decades, both International Humanitarian Law and International Refugee Law have faced critical situations and seen wide violations. Nevertheless, as was signaled by an International Humanitarian Law evaluation published on the occasion of the centenary of the Hague Conventions and the 50th anniversary of the Geneva Conventions,[77] as well as an evaluation of International Refugee Law edited on the occasion of the 50th anniversary of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees,[78] both have been self reaffirming, adapting to new international realities and consolidating and perfecting their form and content in accord with these new realities.

In face of current threats to their norms, it is imperative to reaffirm the continued validity of their basic principles. In my Concurring Opinion in the recent Advisory Opinion No. 18 of the Inter-American Court of Human Rights on the *Juridical Condition and Rights of the Undocumented Migrants* (from 9/17/2003), I underlined the importance of these principles, for the entire juridical system, including the three branches of individual protection, in the following terms:

> "Every legal system has fundamental principles, which inspire, inform and conform their norms. It is these principles (derived etymologically from the Latin *principium*) that, evoking primary causes, sources or origins of the norms and rules confer cohesion, coherence and legitimacy upon the legal norms and the legal system as a whole. It is general principles of law (*prima principia*) which confer an ineluctable axiological dimension to the legal order (both national and international). They reveal the values inspiring the whole legal order and ultimately serve as its foundations. This is how I conceive the presence and position of the principles in any legal order, and their role in the conceptual sphere of Law. (...) From *prima principia* the norms and rules emanate. It is from them that they find their meaning and source in the origins of Law itself. (...) Contrary to those who attempt—to my judgment in vain—to minimize them, I believe that if there are no principles then there no truly legal system exists. Without these principles, the "legal order" simply does not make sense and ceases to exist as such" (par. 44 and 46).

In the Concurring Opinion I surmised that the causes of forced migration (in search of survival, work and better living conditions) "are not fundamentally distinct from those of the displaced population." It is no mere coincidence that the basic principles of equality and non-discrimination occupy "a central position" in the document adopted by the United Nations in 1998 containing the *Guiding Principles on Internal Displacement*.[79] I added that:

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77 P. Tavernier and L. Burgorgue-Larsen (publishers), *Un siècle de droit international humanitaire*, Brussels, Bruylant, 2001, pp. 1-213.

78 V. Chetail (publisher), *La Convention de Genève du 28 juillet 1951 relative au Statut des Réfugiés 50 ans après: bilan et perspectives*, Brussels, Bruylant, 2001, pp. 3-417.

79 Cf. ONU, document E/CN.4/1998/L.98, of 14.04.1998, p. 5; Cf. the principles 1(1), 4(1), 22 y 24(1). The principle 3(2), in turn, affirms the right of the internally displaced to *humanitarian assistance*. – For comments on the above cited document as a whole, Cf., e.g., W. Kälin, *Guiding Principles on Internal Displacement - Annotations*, Washington D.C., ASIL/Brookings Institution, 2000, pp. 1-276.

> "The basic idea of the document is that internally displaced persons should not lose rights inherent to them as human beings as a result of their displacement, and that they be protected by the norms of International Human Rights Law and International Humanitarian Law.[80] Along the same lines, the basic idea underlying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) was that all workers who classify as migrants under its provisions should enjoy their human rights irrespective of their legal situation; hence the central position occupied, also in this context, by the principle of non-discrimination.[81] In short, migrant workers, including undocumented ones, are entitled to fundamental human rights which are not conditioned by their legal situation (irregular or not).[82] In conclusion, the fundamental principle of equality and non-discrimination is protected and remains, stemming from the Universal Declaration of 1948, truly central in the ambit of International Human Rights Law" (par. 64).

In recent decades, the basic principles common to International Refugee Law, International Humanitarian Law and International Refugee Law have effectively crystallized. This can be seen in the previously cited principle of equality and non-discrimination, the principle of the inviolability of the individual, inalienability and irrevocability of individual rights, non-return (*non-refoulement*), and the principle of human security. Underlying the consolidation of these principles are fundamental considerations (emanating from our human conscience) of which such principles are an eloquent expression e.g., the *Martens Clause*.

The fact that this last point has been reiterated in successive International Humanitarian Law[83] instruments for more than a century (from the First World Peace Conference in The Hague in 1899 till today) situates the *Martens Clause*—as I noted in my Concurring Opinion in Advisory Opinion No. 18 of the Inter-American Court of Human Rights on *The Juridical Condition and Rights of the Undocumented Migrants*—as a source of general International Law itself (par. 29). I have characterized the *Martens Clause*, in fact, as an expression of *justifications of humanity*, imposing limits on the *justifications of the State*.[84]

Similarly, in my Opinions at the headquarters of the Inter-American Court of Human Rights,[85] I expressed my conviction that the *universal legal conscience* serves as the ultimate source material of

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80 R. Cohen and F. Deng, *Masses in Flight: The Global Crisis of Internal Displacement*, Washington D.C., Brookings Institution, 1998, p. 74.

81 Such as enunciated in Article 7.

82 A. A. Cançado Trindade, *Elementos para un enfoque de derechos humanos del fenómeno de los flujos migratorios forzados*, Guatemala City, IOM/IIHR (Cuadernos de Trabajo sobre Migración no. 5), 2001, pp. 13 and 18.

83 H. Meyrowitz, "Réflexions sur le fondement du droit de la guerre," *Études et essais sur le Droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet* (ed. Christophe Swinarski), Geneva/The Hague, ICRC/Nijhoff, 1984, pp. 423-424; and cf. H. Strebel, "Martens Clause," *Encyclopedia of Public International Law* (ed. R. Bernhardt), Vol. 3, Amsterdam, North-Holland Publ. Co., 1982, pp. 252-253.

84 A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. III, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 497-509.

85 In Concurring Opinion No. 16 on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999), paragraphs 3-4 and 14 of the Opinion; in the Provisional Measures for Protection in the case of *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (2000), paragraph 12 of the Opinion; in the Sentencing on the judgment in the case of *Bámaca Velásquez v. Guatemala* (2000), paragraphs 16 and 28 of the Opinion; in the previously cited Concurring Opinion no. 18 on *The Legal Condition and Rights of the Undocumented Migrants* (2003), paragraphs 23-25 and 28-30 of the Opinion; amongst others.

national law. Furthermore, no one today would deny that the "laws of humanity" and the "demands of the public conscience" invoked by the *Martens Clause* pertain to the dominion of *jus cogens*.[86] The clause, as a whole, was conceived and has been repeatedly affirmed, ultimately, for the benefit of all humankind.

As I stated in the International Colloquium in Commemoration of the "Tenth Anniversary of the Cartagena Declaration on Refugees," the *corpus juris* safeguarding individual rights has overcome the compartmentalization of the past by allowing the simultaneous application of protection norms—be they International Human Rights Law, International Refugee Law or International Humanitarian Law—to benefit all human beings regardless of circumstances.[87] Today, following the second decade since the adoption of the Cartagena Declaration (2004), one can affirm that the convergences between the three branches of protection of the human person continue to find concrete expression in theory as well as in practice.

VI. The Contribution of the United Nations Cycle of World Conferences

The evaluation that took place in San Jose, Costa Rica over a decade ago, December 1994, convened in the wake of the United Nations Second World Conference on Human Rights in Vienna. It is at this conference that the integrated vision noted earlier found expression. There has been a continuous cycle of United Nations World Conferences since the San Jose evaluation in 1994. Aside from the three conferences that had already taken place (Environment and Development, Rio de Janeiro, 1992; Human Rights, Vienna, 1993; and Population and Development, Cairo, 1994), five more followed (Social Development, Copenhagen 1995; The Rights of Women, Beijing, 1995; Human Settlements-Habitat II, Istanbul, 1996; International Criminal Jurisdiction, Rome, 1998; and The Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 2001).

This cycle of United Nations World Conferences awakened the universal legal conscience to the necessity of rethinking the basis of international order itself, to prepare it to effectively treat issues affecting humanity as a whole. The resulting conclusion follows that:

> "The centrality of the *conditions of life* of all human beings in the international agenda of the 21st century corresponds to a new *ethos* of our times. Such a conception, for its part, corresponds to the continued search for the realization of the ideal of *civitas maxima gentium*, visualized and cultivated by the founders of International Law.(...) With the evolution of the international legal order towards the realization of the ideal of *civitas maxima gentium*, we return (...) to the origins of International Law, which began not strictly as the law between States, but rather as the *law of nations*. The basis of relations between the State and individuals under its jurisdiction, as well as the relations

86 S. Miyazaki, "The Martens Clause and International Humanitarian Law, " *in Études et essais... en l'honneur de J. Pictet*, op. cit. *supra* no. (76), p. 438 and 440.

87 A. A. Cançado Trindade, "Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario: aproximaciones y convergencias," at UNHCR, *International Colloquium in Commemoration of the "Tenth Anniversary of the Cartagena Declaration on Refugees"* (San José de Costa Rica, 05-07.12.1994), San José de Costa Rica, UNHCR/IIHR, 1995, pp. 77-168.

> between States, is not state sovereignty, but rather human solidarity. The human being is, ultimately, the final recipient of the legal norms, the final subject of both internal and international law."[88]

The Program of Action adopted by the International Conference on Population and Development (Cairo, 5-13 September 1994) pointed out that from the period 1985-1993 the number of refugees had more than doubled (from 8.5 to 19 million) as a result of many complex factors, including "massive human rights violations."[89] It pressed States to "respect the principle of *non-refoulement"* (cf. *infra*) and to safeguard the right of persons to "remain secure in their homes," abstaining from policies and practices forcing them to flee.[90] Significantly, the final document of the Cairo Conference insisted on "full respect for the diverse ethical values, religions and cultural backgrounds of the people of each country."[91]

In his *Report on Human Rights, Mass Exoduses and Displaced Persons* (1997), the then United Nations High Commissioner for Human Rights recalled the importance attributed by the Second United Nations Conference on Human Settlements (Istanbul, Habitat-II, 1996) to human settlements in the realization of human rights. He reinforced, moreover, the recommendations of the World Conference in Istanbul on "the prevention of expulsions, the fostering of refugee centers and the lending of support for basic services and equipment for education and health on the behalf of displaced persons, amongst other vulnerable groups."[92]

In fact, a detailed examination of the Istanbul Declaration on Human Settlements and the Habitat Agenda (1996) reveals that, of all the final documents from the United Nations World Conferences of the nineties, those of the 1996 Istanbul Habitat-II Conference were the ones best articulating the cultural and spiritual dimensions of the protection of displaced persons and migrants. After noting that today more than a billion people live in "absolute poverty," the Istanbul Declaration emphasized the cultural and spiritual value of adequate standards of human settlement and its conservation and rehabilitation.[93]

Similarly, the Habitat Agenda, by focusing on refugees, the displaced and migrants (in relation to the lack of adequate shelter), identified poverty and human rights violations as causal factors leading to migration.[94] Furthermore, it emphasized the importance of the preservation of migrants' cultural identity of and equal opportunities for personal, cultural, social and spiritual development.[95] The Habitat Agenda stressed the importance of preserving and cultivating their history—both cultural and spiritual—for later generations, something indispensable for a stable

88 A. A. Cançado Trindade, "La humanización del Derecho Internacional y los límites de la Razón de Estado," 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* - Belo Horizonte (2001) pp. 20-21.

89 U.N., *Population and Development - Programme of Action Adopted at the International Conference on Population and Development* (Cairo, 05-13 September 1994), doc. ST/ESA/Ser.A/149, N. Y., U. N., 1995, p. 55, Par. 10/21.

90 Ibid., p. 56, par. 10/27 and 10/23.

91 Ibid., p. 74, par. 14/3(f); p. 79, par. 15/13; and Cf. p. 27, par. 6/22, for the call to respect the culture, spirituality and way of life of the indigenous communities.

92 United Nations, document E/CN.4/1997/42, 14.01.1997, p. 21, par. 61.

93 U.N., *Habitat Agenda and Istanbul Declaration* (II U.N. Conference on Human Settlements, Istanbul, June 1996), N.Y., U.N., 1996, pp. 7-8.

94 Ibid., pp. 78-79 and 158-159.

95 Ibid., pp. 15, 23 and 34.

community life.[96] In conclusion, the Habitat Agenda promulgated the construction of world peace and stability, on the basis of an "ethical and spiritual vision."[97]

From the final documents of the United Nations World Conferences of the nineties (*supra*), one can conclude that International Law has become more and more concerned with questions of migration and uprootedness as human rights phenomena. Analyses of the matter, from both the legal and sociological prism, lead one to conclusions that cannot go by denied by jurists.[98] The globalization of the economy adds to the persistence (and in many parts of the world the exacerbation) of national disparities. One can see evidence of this in the marked contrast between the poverty of the countries of origin of the migrations (sometimes clandestine) and the incomparably superior resources of the host countries.[99]

Migrants (particularly undocumented ones) frequently find themselves in situations of great vulnerability (more than that of the nationals), confronted with insecure conditions of employment (in the informal economy), unemployment itself and poverty (also in the host country).[100] To this is added cultural shock or distance causing migrants to seek new bonds of solidarity, as well as cultivating their roots, original cultural practices and of their spiritual values (such as those pertaining to funeral rites, with respect to the dead and their memory).[101]

In short, the final documents of the recent United Nations World Conferences (1992 to 2001) reflect the reaction of a universal legal consciousness against affronts to individual dignity on a global scale. In fact, the World Conferences cycle consolidated the recognition of "the legitimacy of the preoccupation of the entire international community with human rights violations in all places and at any moment."[102]

VII. The Contemporary Phenomenon of Uprootedness as a Problem for the Rights of the Individual

Unfortunately, practice reveals that the right to *remain* in one's home has not always prevailed. Nevertheless, when displacement occurs it is necessary to safeguard the human rights of the uprooted. Despite the persistence of the problem of internal displacement, above all during the last two decades, it was only in the first trimester of 1998 that the United Nations Commission on Human Rights having presented the reports of the Representative of the United Nations Secretary-General on the Internally Displaced (Mr. F. M. Deng),[103] finally succeeded in adopting the *1998 Guiding Principles on Internal*

96 Ibid., pp. 98 and 121-122.
97 Ibid., p. 12.
98 For a general study, Cf. e.g., [Various Authors] *Movimientos de personas e ideas y multiculturalidad* (Deusto Forum), Vol. I, Bilbao, Universidad de Deusto, 2003, pp. 11-277.
99 H. Domenach and M. Picouet, *Les migrations*, Paris, PUF, 1995, pp. 58-61 and 111.
100 Ibid., p. 66.
101 Ibid., pp. 48 and 82-83, and Cf. pp. 84-85.
102 A. A. Cançado Trindade, *El Derecho Internacional de los derechos humanos en el siglo XXI*, Santiago, Editorial Jurídica de Chile, 2001, p. 413, and Cf. p. 88.
103 These reports emphasized the importance of prevention. According to Deng, any strategy for protecting the internally displaced must have as its primary objective the prevention of conflicts, the removal of the underlying causes of displacement, connecting the humanitarian question with that of human rights. F. M. Deng, *Internally Displaced Persons* (Interim Report), N.Y., RPG/DHA, 1994, p. 21.

Displacement, with to the purpose of reinforcing and strengthening existant protection methods.[104] In this vein, the newly proposed principles apply to both governments and insurgent groups throughout all stages of displacement. The basic non-discrimination principle occupies a central position in the 1998 document,[105] taking special care to articulate that the internally displaced enjoy the same rights as the rest of the people in the country.[106]

The *1998 Guiding Principles* determine that displacement cannot be carried out in violation the rights to life, dignity, liberty and security (Principles 8 and following). The document also affirms other rights, such as the right to the respect for family life (Principle 17), the right to an adequate standard of living (Principle 18), the right to recognition everywhere as a person before the law (Principle 20) and the right to education (Principle 23).[107] The basic idea underlying the document was that the internally displaced not lose their inherent rights because of displacement, and protect their right to invoke pertinent international protection norms safeguarding such rights.[108]

A tendency of contemporary European doctrine has been to invoke State responsibility in declaring to states generating refugees—and displaced persons—that it constitutes an internationally illegal act (above all because of *culpa lata*).[109] A justification for this doctrinal elaboration lies in the fact that international instruments protecting refugees have foreseen obligations only to the host States, but not in reference to the States of origin. From this, one can invoke a customary norm of humanitarian law prohibiting the incitement of refugee flows. The consequences of the internationally illegal act of generating refugee flows is then established[110]—which is applied *a fortiori* to sudden migratory flows—including the implementation of reparations.

These doctrinal efforts contain, from my perspective, both positive and negative aspects. On the one hand, the horizon for the examination of the matter broadens, including the host State as well as the State of origin (of the refugees), and monitoring human rights protection in both. On the other hand, they reach the level of reparations in private law, including the justification of sanctions imposed on States that are not the only ones responsible for the forced population flows. In today's "globalized" world of profound inequalities, the primacy of anti-historical economic cruelty (trivializing the suffering of past generations), of the eruption of so many disintegrating internal conflicts certain questions emerge. These include how to identify the "individualized" origin of so much violence, how to draw the dividing line and single out responsible States—to the exclusion of other States—for forced migrations, and how to justify reprisals?

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104 Above all, by means of the convergences between International Human Rights Law, International Humanitarian Law and International Refugee Law; Cf. Roberta Cohen and Francis Deng, *Masses in Flight: The Global Crisis of Internal Displacement*, Washington D.C., Brookings Institution, 1998, chap. III, pp. 75 and 78-85.

105 Principles 1(1), 4(1), 22, 24(1).

106 It affirms, moreover, the prohibition of "arbitrary displacement" (Principle 6).

107 The document refers, in conclusion, to the return, resettlement and reintegration of the internally displaced (Principles 28-30). For the adoption of the document, Cf. ONU, doc. E/CN.4/1998/L.98, of 14.04.1998, p. 5.

108 R. Cohen and F. Deng, op. cit. *supra* no. (80), p. 74.

109 P. Akhavan and M. Bergsmo, "The Application of the Doctrine of State Responsibility to Refugee Creating States," 58 *Nordic Journal of International Law - Acta Scandinavica Juris Gentium* (1989) pp. 243-256; and cf. R. Hofmann, "Refugee-Generating Policies and the Law of State Responsibility," 45 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1985) pp. 694-713.

110 W. Czaplinski and P. Sturma, "La responsabilité des États pour les flux de réfugiés provoqués par eux," 40 *Annuaire français de Droit international* (1994) pp. 156-169.

As I pointed out in a recent work,[111] this does not seem to me the best road to follow. The trouble lies with the human condition itself. The question of forced population flows—directly linked to the precarious living conditions of the victims—should be treated as a truly global issue that (along with state responsibility) maintains the *erga omnes* obligations of individual protection. The conceptual development of such obligations constitutes a high priority of contemporary legal literature,[112] with a special emphasis on prevention.

Inequalities of the current international economic-financial system require conceptual development of the law of international responsibility, in a way to include, along with States, agents of international financial systems and non-governmental agents (those controlling the world's economic resources). In the present context of uprootedness, the theme of international responsibility should be raised not so much from a state-centered focus, i.e., within the framework of purely inter-state relations, but rather from that of the relations of the State *vis-à-vis* every human being under its jurisdiction. At the center of the concern is, as it should be, the individual.

With respect to the prevention of uprootedness, the antecedent of the "early warning" system in the United Nations came from a proposal of the special *rapporteur* in the early eighties on the question of human rights and mass exoduses.[113] It was only later that this issue became linked with the question of the internally displaced. All this reveals, ultimately, the importance of the precedence of the right to development as a human right, as well as the *preventative dimension* of the interrelations between development and human rights.[114] The matter has attracted considerable attention in the previously mentioned United Nations World Conferences of the nineties, providing important elements for its consideration (cf. *supra*).[115]

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), despite certain inadequacies (such as that of Article 3, on excluding from its ambit, *inter alia*, refugees and stateless persons), extends protection to all migrants—both "legal" and "illegal"—in various situations.[116] Moreover, the adoption of the Convention—which begun in earnest in July 2003—has contributed decisively to overcoming the compartmentalized vision prevailing before its adoption in the United Nations system. The United Nations only concerned

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111 A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 272-276.

112 Cf., to this effect, my Separate Opinions in the following cases before the Inter-American Court of Human Rights: case of *Blake v. Guatemala* (Sentencing on the judgment, 1998, Series C, no. 36, pars. 26-30); case of *Blake v. Guatemala* (Sentencing on reparations, 1999, Series C, no. 48, pars. 39-40 and 45); case of *Las Palmeras*, relative to Colombia (Sentencing on preliminary exceptions, 2000, Series C, s/n., pars. 1-15 – not yet published).

113 Cf. ONU, document E/CN.4/1995/CRP.1, of 30.01.1995, pp. 1-119.

114 Cf., recently, e.g., UNDP, *Informe sobre Desarrollo Humano 2000*, Madrid, Editorial Mundi-Prensa, 2000, pp. 1-290.

115 For a recent study, cf. A. A. Cançado Trindade, "Sustainable Human Development and Conditions of Life as a Matter of Legitimate International Concern: The Legacy of the U.N. World Conferences," *in Japan and International Law - Past, Present and Future* (International Symposium to Mark the Centennial of the Japanese Association of International Law), The Hague, Kluwer, 1999, pp. 285-309.

116 R. Cholewinski, *Migrant Workers in International Human Rights Law - Their Protection in Countries of Employment*, Oxford, Clarendon Press, 1997, pp. 153 and 182. And, on the normative content of the 1990 Convention in general, Cf., e.g., J. Bonet Pérez, "La Convención Internacional sobre la Protección de los derechos de todos los trabajadores migratorios y de sus familiares," *in La Protección Internacional de los derechos humanos en los albores del siglo XXI* (Editors F. Gómez Isa and J. M. Pureza), Bilbao, Universidad de Deusto, 2003, pp. 321-349.

itself—specifically in this area—with the protection of the rights of foreigners and non-citizens, while the International Labor Organization (ILO) dealt with the protection of migrants in their condition as workers.[117]

Since the adoption of the aforementioned 1990 Convention, the treatment of migrant's rights has been considered from a broader and more coherent perspective. Recent Advisory Opinion No. 18 of the Inter-American Court of Human Rights, from 17/9/2003 on the *Juridical Condition and Rights of the Undocumented Migrants* constitutes an important transcendental framework towards a more integrated approach to the protection of migrants rights (documented and undocumented). Moreover, nowadays, there is no justification in disassociating the problem of human rights and migrants from those of refugees. It is not possible to consider them apart from one another without a combined vision.

VIII. The Phenomenon of Uprootedness in the Jurisprudence of the Inter-American Court of Human Rights

The current worldwide phenomenon of uprootedness, as a problem of the rights of the individual has in recent years attracted the attention of law specialists,[118] and been addressed by the Inter-American Court of Human Rights in recent jurisprudence both in the matter of Provisional Protection Measures and in the exercise of its advisory function. The issue was submitted to the Inter-American Court for consideration initially in the case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic*. The Court accordingly adopted a Resolution on Provisional Protection Measures on 18 August 2000. Such measures had as an objective, *inter alia*, to protect the life and personal integrity of five individuals, to avoid deportation or expulsion of two of them, permit the immediate return to the Dominican Republic of the other two, and reunite two of them with their younger children. The resolution also provided for a more in-depth factual investigation.

In my Concurring Opinion in the Court Resolution I highlighted the truly global dimension of the contemporary phenomenon of uprootedness—which manifests itself in different regions of the world and represents a great challenge to International Human Rights Law—mentioning that:

> "In fact, in a 'globalized' world—the new euphemism *en vogue*—borders are opened to capital, investments, goods and services, but not necessarily to human beings. Wealth is increasingly concentrated in the hands of a few, at the same time that the number of marginalized and excluded regrettably rises, in a growing (and statistically proven) manner. The lessons of the past seem forgotten; the sufferings of previous generations appear to have been in vain. The current 'globalization' frenzy, presented as something inevitable and irreversible—in reality is evidence of the most recent expression of a perverse social Neo-Darwinism—something entirely unforeseen in the past" (par. 3).

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117 Ibid., pp. 139-140. – On the slow and difficult ratification process of the 1990 Convention, cf. S. Hune y J. Niessen, "Ratifying the U.N. Migrant Workers Convention: Current Difficulties and Prospects," 12 *Netherlands Quarterly of Human Rights* (1994) pp. 393-404.

118 Cf., e.g., Virginia Trimarco, "Reflexiones sobre la Protección Internacional en los 90," *Derecho Internacional de los Refugiados* (ed. J. Irigoin Barrenne), Santiago, Editorial Universidad de Chile, 1993, pp. 88-113; Diego García-Sayán, "El refugio en situación de violencia política," en Ibid., pp. 114-125; Cristina Zeledón, "Derechos humanos y políticas frente a la mundialización de los flujos migratorios y del exilio," *Migrações Contemporâneas: Desafio à Vida, à Cultura e à Fé*, Brasília, CSEM, 2000, pp. 97-111.

I continued pondering that this is, for me, an important picture on the threshold of the 21st century in which,

> "(...) human beings are placed below capital and goods—in spite of all the struggles of the past, and all the sacrifices of previous generations. (...) As a result of this contemporary tragedy—caused by man himself—perfectly avoidable had human solidarity prevailed over egoism, there emerges the new phenomenon of uprootedness, above all for those seeking to escape hunger, sickness and misery—with grave consequences and implications for the international norms for the protection of the human being" (par. 4).[119]

With uprootedness one loses the ability to spontaneously express oneself and communicate with the outside world, as well as the possibility of developing a *life project*: "it is, then, a problem concerning all humankind, encompassing the entirety of human rights, and, above all, containing a spiritual dimension which is all the more essential even in today's dehumanized world" (par. 6).

Regarding the first aspect of the issue, I concluded that "the problem of uprootedness should be considered within a framework of action oriented towards the eradication of social exclusion and destitution—if one indeed wishes to arrive at the causes and not just combat symptoms. The development of answers to new protection needs is necessary, even if they are not literally articulated in the international protection instruments in force. The problem can only be adequately confronted bearing in mind the indivisibility of all human rights (civil, political, economic, social and cultural)" (par. 7).

I raised, in my Concurring Opinion, another aspect of uprootedness at par with the *global dimension*, that is to say, that of *state responsibility*. After putting on the record "the vacuums and gaps in the existing norms of protection" on the matter, I went on to remark that,

> "Nobody questions, for example, the existence of a right to *emigrate*, as a corollary of the right to freedom of movement. But States have not yet accepted a right to *immigrate* and *remain* wherever one happens to be. Instead of population policies, the great majority of States pursue a rather police-like function in protecting their frontiers and controlling migratory fluxes, sanctioning so-called *illegal* migrants. Since, according to States, no human right to immigrate and remain wherever one is exists. The control of migratory entries, together with deportations and expulsions, are subject to their own sovereign criteria. It is therefore unsurprising that inconsistencies and arbitrary acts emerge" (par. 8).

119 In the following paragraph I observed that "already in 1948, in a luminous essay, the historian Arnold Toynbee, questioning [in his book Civilization on Trial] the very basis of what is understood as civilization—that is, rather modest advances on the social and moral levels—bemoaned that the mastery of man over non-human nature had unfortunately not extended to the spiritual realm" (par. 5). Already by the mid-20th century, distinct currents of philosophical thought were rebelling against the dehumanization of social relations and the depersonalization of the human being, generated by a technocratic society that treated the individual as a mere agent of production; Cf., e.g., *inter alia*, Roger Garaudy, *Perspectivas do Homem*, third edition, Rio de Janeiro, Ed. Civilização Brasileira, 1968, pp. 141-143 and 163-165.

I continued elaborating that, "The protection norms pertaining to human rights continue to be insufficient in the face of disagreement as to the basis of true international cooperation with respect to the protection of all those who are uprooted. Effective juridical norms cannot exist without corresponding underlying values.[120] With respect to the problem at hand, some protection norms already exist but the acknowledgment of values and the will to apply those norms is lacking. It is not merely a coincidence, for example, that the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,[121] one decade after being approved, has not yet entered into force" (par 9).

I believe that "the question of uprootedness ought to be dealt with not in the light of State sovereignty, but rather as a truly *global* problem (requiring coordination at a universal level), bearing in mind *erga omnes* protection obligations" (par. 10). Despite uprootedness being "a problem affecting the entire *international community,*" I continued noting that,

> "It continues to be treated in an atomized way by States, with a perspective of a legal order of a purely inter-State character, taking for granted that the Westphalian model of international order has, for a long time, been eroded. It is precisely for this reason that States cannot exempt themselves from responsibility in view of the global nature of uprootedness, since they continue to apply this to their own criteria of domestic legal order. (...) The State ought to, thus, respond for the effects of the norms and public policies it adopts in matters of migration, and with respect to deportation and expulsion procedures " (par. 11-12).

Finally, in the Concurring Opinion cited above, I insisted that emphasis be put on the prevention of uprootedness (par. 13), through Provisional Protection Measures adopted by the Court in the case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic (2000).*

The indivisibility of all human rights "is manifested in the phenomenon of uprootedness (cf. *supra*) as well as in the application of provisional protection measures. This being so, there is, juridically and epistemologically, no impediment to such measures. So far such measures have been applied by the Inter-American Court in relation to the fundamental rights to life and personal integrity (Articles 4 and 5 of the American Convention on Human Rights), and also in relation to other rights protected by the American Convention. All those rights being interrelated, it is perfectly possible, in my opinion, to order provisional protection measures for each one, whenever the requisites of 'extreme gravity and urgency' and of the prevention of 'irreparable damage to persons' are met, set forth in Article 63(2) of the Convention" (par. 14).

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120 One should note that contemporary legal doctrine itself has simply been ignored in relation to the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)—despite its importance. The basic idea underlying this Convention is that all emigrants—including *undocumented* and *illegal*—should enjoy their human rights independent of their legal situation. Hence, the position of the *non-discrimination* (Article 7) principle. Not surprisingly, the list of protected rights follows a vision necessarily integral to human rights (including civil, political, economic, social and cultural rights).

121 Prohibiting methods of collective expulsion, and determining that each case of expulsion be "individually examined and judged," in compliance with the law (Article 22).

As to protected rights, "I understand that the extreme gravity of the problem of uprootedness brings about the extension of the application of provisional measures not only to the rights to life and personal integrity (Articles 4 and 5 of the American Convention) but also to the right to personal liberty, the special protection of children in the family, and to circulation and residence (Articles 7, 19 and 22 of the Convention). This is seen in the case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic*. This is the first time in its history that the Court proceeded in this way, in my view appropriately, aware of the necessity to develop, by evolutionary case-law, new means of protection inspired by the reality of the intensity of human suffering itself" (par. 15).

After several other observations, I concluded my Concurring Opinion with the following rumination:

> "A role of fundamental importance is reserved to the legal domain to fulfill new individual protection needs, particularly in the dehumanized world in which we live today. At the start of the 21st century, there is a need to put the individual in their rightful place in society, that is, at the center of State's public policy (such as population policies) and of any development processes—and most certainly above capital, investments, goods and services. There is, moreover, a pressing need to develop the concept of the law of international responsibility, in a way that includes, on par with States, the responsibility of non-state participants. This is one of the greatest challenges of public power and law in the 'globalized' world in which we live, from the perspective of human rights protection" (par. 25).

Later, in the case of the *Peace Community of San José de Apartadó*, the question was raised regarding the protection of the members of a "peace community" in Colombia, ordered by a Resolution on Urgent Measures by the president of the Inter-American Court on 9 October 2000. Such measures were fully ratified by the Court, which in its Resolution on Provisional Protection Measures of November 24, 2000, on extending protection to all the members of the community required the State, *inter alia*, assured the necessary conditions so that the persons of the community "who were forcibly displaced to other parts of the country, could return to their homes."[122]

With respect to the exercise of its advisory function, the Inter-American Court, on 1 October 1999, issued an Advisory Opinion of considerable importance, No. 16, entitled: *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. It deals with a pioneering pronouncement, which has since then served as inspiration to international jurisprudence with regard to *in statu nascendi*, and is relevant to the question of the protection of the uprooted. Advisory Opinion No. 16 sustains that Article 36 of the Vienna Convention on Consular Relations (1963) concerns the protection of rights of the detained foreigner, who is granted the right to prompt information on consular assistance.[123] This right should confer efficacy, in particular cases, to due legal process. Advisory Opinion No. 16 represents an extension of the initial Vienna formulation and should thus be respected by all State Parties, independent of their federal or unitary character.[124]

122 Resolution No. 6 of the cited Resolution; and cf. the Concurring Opinion of Judges A. Abreu Burelli and S. García Ramírez.

123 OC-16/99, de 01.10.1999, resolutions 1-3.

124 Ibid., resolutions 6 and 8.

The lack of compliance with such a law, as expanded by Advisory Opinion No. 16, consequently affects guarantees for due legal process. In such circumstances, the imposition of the death penalty constitutes a violation of the law to not be "arbitrarily" deprived of life,[125] "with the legal consequences inherent to such violations, that is to say, those pertaining to international State responsibility and to reparation obligations."[126] This transcendental Inter-American Court Advisory Opinion has direct relevance for all persons detained abroad —including, naturally, emigrants.

In my Concurring Vote in the Advisory Opinion No. 16, I observed that the evolution of international protection norms have been "fostered by new and constant evaluations emerging from and flourishing in society, and are naturally reflected in the evolutionary process of the interpretation of human rights treaties" (par. 15). I took the liberty to formulate the following observation:

> "The action of protection, in the ambit of International Human Rights Law, does not seek to govern the relations between equals, but rather to protect those ostensibly weaker and more vulnerable. Such protection is of growing importance in a world torn asunder by distinctions betweens nationals and foreigners (including *de jure* discriminations, notably *vis-à-vis* migrants), in a 'globalized' world in which the frontiers open themselves to capital, investments and services but not necessarily to human beings. Foreigners under detention, in a social and legal *milieu* and in a language often different from their own and one they do not sufficiently master, are often particularly vulnerable and unaware of their right to information on consular assistance, the latter having been integrated into the human rights framework to remedy such vulnerability" (par. 23).

I concluded my Concurring Opinion with the observation that "towards the end of this century, we have the privilege to bear witness to the process of the *humanization* of international law, which today also encompasses this aspect of consular relations. In the confluence of the latter with human rights, the subjective individual right to information on consular assistance, to which all human beings are entitled and need to exercise, has crystallized. Such individual rights, located within the specter of universal human rights, are today sustained by conventional and customary international law" (par. 35).

In the jurisprudence of the Court in contentious matters, the broad dimension of the right to life itself should not go unnoticed. Such a right was enlarged by the Inter-American Court in the case of *Villagran Morales et al*. (Judgment, 1999—the "Street Children Case"), to include conditions guaranteeing a dignified life (par. 144). As was stated in this emblematic case before the Inter-American Court,

> "In essence, the fundamental right to life includes not only the right of every person to not be deprived of his life arbitrarily but also the positive right that he will not be prevented from access to conditions guaranteeing a dignified existence. (...) The right to life cannot continue to be conceived in a restricted manner, as it was in the past, referring only to the prohibition of the arbitrary deprivation of life. (...) The obligation of the State to take positive measures is particularly emphasized with

125 In the terms of Article 4 of the American Convention on Human Rights and of Article 6 of the International Covenant on Civil and Political Rights.

126 OC-16/99, de 01.10.1999, resolution 7.

> respect to the protection of the life of the vulnerable and defenseless, in high risk situations, such as street children. The arbitrary deprivation of life is not limited, therefore, to the illicit act of homicide; it also extends to the deprivation of the right to live with dignity. (...) In recent years a notorious deterioration in the conditions of life for large segments of the population has taken place in the State Parties to the American Convention and any interpretation of the right to life cannot minimize this reality above all when dealing with the situation of children in high vulnerable conditions in the streets of our Latin American countries. The necessity to protect the weakest—such as street children—requires an interpretation of the right to life that takes into consideration the minimum conditions for a life with dignity. (...) Any person spending their childhood, as so many in Latin America do, in humiliating misery, lacking even minimum conditions for creating a dignified life, experiences a state of suffering equivalent to that of a spiritual death. Physical death follows as the evidence of the total destruction of the human being. These offences render victims not only destitute in spirit and body, but such suffering also affects their loved ones, in particular their mothers, who also must suffer abandonment."[127]

Later, the Inter-American Court made a pronouncement on human rights violations occurring in the first case in its history relating to a massacre (the sentencing of 29 April 2004). In my Separate Opinion in this case of the *Massacre of Plan de Sanchez* relating to Guatemala, I revisited the theme that I had developed a decade ago on the occasion of the International Colloquium in Commemoration of the "Tenth Anniversary of the Cartagena Declaration on Refugees" in the following terms:

> "The present sentencing of the Inter-American Court in the case of the *Massacre of Plan de Sanchez* goes beyond the common denominator of International Human Rights Law and of International Humanitarian Law and contains conceptual elements of International Refugee Law. There is a case of the express reference to the criteria of a 'well-founded fear of persecution' (par. 42.28), that forms part of the branch of protection of individual rights. In effect, facts like those of the present case (of massacres and 'scorched-earth' policies) give place to forced displacements and the arrival of refugees in Mexico (above all since 1981-1982).[128] From the present case the *approaches and convergences* between the three branches of protection follow, which, as I have maintained for many years, manifest themselves at the normative and interpretive levels as well as the operative levels, in a way that maximizes the protection of individual rights" (par. 23).[129]

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127 Inter-American Court of Human Rights, *Villagran Morales et al versus Guatemala Case* (The "Street Children Case") Judgment of November 19, 1999, Series C, No. 63, Concurring Opinion Judges A. A. Cançado Trindade and A. Abreu Burelli, pp. 105-108, par. 2-4, 6-7 and 9.

128 UNHCR, *Memoria - Presencia de los refugiados guatemaltecos en México*, México, UNHCR/Comisión Mexicana de Ayuda a Refugiados, 1999, pp. 41, 45, 167, 235 and 314.

129 Cf. A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. I, first edition, Porto Alegre, S.A. Fabris Ed., 1997, Chap. VIII, pp. 269-352; A. A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, Santiago de Chile, Editorial Jurídica de Chile, 2001, Chap. V, pp. 183-265; A. A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario - Aproximaciones y convergencias*, Geneva, ICRC, [2001], pp. 1-66.

In Advisory Opinion No. 18, of 17/9/2003, on the *Legal Condition and Rights of Undocumented Migrants*,[130] the Inter-American Court on Human Rights determined that States must respect and assure the respect for human rights in light of the general and basic principle of equality and non-discrimination. Also, any discrimination whatsoever pertaining to the protection and exercise of human rights (founded upon, e.g., migratory status or any other condition) generates international State responsibility. In the Court's view, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*.

The Court added that States cannot discriminate or tolerate discriminatory treatment detrimental to migrants, and in turn must guarantee due legal process for every person, regardless of their migratory status. The latter cannot be a justification for depriving a person the enjoyment and exercise of their human rights, including labor rights. Undocumented migrant workers have the same rights to employment as other State workers. Governments must respect such rights in practice. States cannot subordinate observance of the non-discrimination principle before the law for purposes of their migratory policies or politics of another nature.

In my Concurring Opinion of Advisory Opinion No. 18, I examined nine points in detail, namely: a) *civitas maxima gentium* and the universality of humankind; b) disparities of the contemporary world and emigrant vulnerability; c) reaction of the universal legal conscience; d) construction of the subjective individual right of asylum; e) the position and role of the general principles of the Law; f) the fundamental principles as *substratum* of the legal order itself; g) the principle of equality and non-discrimination in International Human Rights Law; h) the emergence, normative content and reach of *jus cogens*; and i) the emergence, content and reach of *erga omnes* protection obligations (horizontal and vertical dimensions).

In the Concurring Opinion, I recalled that at the beginning the ideal of *civitas maxima gentium* was propagated and cultivated in the writings of the founders of International Law (as in the celebrated *Relecciones Teológicas* [1538-1539], above all the *De Indes-Relectio Prior* of Francisco de Vitoria; the treatise *De Legibus ac Deo Legislatore* [1612] by Francisco Suárez; the *De Jure Belli ac Pacis* [1625] by Hugo Grotius; the *De Jure Belli* [1598] by Alberico Gentili; the *De Jure Naturae et Gentium* [1672] by Samuel Puefendorf; and the *Jus Gentium Methodo Scientifica Pertractatum* [1749] by Christian Wolff)—who had in mind humanity as a whole (par. 4-8). I noted, moreover that,

> "already at the time of the writing and diffusion of the classic works of F. Vitoria and F. Suárez (*supra*), the *jus gentium* had liberated itself from its origins in private law (derived from Roman law), in order to apply itself universally to all human beings (...). The new *jus gentium* (...) opened the way for the conception of a universal international law. (...) Under the framework of the new universal conception the *jus communicationis* affirmed itself, beginning with F. Vitoria, establishing freedom

130 During the course of the advisory procedure before the Inter-American Court pertaining to Concurring Opinion No. 18, the UNHCR, stressing the vulnerable situation of emigrants, referred to the existing nexus between migration and asylum, and added with clarity that the nature and complexity of contemporary displacement makes it difficult to establish a clear distinction between refugees and emigrants. This situation—as I pointed out in my Concurring Vote in the present Concurring Opinion—involving millions of human beings, "reveals a new dimension for individual protection in determined circumstances, and underlines the importance of the fundamental principle of equality and non-discrimination" (par. 34).

> of movement and commercial exchange as one of the pillars of the international community. Controls on foreign investment have only manifested themselves in recent history (...), along with large migratory flows and development of law of refugees and the displaced" (par. 11-12).

This question constitutes, in our time, "a legitimate concern of the entire international community," and, in reality, of "humanity as a whole" (par. 2). I continued, in the same vein that "today, in an era of large migrations, there is an unfortunate distancing, each year greater, from the original universal ideal of *societas gentium* promulgated by the founders of International Law. Migrations and forced displacements intensified in the nineties and were characterized by disparities in living conditions between places of origin and destination of migrants" (par. 13). Moreover,

> "As extenuating circumstances, the State abdicates from its unavoidable social function, and irresponsibly hands over essential public services (health and education, amongst others) to the 'market,' transforming them into merchandise that becomes increasingly inaccessible. The latter come to be seen as mere agents of economic production, in an unfortunate milieu of the commercialization of human relations. At the same time as an increase in widespread intolerance and xenophobia one can see a lamentable erosion in the right to asylum (...). All of these dangerous developments point to a new world lacking in moral imperatives and fermenting an unsustainable model of development" (par. 17).

This worrisome situation presents "a great challenge to the safeguarding of individual rights in our time, at the beginning of the 21st century. (...) In fact, only in the second half of the 19th century, when *immigration* definitively penetrated the sphere of *domestic* law, did it begin to suffer successive and systematic restrictions. The growing importance of certain rights emerged, such as the right to access to judicial recourse (the right to justice *lato sensu*), the right to privacy and family life (including the familial unit), and the right not to be subjected to cruel, inhuman, or degrading treatment. This is an issue transcending purely state or inter-state dimensions, and must evolve to include the fundamental human rights of emigrant workers, including undocumented workers" (par. 35).

Finally, in my above cited Concurring Opinion, I proposed an immediate restitution of "a truly individual right to asylum" (par. 38), the recognition of the importance of the principle of equality and non-discrimination as integral to general or customary international law (par. 60), as well as the broadening of the substantive content of *jus cogens* (par. 65-73) and of the consolidation of *erga omnes* protection obligations (par. 74-85). I concluded that Advisory Opinion No. 18, in reiterating "the universalistic vision marking the origins of the most useful doctrine of International Law," contributes to,

> "the construction of a new 21st century *jus gentium*, guided by general principles of law (amongst them the fundamental principle of equality and non-discrimination), characterized by due process in its broadest reach, cemented in the recognition of *jus cogens* and instrumentalized by resulting *erga omnes* protection obligations and ultimately established, upon the full respect and guarantee of inherent individual rights" (par. 89).

The Inter-American Court, in the case of the *Peace Community of San Jose de Apartado* (2000) and more recently in the case of the *Communities of Jiguamiando and Curbarado*, and also with respect to Colombia, adopted Provisional Protection Measures on March 6, 2003, to assure that every person

could continue living in their habitual residence and supply the displaced persons with the necessary conditions to return to their homes. In my Concurring Opinion in the case of the *Communities of Jiguamiando and Curbarado*, I expressed that we must

> "(...) tak[e] into account new individual protection needs —revealed by situations such as those of the present case— which have, for the most part, converged in recent years— at the normative, interpretive and operative levels— between the three branches of legal human protection instruments, namely, International Human Rights Law, International Refugee Law and International Humanitarian Law. The measures adopted by the Court in the present case of the *Communities of Jiguamiando and Curbarado*, as much as in the previous cases of the *Peace Community of San Jose de Apartado* (2000-2002) and in *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (2000-2002), demonstrates the gradual crystallization of a veritable *right to humanitarian assistance*. Such measures have already saved many lives, protected the right to personal integrity and circulation and residence for many individuals, strictly within the legal domain. It is imperative, in our times, to focus on the content and legal precedents of this emerging right to humanitarian assistance, within the framework of human rights treaties, Humanitarian Law and of Refugee Law, in a way that refines its elaboration to the benefit of those entitled to this right. The recent practice of the Inter-American Court in matters of provisional measures of protection, benefiting collectivities, demonstrates that it is perfectly possible to sustain the right to humanitarian assistance *within the framework of the Law*, without resorting to the indiscriminate use of force. The emphasis should fall upon those persons benefiting from humanitarian assistance, and not upon the potential for action of the agents capable of providing aid— thus recognizing the necessary primacy of Law over force. The ultimate foundation of the exercise of the right to humanitarian assistance resides in the inherent dignity of the human person. Human beings are entitled to protected rights, and the situations of vulnerability and suffering that they find themselves in, above all situations of poverty, economic exploitation, social marginalization and armed conflict, heighten *erga omnes* obligations to protect such inherent rights. The recognition of said obligations set the stage for the current process that humanizes international law. In fact, constructing a more institutionalized international community reveals a new *jus gentium*, centered on individual necessities and aspirations and not on the political or social collectives to which they belong. (...)" (par. 5-8).

To conclude, in the even more recent cases of the *Kankuamo Indigenous Community* (Protection Measures 5/7/2004) pertaining to Colombia, and the *Indigenous Community of Sarayaku* (Protection Measures 6/7/2004) referring to Ecuador, the Inter-American Court required that each State guarantee the right of free circulation to the persons of the two indigenous communities. In my Concurring Opinions in both cases I emphasized the relevance as much for the *erga omnes* protection obligations under the American Convention with its results *vis-à-vis* special mediators (the *Drittwirkung*), as for the convergences— at the normative, interpretive and operative levels— between International Human Rights Law, International Refugee Law and International Humanitarian Law.[131] I again referred to the *emerging right to humanitarian assistance* in the following terms:

131 Par. 8-9 of my Vote in the case of the *Kankuamo Native People*, and par. 6-7 of my Vote in the case of the *Sarayaku Native People*.

> "In a meeting at the *Institut de Droit International*, I maintained that in exercising the emerging right to humanitarian assistance, the emphasis should be on the persons benefiting from the humanitarian assistance, and not upon the potential of action of those materially capable of providing such aid. The ultimate foundation of the exercise of the right to humanitarian assistance resides in the inherent dignity of the human person. Human beings are entitled to these protected rights, as well as to the right of humanitarian assistance itself. The situations of vulnerability and suffering that they find themselves in—above all situations of poverty, economic exploitation, social marginalization and armed conflict—heighten the necessity of the *erga omnes* obligations protecting inherent rights. Moreover, those entitled to protected rights are more capable of identifying their basic needs for humanitarian assistance, constituting a legal response to new individual protection needs. To the degree that international legal personality and individual capacities become increasingly consolidated, diminishing margins of doubt, the right to humanitarian assistance becomes increasingly applicable.[132] For its part, the current phenomenon of the expansion of such international legal personality and capacity responds, as can be inferred from the present case (...), to a pressing need of the international community in our times. In conclusion, the doctrinal and jurisprudential development of *erga omnes* obligations protecting individuals, whatever their situation or circumstance, contributes to the formation of a truly international *public order* based on respect and the observance of human rights, capable of assuring more cohesion and harmonization of the organized international community (the *civitas maxima gentium*), centered in the individual as a subject of international law."[133]

IX. The Convergences Between the Three Branches of Protection in the New Human Security Concept

Throughout the last decade the three branches of human protection have highlighted their relationship to security and, more appropriately, human security. The question has been put forth specifically in the framework of the adoption of methods infringing upon liberty, linked to the "preemptive" armed attacks in the struggle against terrorism. Each one of these aspects merits special consideration.

1. The Three Branches of Protection in the Human Security Concept

Throughout the last decade, the convergences between the three branches of protection of individual rights have led to the new conceptual construction of *human security,* in the face of today's growing threats (rising social marginalization, organized crime, drug-trafficking, arms sales and terrorists attacks, amongst others). The old expression "State security," with its unfortunate reminders of a history of repression and massive human rights violations in the recent experience of many Latin American countries, has been rightly replaced by the expression "human security."

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132 Cf. A. A. Cançado Trindade, "Reply [Assistance Humanitaire]," 70 *Annuaire de l'Institut de Droit International* - Session de Bruges (2002-2003) no. 1, pp. 536-540.

133 Par. 12-13 of my Vote in the case of the *Kankuamo Native People*, and par. 10-11 of my Vote in the case of the *Sarayaku Native People*.

It should not go unnoticed that the Inter-American Convention against Terrorism, adopted in 2002 by the General Assembly of the Organization of American States in Barbados (where I had the honor of representing the Inter-American Court of Human Rights), decreed on the denial of asylum (Article 13) and on the refugee condition (Article 12) to persons when there are "serious reasons for considering" that they have committed a terrorist act. It nevertheless determined that the measures adopted by the State Parties in the framework of the aforementioned Convention need to be carried out with "full respect to the state of the Law" and of "human rights and basic liberties (Article 15[1])." The same disposition assures detainees "the enjoyment of all rights and guarantees (Article 15[3])," and refers expressly to the full *corpus juris* of "International Humanitarian Law, International Human Rights Law and International Refugee Law (Article 15[2])."[134]

This provision gives concrete expression to the convergences of the three branches of individual protection. It was inserted into the aforementioned Convention in a dramatic way (as I well remember) in the last minutes of the debates in the General Assembly of the OAS in Bridgetown, Barbados, 2002. Not even the so-called fight against terrorism could serve as a pretext for imfringing upon inherent individual rights.

Two other elements are necessary to point out in this regard. It was precisely to give a new focus to the issue of security that the United Nations decided upon the creation, within the framework of the Millennium Summit (2000), of the Commission on Human Security, which was directed by the former United Nations High Commissioner for Refugees (Mrs. Sadako Ogata). A couple of years ago I expressed my thoughts before this Commission. The Commission on Human Security, in its 2003 *Report*,[135] reaffirms the importance of multilateralism and categorically rejects unilateral action over the peaceful resolution of conflicts (p. 12 and 49). Its focus is based on rights and "humanitarian strategies (p. 27), clearly avoiding, in this way, reference to the concept of State security. For this reason, it insists on the new concept of "human security," expressly referring to the three branches of International Human Rights Law, Humanitarian Law, and Refugee Law (p. 49). Moreover, it makes a call for the necessity of arms control to insure the "security of persons (p. 134)."

Lastly, another recent international document, the Declaration on Security in the Americas, adopted in Mexico City at the recent Special OAS Conference on Security in October 2003 (where I again had the honor to represent the Inter-American Court of Human Rights), emphasized the "multidimensional character" of security (preamble and item II[2]), invoked the principles of the United Nations Charter and the OAS Charter (item I[1]), stressed the "human dimension" of the problem (item II[4]), and affirmed its commitment to multilateralism (item II[4][z]). The adoption of this Declaration in these terms (not without some deliberation) can be seen as a triumph of Latin American diplomacy.[136]

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134 See document in: OAS, document OEA/Ser.P/AG/doc.4100/02/rev.1, 03.06.2002, pp. 1-11.

135 U.N. Commission on Human Security, *Human Security Now*, N.Y., U.N., 2003, pp. 2-152.

136 I remember during the debates of this 2003 Conference in Mexico City, the Association of Latin American Parliamentarians, for example, sustained that in place of "preemptive war" preventive diplomacy should be imposed. Mexican NGOs emphasized the importance of refugees within the framework of reinforced multilateralism. Cf. the text of the Declaration in OAS, document OAS/Ser.K/XXXVIII/CES/CG/doc.1/03, of 28.10.2003, pp. 1-14.

2. The Three Branches of Protection in Relation to the Deprivation of Liberty

Each time the norms of International Human Rights Law, International Humanitarian Law and International Refugee Law have been separated the results have been disastrous. A contemporary example can be found in measures depriving and infringing upon liberties under the auspices of the so-called fight against terrorism. On November 13, 2001 the President of the United States issued, as Commander-in-Chief of the Armed Forces of his country, an *Executive Order* (of a military nature) titled "The Detention, Treatment and Judgment of Certain Foreigners in the War Against Terrorism," in response to the terrorist aggression of September 11, 2001. The *Executive Order* includes foreigners that the President of the United States considers should be detained and processed as persons responsible for terrorist acts.[137]

The *Executive Order* violates in a manifestly unacceptable manner the basic principles of non-discrimination and equality before the law. Terrorism is not even properly defined, given the generality of the terms of the document, and thus places it in conflict with the principle of legality. Instead of the principle of presuming innocence (consecrated in every legal system), the presidential measure presumes guilt. The so-called *Patriot Act* likewise is an affront to general principles of law and damages fundamental guarantees. The *Executive Order* of November 13, 2001 grants unlimited discretional power to the President. It decrees that the accused be judged by special military commissions to be created—whether the detainees themselves are military or not—excluding ordinary tribunals, in flagrant violation of the right to a criminal judge.

In violation of North American *civil rights* achievements the *Executive Order* leaves behind the right of the accused to communicate freely with their lawyers (right to defense), or protection against forced confessions, or the publication of the judgments (prior to that, confidential). It expressly excludes the application of the general principles of law with respect to the burden of proof, as well as any appeal before North American and international tribunals: only the President of the United States, or the Secretary of Defense can revise decisions of the military commissions, which include imposition of the death penalty. These dispositions clash with the United Nations International Covenant of Civil and Political Rights (to which the United States is bound).

The military commissions, to which the *Executive Order* refers, do not integrate the independent Judicial entity, but do integrate the Executive. In this way the Chief tasks the armed forces with "administer[ing] justice" in cases of terrorism, along with their stated function of combating and destroying terrorism. However, it is not possible to be a belligerent participant and at the same time a "judge" in a situation of international armed conflict, as the *Order* claims. Upon signing it, the President adopted the same measures condemned by the United States when other countries attempted to apply such judicial measures, or in effect did apply them.[138]

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137 In an attempt to justify this, the U.S. Attorney General declared (on 26.11.2001) that foreign terrorists "did not merit the protection of the [US] Constitution".

138 How will the United States in the future be able to demand the observance of due legal process in other countries, when they deny it in their own penal system? Vast international jurisprudence exists condemning exceptional measures (such as special military exemption).

No State can consider itself above the Law; nor can they combat terrorism with indiscriminate repression, in violation of the Law. One cannot fight terrorism with its own weapons. The struggle against terrorism today is articulated by twelve applicable international conventions (adopted between 1970 and 2000). In the same manner, there are multilateral mechanisms of control and prohibition, to destroy arsenals of weapons of mass destruction, implemented by international conventions that need to be applied and strengthen—all within the Law. Only with the primacy of Law over force will the innocent victims of the September 11, 2001 attacks, and many others which have not been as visible in the news, be truly vindicated.

On March 12, 2002 the Inter-American Commission of Human Rights ordered precautionary measures against the United States to determine the legal status of the detainees in Guantánamo. The United States promptly questioned the competence of the Commission in adopting such measures, and, in a later writing on July 15, 2002, argued that the law of war and human rights were different normative *corpus*, the first being *lex specialis*, and the second not being applicable. Moreover, the document established the concept of "illegal combatants," with restrictive purposes.[139]

Contrary to what the United States argued, according to International Humanitarian Law every person captured in international armed conflicts falls into its normative scope. Combatants fall under the Third Geneva Convention relative to the Treatment of Prisoners of War. Civilians or non-combatants fall under the Fourth Geneva Convention relative to the Protection of Civilians in times of War. The expression "illegal combatants" is not found in the Geneva Conventions and is utilized by the United States so as to avoid the legal definition for the status of certain detainees, thus ignoring the Geneva Conventions. Convention III determines (Article 5) that, in cases of uncertainty, such legal status should be determined by a competent and independent tribunal.

The United States cannot unilaterally classify detainees according to its own criteria ignoring universally applicable law; something it well knows. The United States cannot ignore the guarantees of Protocol I (of 1977) of the Geneva Conventions, which are international customary law, and which extend to all captured persons. There is no loophole or legal limbo here;[140] what occurs in the Guantánamo and Abu Ghraib prisons is a violation of International Humanitarian Law and International Human Rights Law. No State is permitted to "choose" whether the Geneva Conventions apply to them.

Moreover, International Human Rights Law, International Refugee Law and International Humanitarian Law apply concomitantly in circumstances such as those evident today. In that which concerns the applicable norms of International Human Rights Law, the most pertinent are those of the United Nations Convention Against Torture and those of the United Nations International Covenant on Civil and Political Rights (to which the United States is bound). The United States argues that since International Humanitarian Law is a *lex specialis* (in their estimation), its application (according to their own criteria) excludes it from being an international norm of human rights.

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139 Cf. U.S., *Additional Response of the United States to Request for Precautionary Measures of the Inter-American Commission on Human Rights - Detainees in Guantánamo Bay, Cuba*, of 15.07.2002, pp. 1-35.

140 As has been well clarified in the jurisprudence of the *ad hoc* International Criminal Tribunal for the former Yugoslavia, in the case of *Celebici* (1998, par. 271).

Norms of International Humanitarian Law and of International Human Rights Law have been applied simultaneously and concomitantly, and international practice in recent decades is full of examples to this effect. Various humanitarian entities have protested the argument put forth by the United States [which tends to misconstrue the international standard], and against the abuse it favors.[141] One can recall the news of torture committed in the prisons of Abu Ghraib and Guantánamo, and the protests they generated all over the world. The argument invoked by the US is entirely unfounded. Their intention is to create a legal limbo permitting certain practices that have been condemned for a long time, in peremptory terms and by the universal conscience. No loophole or legal limbo exists in what has been a clear and systematic violation of the basic precepts of international law.

The so-called war against terrorism attempts, alarmingly, to relativize and minimize the absolute prohibition against torture. Torture is prohibited in absolute terms under International Human Rights Law. A truly international legal regime has been established based the prohibition against all forms of torture, both physical and psychological.[142] This prohibition is legally recognized today under the jurisprudence of the Inter-American and European Human Rights Courts and of the *ad hoc* International Criminal Tribunal for the former Yugoslavia.[143] The absolute prohibition against torture, under any and all circumstances, currently falls into the dominion of international *jus cogens*. It is imperative to strongly reaffirm, as much as necessary, the primacy of Law over force.

3. The Fallacy of "Preemptive" Armed Attacks

Today's grave abuses and violations of International Humanitarian Law and International Human Rights Law are taken within the framework of armed actions called "preemptive," and "preeemptive self-defense", which lacks basis in international law.[144] In an attempt to justify the indiscriminate use of force at the international level the theory of "preemptive self-defense" has been created. One cannot passively consent to this misinterpretation of international law by the world's economic and military superpower. Such dominance has unfortunately been in effect for half a decade and intends to "relativize" one of the basic principles of the United Nations Charter, enshrined in Article 2(4)—that of the prohibition of the threat or use of force. The so-called United Nations Security Council doctrines of "implicit authorization" for the use of force [invoked to "justify" the 1998 Iraq bombing, and of the "*ex post facto* authorization" by the Security Council on use of force invoked in an attempt to "explain" the bombing of Kosovo in 1999] has no founding whatsoever in International Law.

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141 Cf., e.g., Amnesty International, Memorandum to the United States Government on the Rights of People in U.S. Custody in Afghanistan and Guantánamo Bay, of April 2002, pp. 1-59; Human Rights Watch, Background Paper on Geneva Conventions and Persons Held by U.S. Forces, of 29.01.2002, pp. 1-6; International Committee of the Red Cross, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts - Report (28th International Conference of the Red Cross and Red Crescent, 02-06.12.2003), Geneva, ICRC, 2003, pp. 3-70.

142 A .A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 345-352.

143 A. A. Cançado Trindade, "A Proibição Absoluta da Tortura," in *Correio Braziliense - Suplemento 'Direito e Justiça,'* Brasília, 23.08.2004, p. 1.

144 Ian Brownlie, "'International Law and the Use of Force by States' Revisited," 21 *Australian Year Book of International Law* (2000-2001) pp. 21-37; J.A. Pastor Ridruejo, "¿Ha sido legal el uso de la fuerza en Afganistán?", in *Los retos humanitarios del siglo XXI* (ed. C. Ramón Chornet), Valencia, PUV/Universidad de Valencia, 2004, pp. 95-109; O. Corten, *Le retour des guerres préventives: le droit international menacé*, Brussels, Éd. Labor, 2003, pp. 5-95.

The principles prohibiting the threat or use of force and obliging states to find peaceful solutions to international controversies are the foundations of the collective security system of the United Nations Charter.[145] These principles provide that any exception to the regular operation of this system should be narrowly interpreted.[146] The most clear legal doctrine, and the most authoritative comments on the United Nations Charter, state that the text and spirit of Article 51 (on legitimate self-defense) is in contravention to so-called "preemptive defense" and in no way authorizes it.[147] Its own legislative history clearly indicates that Article 51 is subordinate to the general prohibition on the threat or use of force (Article 2[4] of the Charter), aside from being subject to the decision of the Security Council.[148]

Attempts to broaden the scope of international law to include "preemptive self-defense" led to fear that such a conceptually ambiguous and imprecise term could open the door to a generalized use of force and legitimation of the widespread recourse to aggression.[149] Moreover, in our times, with the alarming proliferation of weapons of mass destruction, the principle of non-threat and of the non-use of force imposes itself even more so, taking on a truly imperative character.[150]

In the case of the 2003 *invasion of Iraq*, the flagrant violation by the invading powers of the United Nations Charter included violations of International Human Rights Law, International Refugee Law and International Humanitarian Law.[151] In an attempt to "justify" its armed action in violation of the United Nations Charter, the invading powers initially tried to prove an "implicit authorization" of resolution 1441 of the Security Council in November 2002, which eventually proved unfounded.[152]

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145 A. A. Cançado Trindade, "Foundations of International Law: The Role and Importance of Its Basic Principles," in *XXX Curso de Derecho Internacional organizado por el Comité Jurídico Interamericano* – OAS (2003) pp. 359-415.

146 L.-A. Sicilianos, "L'autorization par le Conseil de Sécurité de recourir à la force: une tentative d'évaluation," 106 *Revue générale de Droit international public* (2002) pp. 5-50, esp. pp. 47-48; B. Conforti, "Puissance et justice," *in Ouvertures en Droit international - Hommage à René-Jean Dupuy*, Paris, SFDI/Pédone, 2000, pp. 105-109, esp. p. 109.

147 Cf., e.g., B. Simma (ed.), *The Charter of the United Nations - A Commentary*, Oxford, Oxford University Press, 1994, pp. 675-676; A. Cassese, "Article 51," *in La Charte des Nations Unies - Commentaire article par article* (eds. J.-P. Cot y A. Pellet), Paris/Brussels, Economica/Bruylant, 1985, pp. 770, 772-773, 777-778 and 788-789; I. Brownlie, *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1981 [reprint], pp. 275-278; J. Zourek, *L'interdiction de l'emploi de la force en Droit international*, Leiden/Geneva, Sijthoff/Inst. H. Dunant, 1974, p. 106, and cf. pp. 96-107; H. Kelsen, *Collective Security under International Law* (1954), Union/New Jersey, Lawbook Exchange Ltd., 2001 [reprint], pp. 60-61; Chr. Gray, *International Law and the Use of Force*, Oxford, Oxford University Press, 2000, pp. 112-115 and 192-193.

148 Cf. H. Kelsen, *The Law of the United Nations*, London, Stevens, 1951, p. 792.

149 J. Delivanis, *La légitime défense en Droit international public moderne*, Paris, LGDJ, 1971, pp. 50-53, and cf. pp. 42, 56 and 73; and cf. L.D. San Martino, *Legítima Defensa Internacional*, Buenos Aires, Fundación Centro de Estudios Políticos y Administrativos, 1998, pp. 20-21, 30-31, 40-42 and 48-49.

150 A. A. Cançado Trindade, "El primado del Derecho sobre la fuerza como imperativo del *Jus Cogens*," in *Doctrina latinoamericana del Derecho Internacional* (editors A. A. Cançado Trindade and F. Vidal Ramírez), Vol. II, San José de Costa Rica, Inter-American Court of Human Rights, 2003, pp. 51-66; R.St.J. Macdonald, "Reflections on the Charter of the United Nations," in *Des Menschen Recht zwischen Freiheit und Verantwortung - Festschrift für Karl Josef Partsch*, Berlin, Duncker & Humblot, 1989, p. 45; R. Macdonald, "The Charter of the United Nations in Constitutional Perspective," 20 *Australian Year Book of International Law* (1999) p. 215.

151 Cf., e.g., *inter alia*, E. Metcalfe, "Inequality of Arms: The Right to a Fair Trial in Guantánamo Bay," 6 *European Human Rights Law Review* (2003) pp. 573-584; C. Moore, "The United States, International Humanitarian Law and the Prisoners at Guantánamo Bay," 7 *International Journal of Human Rights* (2003) pp. 1-27; J.-C. Paye, "Lutte antiterroriste: la fin de l'état de Droit," 15 *Revue trimestrielle des droits de l'homme* (2004) no. 57, pp. 61-75.

152 Given the vague and generic tone of its operative paragraph 13.

The United States and United Kingdom knew they needed express authorization from the Security Council before initiating an armed intervention. They circulated (along with Spain) a resolution on February 24, 2003 requesting authorization for the use of force. Later, anticipating the veto of France and Russia, and in the face of opposition from Germany and others, they withdrew the resolution and never submitted it to the Security Council. At a time when the great majority of United Nations member States favored a continuation of the arms inspection missions in Iraq, the United States and the United Kingdom, with their so-called coalition, opted for the invasion of Iraq without the Security Council's authorization.[153]

They immediately tried to tie resolution 1441 to the previous Security Council resolutions 678 (from 1990) and 687 (from 1991). These resolutions were not only adopted in a context over a decade ago, but did not authorize the use of armed force against Iraq. The use of these resolutions in arguments of the United States and the United Kingdom, reveals them to be equally uninformed and unfounded. Since then "armed preeemptive attacks," "preemptive war" and "preemptive self defense" have been invoked in an attempt to conceal a flagrant violation of the United Nations Charter and of International Law.[154] On more than one occasion various non-aligned countries opposed the threat of armed aggression against Iraq,[155] which also condemned the majority of United Nations member countries[156] who favored the continuation of the arms inspections in Iraq within the framework of United Nations decisions.

A grave act like terrorism does not lead to the legal determination of an "act of war," which is clearly prohibited by international law. One must not confuse *jus in bello* with *jus ad bellum*, as many currently do. This misinterpretation constitutes a worrisome regression, given that *jus ad bellum* is prohibited by contemporary international law.[157] One cannot stand by idly while the collective security system of the United Nations Charter is jeopardized. The Charter was adopted, as stated in its preamble, to protect later generations from the destruction of war and unspeakable human suffering. Violations of the basic principles of the United Nations Charter do not constitute a "new practice," but incur international responsibility for those in violation.

Illegal acts, those in flagrant violation of international law, do not generate legal consequences in the sense of creating a "new practice." *Ex injuria jus non oritur*. One or more violations of international law norms does not mean that such norms no longer exist, but rather that they have been violated. International Human Rights Law, International Refugee Law and International Humanitarian Law have all been violated, but despite such transgressions have endured. On the contrary, those in violation of their norms have tried to deny the facts, their responsibility, find "justifications," or propose new "theories". Nonetheless, in the face of such challenges, the three branches of protection

153 F. Nguyen-Rouault, "L'intervention armée en Irak et son occupation au regard du Droit international," 108 *Revue générale de Droit international public* (2003) pp. 835-864; O. Corten, "Opération 'Iraqi Freedom': peut-on admettre l'argument de l'`autorisation implicite' du Conseil de Sécurité?", 36 *Revue belge de Droit international* (2003) pp. 205-243.

154 Nor was it possible to qualify the Iraqi invasion as a "countermeasure," since Article 50 of the Articles on States Responsibility, of the 2001 United Nations Law Commission, excludes recourse to armed force, thus prohibiting armed reprisals.

155 Communiqués of September 18, 2002; October 16, 2002; February 25, 2003; March 24, 2003.

156 F. Nguyen-Rouault, "L'intervention armée en Irak...," op. cit. *supra* no. (153), pp. 835-864; O. Corten, "Operation 'Iraqi Freedom'...," op. cit. *supra* no. (153), pp. 205-243.

157 G. Abi-Saab, "Les Protocoles Additionnels, 24 ans après," *in Les nouvelles frontières du Droit international humanitaire* (ed. J.-F. Flauss), Brussels, Bruylant, 2003, pp. 17-39, esp. pp. 34-36; Y. Sandoz, "L'applicabilité du Droit international humanitaire aux actions terroristes," in ibid., pp. 54-55 and 71-72; L. Condorelli, in ibid., pp. 181-188.

have been strengthened, in large part due to the faithful observance of the great majority of States and subjects of international law.[158]

Nothing in the United Nations Charter gives one or more of its State members power to unilaterally decide that peaceful resolutions to international controversies have been "exhausted." Nor does anything in the United Nations Charter authorize one or more of its member states to decide *motu propio* strategies regarding the use of armed force. The unfounded artifice of "preemptive self defense" was repudiated, in a categorical manner, by the 12th Congress of the Spanish-Portuguese-American Institute of International Law (IHLADI, September 2002). The preamble of the adopted resolution, which I co-sponsored with international jurists from fifteen other countries, was approved by a resounding majority on September 13, 2001. It mentions the "accentuated tendency of certain States to put their particular interests before those of the international community." It also expressed concern for "deeds, such as terrorism—a grave violation of human rights—affecting [the international community] as a whole." It showed alarm concerning the "unilateral conduct weakening institutions enshrined in International Law to guarantee peace and security."[159]

On the operational side, the declaration cautioned that the United Nations Charter, customary international law and general legal principles "constitute the legal environment to which the exercise of the right to self-defense should necessarily adjust itself," and which should, moreover, fully observe under any circumstances, the norms and principles of International Humanitarian Law. The IHLADI declaration expressed its "categorical rejection of "preemptive self-defense" as a means of combating international terrorism" (par. 3). It manifested, lastly, its equal and "firm repudiation" of international terrorism, to be "severely sanctioned," under the "ambit of the Law," by "all the States of the international community" (par. 4).[160]

Other manifestations of disapproval were voiced. In a resolution adopted in its Bruges Session (Belgium) in 2003, the *Institut de Droit International* approved by a vast majority (with my vote in favor) a declaration condemning the war of aggression, insisting on respect for International Humanitarian Law, and reminding the world that belligerent occupation does not imply the cessation or transference of sovereignty and the occupying power cannot recklessly dispose of natural resources of the occupied country. The occupying power has, moreover, the duty to satisfy the basic needs of the local population, and responsibility to maintain order and guarantee security of the country's inhabitants.[161] Pertinent resolutions of the United Nations have treated occupation as a question of fact, without legitimizing it, and have pointed out the necessity to respect human rights and the apply International Humanitarian Law during and following the occupation.[162]

158 *La pratique et le Droit international* (Colloque de Genève de la SFDI, 2003), Paris, SFDI/Pédone, 2004, pp. 116 and 300-301.

159 In: 16 *Anuario del Instituto Hispano-Luso-Americano del Derecho Internacional* (2003) pp. 657-658.

160 Ibid, p. 658.

161 I. D. I., *Bruges Declaration on the Use of Force*, September 2, 2003, pp. 1-3 (internal distribution, to be published soon by the I. D. I *Annuaire* of Bruges Section).

162 J. Cardona Lloréns, "Libération ou occupation? Les droits et devoirs de l'État vainqueur," *in L'intervention en Irak et le Droit international* (eds. K. Bannelier, O. Corten, Th. Christakis y P. Klein), Paris, Pédone/CEDIN, 2004, pp. 221-250.

Another important initiative has been the manifesto put forth by the *Université Libre de Bruxelles* and signed by three hundred professors of International Law from various countries on January 1, 2003. This documents repudiated "legitimate preemptive defense" as contrary to international law, condemned the war of aggression as a crime against peace, and reaffirmed the responsibility of the United Nations Security Council to maintain peace and international security.[163] In sum, there is not, under the United Nations Charter, any justification for the preemptive attacks or "preemptive self-defense," which are in fact in flagrant violation of international law. In his speeches of 2003 and 2004 before the United Nations General Assembly, the Secretary-General of the UN, Mr. Kofi Annan, warned that the new argument used by the invading powers of Iraq jeopardized the basic principles that have assured peace and international security during the last six decades.[164]

It is not surprising that the overwhelming majority of States rejected the justification of preemptive self-defense and armed unilateralism as manifestly contrary to international law. It is precisely because the world in which we live has become so much more dangerous that it is necessary to vigorously reject these violations of international law. Preemptive action is, by nature, based on an entirely subjective evaluation of the supposed threat. If, on the other hand, a State is the victim of an armed attack, then Article 51 of the United Nations Charter applies and the classic right to self-defense is governed by the principles of good faith, necessity and proportionality. If an armed attack does not occur then how does one determine if the "preemptive" armed attack—in response to a supposed threat, subjectively assessed—obeys the principles of necessity and proportionality?

As Th. Christakis has observed, the "doctrine" of "preemptive self-defense" thus denotes an absurd legal situation: if a State is the victim of armed aggression, its right to self-defense is limited, but if it is not, its legitimate anticipatory or preemptive self-defense would be unlimited! It is not surprising the total absence of United Nations resolutions endorsing such "preemptive or anticipatory" actions, which are, aside from being logically absurd, manifestly illegal.[165]

In face of the upsurge in the use of force these days, all true international jurists have the unavoidable duty to revive and reaffirm the principles, foundations and institutions of International Law. This body of law provides elements for combating and putting an end to violence, terrorist acts and the arbitrary use of power. Regrettably, many analysts, instead of concentrating on these principles, foundations and institutions, prefer to theorize on what is most retrograde in the international order, that is, the practice of reprisals and of the use of force in general. Armed "preemptive" attacks and unlimited "countermeasures" have no backing whatsoever in International Law. On the contrary, they openly violate it.[166]

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163 Cf. "Appel de juristes de Droit international concernant le recours à la force contre l'Irak, " 36 *Revue belge de Droit international* (2003), pp. 266-274.

164 L. Condorelli, "Vers une reconnaissance d'un droit d'ingérence à l'encontre des `États voyous'?," in *L'intervention en Irak et le Droit international* (eds. K. Bannelier, O. Corten, Th. Christakis and P. Klein), Paris, Pédone/CEDIN, 2004, pp. 47-57, esp. pp. 51-52 and 55-56.

165 Th. Christakis, "Vers une reconnaissance de la notion de guerre préventive?" *in L'intervention en Irak et le Droit international* (eds. K. Bannelier, O. Corten, Th. Christakis and P. Klein), Paris, Pédone/CEDIN, 2004, pp. 9-45, esp. pp. 20-23.

166 A. A. Cançado Trindade, "O Direito e os Limites da Força," en 12 *Fonte - Procuradoria Geral do Estado doCeará* – Fortaleza/Brazil (August/October of 2002), no. 51, p. 2.

They are spurious "doctrines" that—in addition to creating multitudes of silent and innocent victims through systematic violations of International Human Rights Law, International Refugee Law and International Humanitarian Law—represent a regression towards barbarism. What is preemptive is Law and diplomacy, not war. The dangerous escalation of violence we have witnessed at the beginning of the 21st century will only be contained by faithful adhesion to, and implementation of, the Law. It is in moments of crisis of unseen global consequences such as today that it is most necessary to preserve the fundamental principles and values upon which democratic societies are based.

At a conference recently held at the *Instituto Diplomático Rio Branco* in Brasilia on October 28, 2004, co-sponsored by the Institute and International Committee of the Red Cross, I presented my views as support for ten particular points. I will resume these points now.

First, the convergences between International Human Rights Law, International Refugee Law and International Humanitarian Law (at the normative, interpretive and operative levels) have increased in the last decade. Each time that one branch attempted to separate itself from another (as the United States tried to do to "justify" the abuses in Guantánamo, *supra*) the results have been disastrous.

Second, one should not confuse *jus in bello* with *jus ad bellum*, the latter being peremptorily condemned by contemporary international law.

Third, there is no alternative to multilateralism; unilateralism is an affront to the basic principles of international law, and today it is imperative to strengthen the United Nations system.

Fourth, "preemptive self-defense" or "preemptive war" is legally unfounded, logically absurd and manifestly illegal.

Fifth, the norms of International Humanitarian Law apply to anyone captured in armed conflict, precluding any legal loopholes or legal limbo, nor any reason for the "revision" of International Humanitarian Law, which is universal law.

Sixth, the use of armed force is in violation of the United Nations Charter does not signify a "new practice," but implies the aggressor's international State responsibility.

Seventh, the fight against terrorism needs to take place in accordance with the Law (abiding by the twelve international conventions on the matter), and in full respect of the norms of International Human Rights Law, International Refugee Law and International Humanitarian Law.

Eighth, territorial occupation does not imply the cessation or transference of sovereignty. The occupying power thus has the responsibility to comply with the norms of the three branches of international protection for the rights of the individual.

Ninth, the occupying power cannot appropriate natural resources of the occupied country.

Tenth, in any and all circumstances the primacy of the Law over force is imperative, as a manifestation of the achievements of modern civilization.

X. The *Jus Cogens* Character of the Principle of *Non-Refoulement*

The next point to consider in the present study concerns the principle of *non-refoulement*. The first references to *non-refoulement* arose in international practice in the period between the two wars, above all beginning in the thirties.[167] However, it was in the period after World War II that *non-refoulement* began to figure as a *basic principle* of International Refugee Law, enshrined in Article 33 of the 1951 Convention Relating to the Status of Refugees, and years afterwards, also in Article II(3) of the OAU Convention (1969), governing aspects of refugee problems in Africa.[168]

The normative content of the principle of *non-refoulement* is also expressed in human rights treaties such as the European Convention on Human Rights of 1950 (Article 3), the American Convention on Human Rights of 1969 (Article 22[8]) and, more recently in the United Nations Convention against Torture of 1984 (Article 3).[169] Thus, despite its relatively recent historical development, it can be said that in the years following the end of the Vietnam War (the end of the seventies and beginning of the eighties) *non-refoulement* was already considered a principle of international customary law,[170] extending beyond the application of treaties on refugee law and human rights.

The following step was made by the 1984 Cartagena Declaration on Refugees, which related the principle of *non-refoulement* to the domain of *jus cogens*.[171] This characterization has also found support in contemporary doctrine on the issue[172]—which needs, nevertheless, more conceptual development in this regard (cf. infra). One can never reiterate too often the importance of *non-refoulement*, the

167 Cf. e.g., Article 3 of the Convention Relating to the Status of Refugees (1933), which only managed ratifications from eight States.

168 Cf. G.S. Goodwin-Gill, *The Refugee in International Law*, 2a. ed., Oxford, Clarendon Press, 1996, pp. 117-124, and cf. pp. 135 and 167.

169 For its part, the African Charter on Human and Peoples' Rights of 1981 prefers to center itself more on the institution of asylum (Article 12[3]).

170 Recently, this thesis was reiterated by the International Institute of Humanitarian Law of San Remo. On the occasion of the 50th anniversary of the 1951 Convention on the Status of Refugees, the Institute adopted the *San Remo Declaration on the Principle of Non-Refoulement* (September, 2001), according to which this principle, consecrated in Article 33 of the cited Convention, forms "an integral part of international customary law." In its *Explanatory Note* on the same principle, the San Remo Institute affirmed – "The principle of *non-refoulement* of refugees can be regarded as embodied in customary international law on the basis of the general practice of States supported by a strong *opinio juris*. The telling point is that, in the last half-century, no State has expelled or returned a refugee to the frontiers of a country where his life or freedom would be in danger - on account of his race, religion, nationality, membership of a particular social group or political opinion - using the argument that *refoulement* is permissible under contemporary international law. Whenever *refoulement* occurred, it did so on the grounds that the person concerned was not a refugee (as the term is properly defined) or that a legitimate exception applied. As the International Court of Justice pointed out in a different context, in the 1986 *Nicaragua* Judgment, the application of a particular rule in the practice of States need not be perfect for customary international law to emerge: if a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, this confirms rather than weakens the rule as customary international law." International Institute of Humanitarian Law, *San Remo Declaration on the Principle of Non-Refoulement*, San Remo, IIHL, 2001, pp. 1-2.

171 Conclusion five.

172 Cf., e.g., Jaime Ruiz de Santiago, "Human Rights and International Refugee Protection," *XV International Law Course Organized by the Inter-American Juridical Committee* (1988), Washington D.C., Secretary General of the OAS, 1989, pp. 250 and 243; Roberto Garretón, "Principio de No-Devolución: fuerza normativa, alcances, aplicación en los países no partes en la Convención," International Colloquium in Commemoration of the "Tenth Anniversary of the Cartagena Declaration on Refugees," (San Jose, December 1994), San Jose, Costa Rica, UNHCR/IIHL, pp. 229-230.

true keystone of all international refugee protection. The principle of *non-refoulement* has been characterized correctly as the "backbone" of the legal system protecting refugees. In not allowing for contrary provisions it has become fully integrated into the domain of *jus cogens*.[173]

It is also worthwhile to remember the imperative character of *non-refoulement* with respect to the norms of International Refugee Law and International Human Rights Law—as noted by the 1994 San Jose Declaration on Refugees and Displaced Persons.[174] The previously cited 1984 United Nations Convention against Torture essentially consecrated the principle of *non-refoulement* to prevent torture, within an eminently human rights context. In the same vein, Article 22(8) of the American Convention on Human Rights, in my Concurring Opinion in the above cited case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (2000) before the Inter-American Court of Human Rights, I maintained that the principle of *non-refoulement* had become integrated into international customary law as well as *jus cogens* (par. 7, no. 5).

One should be careful with regard to certain *en vogue* neologisms, which can suggest an improper relativization of the *non-refoulement* principle. Already by 1980, for example, the Executive Committee of the UNHCR in Resolution No. 19(XXXI) on temporary refuge, considered it necessary to warn that the principle of non-return should be "scrupulously" observed "in all situations of large refugee flows (item [a])." More recently, Resolution No. 82(XLVIII) of 1997, the Executive Committee of the UNHCR once again highlighted *non-refoulement*, including its importance in light of the United Nations Convention against Torture (item [d] [i]). It would be unfortunate if the current use these days of expressions such as "temporary protection" came to replace protection standards cultivated over years of struggle for the rights of refugees and displaced persons. The new expression "internally displaced in transit," sometimes used in our continent, aside from being dangerous, is difficult to comprehend.

While the expression "refugees in orbit," is a bit surreal, it appears to return to the classic concept of "refugee" and has been incorporated into the vocabulary of the contemporary literature on the matter without further criticism. If one is "in orbit," that is to say, expelled or sent from one country to another, it is difficult to characterize them as a *stricto sensu* refugee. Even though one attempts to broaden the protection of refugees to the largest number of persons in similar situations of vulnerability—which seems to me very relevant—one should avoid the use of inadequate, possibly vacuous, words or expressions. With good reason the former European Commission on Human Rights noted that with respect to the problem of refugees in orbit, in certain situations the "repeated expulsion of a foreigner" could pose a problem under Article 3 of the European Convention, which prohibits inhuman or degrading treatment.[175]

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173 Jaime Ruiz de Santiago, "El Derecho Internacional de los Refugiados en su relación con los Derechos Humanos y en su evolución histórica," in *Derecho Internacional de los Refugiados* (ed. J. Irigoin), Santiago de Chile, Universidad de Chile, 1993, p. 67. For the characterization of the principle of *non-refoulement* as a "basic guarantee" of asylum, see Cf. Leonardo Franco, "El Derecho Internacional de los Refugiados y su aplicación en América Latina," *Anuario Jurídico Interamericano* – OAS (1982) pp. 178-179.

174 Conclusion sixteen, letter (a).

175 Application no. 8100/77, X v. Federal Republic of Germany (not published), cit in: N. Mole, Problems Raised by Certain Aspects of the Present Situation of Refugees..., op. cit. infra no. (180), p. 26; and in: N. Mole, Asylum and the European Convention on Human Rights, Strasbourg, Council of Europe/Directorate of Human Rights, doc. H/INF(2000)/8 prov., May 2000, p. 28.

One avoids, thus, the use of an odd expression, treating the matter in more precise terms and with a clear, legal and conventional base.[176]

Nefarious neologisms with clearly destructive purposes have also surfaced in the domain of International Humanitarian Law: "preemptive self-defense," "preemptive war," "humanitarian intervention (in place of the right to humanitarian assistance)," "illegal combatants," amongst others. As already noted, they are unfounded and devoid of meaning, and their use should be avoided (cf. *supra*). It is lamentable how expressions without the slightest legal meaning become utilized in the domain of international human protection, including by "operators of the law," without the least bit of criticism and reflection. A minimum terminological rigor is necessary to preserve the gains of previous generations towards the protection of individual rights. I believe in the present *protection law* there is no room for relativizations or regressions.

The previously mentioned convergences between International Refugee Law and International Human Rights Law (cf. *supra*) have had the effect of broadening the normative content of the principle of *non-refoulement*.[177] *Non-refoulement*, defined in International Refugee Law as the prohibition of rejection at the border, came also to be associated in International Human Rights Law framework with the absolute prohibition of torture and cruel, inhuman or degrading treatment, as evidenced by Article 3 of the United Nations Convention against Torture (1984).[178]

The principle of *non-refoulement* has a preventive dimension, seeking to avoid the mere *risk* of being subjected to torture or other cruel, inhuman or degrading treatment (resulting from extradition, deportation or expulsion). This is what can be inferred from recent international jurisprudence, in both regional and global ambits. It is illustrated, in the matter of extradition in the renowned sentencing of the European Court of Human Rights in the case of *Soering v. the United Kingdom* (1989), in which *non-refoulement* is inferred from Article 3 of the European Convention on Human Rights.[179] The same principle enunciated by the European Court in the *Soering* case, objecting to extradition on the basis of Article 3 of the European Convention, was reaffirmed by the Court in the case of *Vilvarajah v. the United Kingdom* (1991). In this case it sustained that the prohibition of poor treatment under Article 3 of the European Convention was absolute and applied equally to cases of expulsion.[180] This reference to *non-refoulement* lends itself, thus, as much in matters of extradition as of deportation or expulsion under Article 3 of the European Convention (cf. *supra*).

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176 For other critiques on the use of inadequate expressions, within the context of the Inter-American system for the protection of human rights, see Cf. A. A. Cançado Trindade, "Reflexiones sobre el futuro del Sistema Interamericano de Protección de los Derechos Humanos," en *El futuro del Sistema Interamericano de Protección de los Derechos Humanos* (eds. J. E. Méndez and F. Cox), San Jose de Costa Rica, IIHL, 1998, pp. 573-603.

177 For its part, the 1969 OAU Convention regulating refugee problems in Africa dedicates particular attention, e.g., to the conditions of *voluntary* repatriation (Article 5, par. 1-5), and is categorical in affirming that "no refugee will be repatriated against his or her will" (par. 1). In the provision on the right to asylum (Article 2), it equally prohibits rejection at the border, return or expulsion (par. 3).

178 W. Suntinger, "The Principle of *Non-Refoulement*: Looking Rather to Geneva than to Strasbourg?," 49 *Austrian Journal of Public and International Law* (1995) pp. 203-208; G.S. Goodwin-Gill, "The International Protection of Refugees: What Future?," 12 *International Journal of Refugee Law* (2000) pp. 2-3.

179 The Committee of Human Rights, under the International Covenant on Civil and Political Rights has also, aside from having affirmed the principle of *non-refoulement* in its "general commentary" no. 7/16 (1982) and 20/44 (1992), treated, in its practice, the matter in cases of extradition (of persons at risk for capital punishment); cit. in W. Suntinger, op. cit. *supra* no. (178), pp. 205, 208 and 214.

180 Cf. N. Mole, *Problems Raised by Certain Aspects of the Present Situation of Refugees from the Standpoint of the European Convention on Human Rights*, Strasbourg, Council of Europe (Human Rights Files no. 9 rev.), 1997, pp. 10, 16 and 18.

One can proceed in the same fashion under provisions on other protected rights, as, e.g., the right to privacy and family life under Article 8 of the European Convention. Questions raised in some recent cases under the European Convention reveal that Article 8 can be effectively invoked in order to protect, for example, second generation emigrants against deportation or expulsion, based on their family and social ties and their firmly established roots in the country of residence.[181]

Also exemplifying the preventative dimension of the principle of *non-refoulement* in matters of expulsion is the previously mentioned case of *Mutombo v. Switzerland* (1994); The United Nations Committee Against Torture[182] concluded that the expulsion (or forced return) of the petitioner from Zaire from Switzerland would constitute a violation of Article 3 of the United Nations Convention against Torture, given that in Zaire there existed a "consistent pattern" of grave and massive human rights violations.[183] Along the same lines, the Human Rights Committee (under the United Nations International Covenant on Civil and Political Rights) has likewise considered threats of extradition in light of human rights protection, taking into account the *jus cogens* character of the prohibition of poor treatment and torture (probable or potential, in the State requesting extradition).[184]

Certain basic principles such as *non-refoulement* represent a minimum for the protection of the rights of the individual and are also incorporated into State law.[185] In contrast to Mister Jourdain, the celebrated character of Molière, who spoke prose without knowing it,[186] the international organs safeguarding human rights know perfectly well what they are doing, applying the principle of *non-refoulement* without saying it...

In fact, since the eighties, within the framework of human rights treaties benefiting not only refugees but foreigners in general, the ambit for the application of the principle of *non-refoulement* has broadened for *ratione personae* as much as for *ratione materiae*. Each and every individual is protected—in cases of extradition, expulsion, deportation or return to a State where they could be at risk of being subjected to torture or cruel, inhuman or degrading treatment (the preventive dimension).[187]

In my opinion, there is now no room for doubting that the *non-refoulement* principle falls under the domain of *jus cogens,* considering that a truly international regime against torture, forced disappearances and

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181 Cf., e.g., the cases of *Moustaquim v. Belgium* (1991), *Beldjoudi v. France* (1992), *Djeroud v. France* (1991) and *Lamguindaz vs. the United Kingdom* (1992-1993), *cit. in*: R. Cholewinski, "Strasbourg's 'Hidden Agenda'?: The Protection of Second-Generation Migrants from Expulsion under Article 8 of the European Convention on Human Rights," 3 *Netherlands Quarterly of Human Rights* (1994) pp. 287-288, 292-294 and 297-299.

182 Under the above cited United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

183 Cit. in W. Suntinger, op. cit. *supra* no. (178), pp. 210 and 221-222.

184 F. Pocar, "Patto Internazionale sui Diritti Civili e Politici ed Estradizione," in *Diritti dell'Uomo, Estradizione ed Espulsione - Atti del Convegno di Ferrara per Salutare G. Battaglini* (ed. F. Salerno), Padova/Milano, CEDAM, 2003, pp. 79-95.

185 In Switzerland, for example, today the "peremptory character of the prohibition of refoulement" is recognized (due to an initiative of the Swiss Federal Council of 1994); The Swiss Federal Constitution revised in 1999 declares that no constitutional amendment can enter into conflict with the norms of *jus cogens*; Erika de Wet, "The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law," 15 *European Journal of International Law* (2004) pp. 101-102.

186 Molière, "Le bourgeois gentilhomme" (act II, scene IV, and act III, scene III), in *Oeuvres complètes*, Paris, Éd. Seuil, 1962, pp. 514-515 and 518.

187 Henri Fourteau, *L'application de l'article 3 de la Convention européenne des droits de l'homme dans le droit de l'homme dans le droit interne des États membres*, Paris, LGDJ, 1996, pp. 211-212, 214, 219-220 and 227.

summary, extra-legal and arbitrary executions[188] has already been shaped. Moreover, the principle of *non-refoulement*, whose prohibition is *absolute*—with the support it has been given by International Human Rights Law—attempts to avoid even the *risk* of subjecting someone to torture (and cruel, inhuman or degrading treatment).

The *jus cogens* character of *non-refoulement* situates the latter above the political considerations of both the States and political organs of international organizations.[189] In this way it also calls attention to the importance of the access of individuals to justice at the international level.[190] The establishment of the fundamental principle of *non-refoulement* of International Refugee Law, confirmed and expanded by International Human Rights Law as part of *jus cogens*, undoubtedly implies a limitation on state sovereignty (in matters of extradition, deportation and expulsion) in favor of the integrity and well-being of the individual. Moreover it corresponds to an unequivocal manifestation of the growing individual-centered vision of contemporary international law.

XI. The General Obligation "To Respect" and "To Ensure Respect": *Erga Omnes* Protection for the Rights of the Individual

Following Resolution XXIII "Human Rights in Armed Conflicts" adopted on May 12, 1968 by the First World Conference on Human Rights in Teheran, the International Conferences of the Red Cross adopted successive "human rights" resolutions. The consolidation in recent years of an international legal regime on the absolute prohibition of torture, cruel, inhuman or degrading treatment or punishment; of arbitrary detention and imprisonment; and of summary, arbitrary or extra-legal executions[191] has been a driving force behind the normative convergences between the three branches of individual rights protection. Such convergences become well known, e.g., in the influence of the evolution of human rights on the establishment of fundamental guarantees by the two Additional Protocols (1977) of the 1949 Geneva Conventions.[192]

In the study I presented at the International Colloquium in Commemoration of the "Tenth Anniversary of the Cartagena Declaration on Refugees" in San Jose, I focused on the full extent of conventional protection obligations, beginning with the general duty *to respect and ensure respect* for the rights established in humanitarian treaties. Such obligations—articulated in both the 1949 Geneva Conventions and its Additional Protocol I (of 1977) and in human rights treaties[193]—bring to light *erga omnes* protection obligations.[194] As I noted in this study,

188 A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. II, Porto Alegre, S.A. Fabris Ed., 1999, pp. 345-358.

189 J. Allain, "The *Jus Cogens* Nature of *Non-Refoulement*," 13 *International Journal of Refugee Law* (2002) no. 4, pp. 538-558.

190 Cf., on this point, A. A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilboa, Universidad de Deusto, 2001, pp. 9-104.

191 Cf. A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. II, Porto Alegre/Brazil, S.A. Fabris, Ed., 1999, pp. 345-358.

192 Cf. A. A. C. T., *Aproximaciones y convergencias*, op cit. *supra* no. (1), pp. 119-122.

193 E.g., the International Covenant on Civil and Political Rights, Article 2(1); Convention on the Rights of the Child, Article 2(1); European Convention of Human Rights, Article 1; American Convention on Human Rights, Article 1(1); amongst others.

194 Cf. Ibid., pp. 128-134.

> "It deals with unconditional obligations, demanded of every State independent of its participation in a particular conflict, and whose full compliance is in the interest of the international community as a whole (...). In virtue of the general obligation of 'ensuring respect' for Humanitarian Law, the existence of a *common legal interest* is formed, in virtue of which all the States Parties of the Geneva Conventions, and each particular State, has legal interest and is qualified to act to ensure respect for Humanitarian Law (Common Article 1 to the four Conventions of 1949) and not just against a State violating provisions of the Geneva Conventions, but also against the rest of the States Parties not fulfilling the obligation (of conduct or behavior) of "ensuring respect" for Humanitarian Law."[195]

The same applies to human rights norms.[196] In my study, I referred to cases in which this general obligation (*to respect and to ensure respect*) had particular relevance—such as those concerning the interactions between human rights and humanitarian law—namely, the *Iran/Iraq Conflict* (1983-1984), the contentious *Nicaragua v. the United States* (1984-1986), the cases of *The Former Yugoslavia* (1992-1993) and of *Kuwait Under Iraqi Occupation* (1992),[197] 129-143 amongst others. Throughout the last decade (1994-2004), the emphasis on the general obligation of States Parties in humanitarian treaties *to respect and ensure respect* of protected individual rights has been a constant and no one would question its broad reach today.

It has extended to such a degree that this general obligation *to respect and ensure respect,* as well as the celebrated Martens Clause, is included in the "select group of norms and principles" supported by the international community as a whole for the promotion of basic considerations of humanity and the construction of a truly international *public order*.[198] In a recent speech at the San Remo Institute of International Humanitarian Law, the President of the International Committee of the Red Cross (J. Kellenberger) argued that, in addition to the general obligation *to respect and ensure respect*, Article 1 common to the four 1949 Geneva Conventions[199] also requires States to abstain from supporting any armed action in violation of humanitarian law and to take positive measures to avoid such violations.[200]

The President of the ICRC insisted, during another recent occasion, on the convergences between the three branches of protection of the rights of the individual in the following terms:

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195 Ibid., pp. 129-130.

196 In international jurisprudence regarding human rights, such a general obligation (*to respect and ensure respect*) was the focus of the classic cases of *Ireland v. the United Kingdom* (1976-1978) and of *Chipre v. Turkey* (1975), under the European Convention of Human Rights, and in all of jurisprudence in contentious material for the Inter-American Court of Human Rights to date, under the American Convention on Human Rights.

197 Cf. A. A. C. T., *Aproximaciones y convergencias*, op cit. *supra* no. (1), pp. 129-143.

198 Cf. L. Boisson de Chazournes and L. Condorelli, "Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests," 82 *Revue internationale de la Croix Rouge* (2000) no. 837, p. 85.

199 And the corresponding provision of various human rights treaties.

200 J. Kellenberger, "Striving to Improve Respect for International Humanitarian Law," *XXVIII Round Table on Current Problems of International Humanitarian Law*, San Remo, 02.09.2004, p. 3 (available in electronic version: www.cicr.org).

> "The common underlying purpose of International Humanitarian and International Human Rights Law is the protection of the life, health and dignity of human beings. (...) The guiding principle is that individuals have the right to be protected from arbitrariness and abuse because they are human, which was an idea revolutionizing international law and having a lasting impact on international relations. (...) Like International Human Rights, International Humanitarian Law aims, among other things, to protect human life, prevent and punish torture and ensure fundamental judicial guarantees to persons subject to criminal process. (...) One of the basic tenets of International Refugee Law aimed at safeguarding, among other things, the right to life, is the principle of *non-refoulement*. With regards torture and other forms of cruel, inhuman or degrading treatment or punishment, it hardly needs to be emphasized that such acts are prohibited under both International Humanitarian Law and other bodies of law in all circumstances, and are considered crimes under international law. (...) Fundamental judicial guarantees are another example of norms that are common to International Humanitarian and Human Rights Law. (...) The ICRC's Study on Customary International Humanitarian Law Applicable in Armed Conflicts (...) confirms the overlapping nature of a number of fundamental guarantees provided for in both Humanitarian and Human Rights Law."[201]

This is one manifestation of the recognized intensification, throughout the last decade, of the convergences between the three branches of protection for the rights of the human person — at the normative, interpretive and operative levels. At the normative level, for example, today there are international instruments combining, within their own material content, both human rights and humanitarian law norms. This is the case, e.g. of the Optional Protocol of the United Nations Convention on the Rights of the Child On the Involvement of Children in Armed Conflict (2000). Recently there has also been attention given, for example, to the convergence between refugee and human rights, with special attention on the right of asylum.[202]

The diversification of the sources of human rights violations, seen in the current challenges confronting the application of International Human Rights Law, International Refugee Law and International Humanitarian Law, grants, in my view, an even greater importance to the State obligation *to respect and ensure respect* for these rights in all circumstances. I took the liberty to point out in my Separate Opinion in the case of *The Palmeras* (Preliminary Objections, Sentencing of 2/4/2000) concerning Colombia — to sustain the convergences between the *corpus juris* and the three branches of individual protection at the normative, interpretative and operational levels). I think that the concrete and specific purpose of developing *erga omnes* protection obligations (the necessity of which I have likewise been sustaining for some time) can be better served by identifying and complying with the *general obligation of guarantee* of the exercise of individual rights (par. 7).

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201 J. Kellenberger, "International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence" (Address of September 2003), 85 *Revue internationale de la Croix Rouge* (2003) no. 851, pp. 646-649.

202 Cf. e.g., C. W. San Juan and M. Manly, "El asilo y la protección internacional de los refugiados en América Latina: Análisis crítico del dualismo 'asilo-refugio' a la luz del derecho internacional de los derechos humanos," in *El asilo y la protección internacional de los refugiados en América Latina* (coord. Leonardo Franco), Buenos Aires, Univ. Nac. Lanus/UNHCR, 2003, pp. 29-30 and 53-61.

The meaning of this general obligation is clear: it deals with *respecting and ensuring respect* for protection norms in all circumstances. This obligation can lead us to consolidate *erga omnes* protection obligations (par. 8),[203] keeping in mind the full potential of the application of the notion of *collective guarantee*, underlying all humanitarian treaties (par. 9). The concept of *erga omnes* obligations has already been articulated in international jurisprudence.[204] Nevertheless, so far consequences of *erga omnes* obligations and their violation has not yet been defined by the legal regime (par. 10).[205] However, if on the one hand, we have not yet succeeded in opposing an obligation for protection of the international community as a whole, on the other hand—as I added in my Separate Opinion in *The Palmeras* case,

> "International Human Rights Law nowadays provides us with elements for the consolidation of opposing obligations of protection for all the States Parties in human rights treaties (obligations *erga omnes partes*).[206] Thus, various treaties, of both Human Rights[207] and of International Humanitarian Law,[208] provide for the general obligation of the State Parties to *guarantee* the exercise of the rights set forth therein and their observance thereof.
>
> As pointed out by the *Institut de Droit International*, in a resolution adopted at the session in Santiago de Compostela in 1989, such obligation is applicable *erga omnes*, as each State has a legal interest in safeguarding human rights (Article 1).[209] Thus, parallel to the obligation of all the State Parties to the American Convention to protect the rights enshrined therein and to guarantee their free and full exercise to all the individuals under their jurisdiction, there exists the obligation of the States Parties *inter se* to secure the integrity and effectiveness of the Convention. This general protection duty (collective guarantee) is of direct interest to each State Party, and to all of them jointly (obligation *erga omnes partes*). This is equally valid in times of peace and armed conflict." (par. 11-12).[210]

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203 Cf. A. A. C. T., *Aproximaciones y convergencias*, op cit. *supra* no. (1), pp. 143-149, and Cf. also pp. 149-160.

204 As is illustrated, in that which concerns the International Court of Justice, its sentences in the cases of *Barcelona Traction* (1970), of the *Nuclear Tests* (1974), of *Nicaragua v. the United States* (1986), of *East Timor* (1995), and of *Bosnia-Herzegovina v. Yugoslavia* (1996), and the arguments of the parts in the cases of *Northern Cameroon* (1963) and of *Southwestern Africa* (1966), as well as their Advisory Opinion on *Namibia* (1971) and the arguments (written and oral) pertaining to the Advising Opinion on the *Nuclear Arms* (1994-1995).

205 The Hague Court had a unique opportunity to do so in the case of East Timor (1995), having wasted the opportunity to relate the *erga omnes* obligations with something antithetical to them: state consent as the basis of the exercise of its jurisdiction in contentious matters. Nothing could be more incompatible with the very existence of *erga omnes* obligations than the positivist-voluntarist conception of International Law and the emphasis on state consent as the foundation of the exercise of international jurisdiction.

206 In regards to the *erga omnes partes* obligations, opposed to all the State Parties in certain treaties or to a determined community of States, cf. M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford, Clarendon Press, 1997, pp. 201-202; C. Annacker, "The Legal Regime of *Erga Omnes* Obligations in International Law," 46 *Austrian Journal of Public and International Law* (1994) p.135.

207 Cf. e.g., American Convention on Human Rights, Article 1(1); International Covenant on Civil and Political Rights, Article 2(1); United Nations Convention on the Rights of the Child, Article 2(1).

208 Article 1 common to the four Geneva Conventions on International Humanitarian Law of 1949, and Article 1 of the I Protocol Additional of 1977 to the 1949 Geneva Conventions.

209 Cf. I.D.I., 63 *Annuaire de l'Institut de Droit International* (1989)-II, pp. 286 and 288-289.

210 Thus, a State Party in the 1949 Geneva Conventions and its I Additional Protocol of 1977, though not involved in a determined armed conflict, is enabled to demand from other Sates Parties the fulfillment of their conventional obligations of humanitarian nature; L. Condorelli y L. Boisson de Chazournes, "Quelques remarques à propos de l'obligation des États de 'respecter et faire respecter' le droit international humanitaire 'en toutes circonstances,'" v *in Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet* (ed. C. Swinarski), Geneva/The Hague, ICRC/Nijhoff, 1984, pp. 29 and 32-33.

There is another possibility of asserting the *erga omnes* protection obligations, as I noted in the same Opinion in *The Palmeras* case pertaining to Colombia,

> "Some human rights treaties establish a mechanism of petitions which comprise individual petitions as well as inter-State petitions; these latter constitute a mechanism *par excellence* of collective action guarantee. The fact that they have not been used frequently (they have yet to be used in the Inter-American system of protection, until now) suggests that the State Parties have not yet disclosed their determination to construct an international *ordre public* based upon respect for human rights. However, they could—and should—do so in the future, with their growing awareness of the need to achieve greater cohesion and institutionalization in the international legal order, above all in the present domain of protection.
>
> In any case, there could hardly be better examples of mechanisms for applying the *erga omnes* protection obligations (at least in the relations of States Parties *inter se*) than the supervising methods foreseen *in the human rights treaties themselves*, for the exercise of the collective guarantee of protected rights. In other words, the mechanisms for applying *erga omnes partes* protection obligations already exist. What is urgently needed is to develop their legal regime, with special attention to the *positive obligations* and *juridical consequences* of the violations of such obligations.
>
> In conclusion, the absolute prohibition of grave human rights violations—starting with the fundamental right to life— in fact extends itself well beyond treaty law, incorporated as it is into contemporary customary international law. Such prohibition places priority on *erga omnes* obligations owed to the international community as a whole. These latter clearly transcend individual State consent, definitively burying the positivist-voluntarist conception of International Law, and heralding the advent of a new international legal order committed to the prevalence of superior common values, and with moral and juridical imperatives, such as that of the protection of the human being under any circumstance, in times of both peace and armed conflict." (par. 13-15).

I have insisted on this position in support of *erga omnes* protection obligations on other occasions at the Inter-American Court of Human Rights. For example, in my Concurring Opinions in the Resolutions on Provisional Protection Measures adopted by the Court in the cases of *The Peace Community of San Jose de Apartado* (from 6/18/2002, concerning Colombia), of the communities *of the Jiguamiando and of the Curbarado* (of 3/6/2003, also referring to Colombia), of the indigenous community of *Kankuamo* (from 7/5/2004, also relative to Colombia), of the indigenous community of *Sarayaku* (from 7/6/2004, concerning Ecuador), of the prison of *Urso Branco* (from 7/7/2004, referring to Brazil) and of the Broadcasting Television Station *'Globovision'* (of 9/4/2004, relative to Venezuela).

In the case of *Bamaca Velasquez v. Guatemala* (Sentencing of 11/25/2000), the Court examined, in the context of a *cas d'espèce*, the internal Guatemalan conflict under the converging perspectives of International Human Rights Law and International Humanitarian Law. The Court took into account the 1949 Geneva Conventions, in particular Article 3, as an interpretive element in determining violations of the American Convention on Human Rights in particular, and maintained the general obligation,

under Article 1(1), *to respect and ensure respect* for the protected rights.[211] In my Separate Opinion in the same *Bamaca Velasquez* case, I likewise took into account the norms of both International Human Rights Law and International Humanitarian Law, as well as the *Martens Clause*.[212]

XII. Final Reflections

The present study would not be complete without adding some brief personal reflections. The current Mexico Conference of November 2004 is part of a significant historical process. In my study over a decade ago, presented at the International Colloquium of San Jose, Costa Rica in December 1994 and published on the occasion of the "Tenth Anniversary of the 1984 Cartagena Declaration on Refugees," I pointed out that,

> "Recent developments in the international protection of the human person, both in times of peace and armed conflict (...), articulate the general obligation of *required diligence* on the part of the State, doubling its legal responsibilities to take positive measures to prevent, investigate and penalize human rights violations, and also putting on the agenda the debate of *erga omnes* protection and the question of *Drittwirkung* and its applicability with respect to third parties. The new dimension of the *right of individual protection* is legally established on the obligation *to respect and ensure respect* in all circumstances articulated in treaties of International Humanitarian Law and International Human Rights Law. In the present domain of the *right of protection*, it has made use of international law with a view toward perfecting and strengthening, never restricting or debilitating, the level of protection at both the normative and prosecutorial levels. It is necessary to continue exploring all legal possibilities with this aim in mind. The recognition (including legal) of the broad reach and dimension of the conventional international human protection obligations assures continuity of the process of expansion of the *right of protection*. The approaches or convergences between the complementary regimes of protection: International Human Rights Law, International Refugee Law and International Humanitarian Law, dictated by protection *necessities* and manifested at the normative, interpretive and operative levels has contributed to effective solutions and to the perfecting and strengthening of international protection in any situation or circumstance. It is necessary to continue advancing resolutely in this direction."[213]

Fortunately, it has effectively progressed in such a way throughout the last decade. It is important that it continues advancing in the coming years. It even more important as the challenges to individual protection rights have become greater today than they were a decade before. Either way, contemporary initiatives for aid or humanitarian assistance have recognized that it is impossible not to take into account, simultaneously or concomitantly, International Human Rights Law, International Refugee Law and International Humanitarian Law norms to effectively address new protection needs.[214]

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211 CIADH, case of *Bámaca Velásquez v. Guatemala* (Judgment), Sentencing of 25.11.2000, Series C, no. 70, pp. 136-140, par. 203-210.

212 Ibid., Separate Opinion of Judge A. A. Cançado Trindade, Series C, no. 70, pp. 151-168, par. 1-40, esp. pp. 157-158 and 166, par 17-18 and 36.

213 Cf. A. A. C. T., *Aproximaciones y convergencias*, op cit. *supra* no. (1), pp. 167-168.

214 Cf. e.g., H. Fischer and J. Oraá, *Derecho Internacional y ayuda humanitaria*, Bilbao, Universidad de Deusto, 2000, pp. 28-29, 41-55, 61-65 and 81-83.

Global Consultations on International Protection were held by the UNHCR in a Meeting of Regional Experts in San Jose, Costa Rica in 2001 at the headquarters of the Inter-American Court of Human Rights during my Presidency at the International Tribunal. It was concluded there *inter alia* that, in order to confront certain restrictive asylum tendencies, "the convergent application of the three branches of international law for the protection of persons, namely, International Human Rights Law, International Refugee Law and International Humanitarian Law" would be required (Recommendation 2[XVI]). At the universal level, there are today a broad series of resolutions by the United Nations General Assembly that include problems concerning human rights and refugee rights from an essentially convergent view.[215]

The beneficial effects of the interactions between International Human Rights Law, International Refugee Law and International Humanitarian Law for the effective protection of individual rights have never been more apparent. Thus, the consolidation of a truly international regime against torture in the domain of International Human Rights Law becomes also beneficial for refugees, and for the protection granted by some human rights treaties against torture and cruel, inhuman or degrading treatment, achieving in this greater reach than possible within the framework of International Refugee Law.[216]

The practice of the international human rights supervisory organs is particularly illustrative in reinforcing the prohibition against *refoulement*. Remember, in this regard, aside from the examples previously cited, e.g. the practice of the United Nations Committee against Torture, in application of Article 3 of the 1984 United Nations Convention against Torture, comes within the reach of the *non-refoulement* principle.[217] This development illustrates the intensification of the convergence between the three branches of protection for the rights of the individual, maximizing protection at the normative, interpretive and operative levels.

On the 20th anniversary of the adoption of the Cartagena Declaration, advances in protection have been accompanied by an aggravation in the vulnerability of individuals in large migratory flows. Thus, new demands for individual protection arise.[218] Sadly, economic progress and the "liberalization" of labor have not put an end to contemporary forms of slavery. Today, undocumented emigrants run the risk of finding themselves in conditions very similar to those of slavery.[219] The current closing of borders in

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215 Cf. the following resolutions of the United Nations General Assembly: resolutions 34/60, of 29.11.1979; 36/148, of 16.12.1981; 37/186, of 17.12.1982; 38/103, of 16.12.1983; 39/117, of 14.12.1984; 40/149, of 13.12.1985; 41/148, of 04.12.1986; 42/144, of 07.12.1987; 43/117, of 08.12.1988; 43/154, of 1988; 44/137, of 15.12.1989; 44/164, of 15.12.1989; 45/140, of 14.12.1990; 45/153, of 18.12.1990; 46/106, of 16.12.1991; 46/127, of 17.12.1991; 47/105, of 16.12.1992; 48/116, of 20.12.1993; 48/135, of 20.12.1993; 48/139, of 20.12.1993; 49/169, of 23.12.1994; 50/152, of 21.12.1995; 50/182, of 22.12.1995; 51/70, of 12.12.1996; 51/71, of 12.12.1996; 51/75, of 12.12.1996; 52/103, of 12.12.1997; 52/132, of 12.12.1997; 53/123, of 09.12.1998; 53/125, of 09.12.1998; 54/147, of 17.12.1999; 54/180, of 17.12.1999; 55/77, of 04.12.2000; 56/13, of 19.12.2001; 56/166, of 19.12.2001; and 57/206, of 18.12.2002.

216 J.-F. Flauss, "Les droits de l'homme et la Convention de Genève du 28 juillet 1951 relative au Statut des Réfugiés" *in La Convention de Genève du 28 juillet 1951 relative au Statut des Réfugiés 50 ans après: bilan et perspectives* (ed. V. Chetail), Brussels, Bruylant, 2001, p. 117.

217 Ibid., pp. 188 and 123.

218 Cf. A. Roberts, "El papel de las cuestiones humanitarias en la política internacional en los años noventa," in *Los desafíos de la acción humanitaria - Un balance*, Barcelona, Icaria/Antrazyt, 1999, pp. 31-70; J. Abrisketa, "El derecho a la asistencia humanitaria: fundamentación y límites," in Ibid., pp. 71-100; X. Etzeberría, "Marco ético de la acción humanitaria," in Ibid., pp. 101-127.

219 M. Lengellé-Tardy, *L'esclavage moderne*, Paris, PUF, 1999, pp. 8-9, 26 and 77, and cf. p. 13.

many countries could, once again, sadly perpetuate and aggravate contemporary forms of slavery.[220] Scientific and technological progress has likewise not been able to liberate human beings from this evil.[221] Victims can only count on one defense against this form of human exploitation: Law.

International Refugee Law established itself, beginning in the mid-20th century, in the light of a global vision divided into sovereign, self-sufficient State territories. Three decades later the phenomenon of displacement has come to challenge this now anachronistic vision. Internal conflicts in different latitudes have required a reevaluation and updating of the *corpus juris* of International Refugee Law, no longer centered on State borders, but rather oin the objective situation of the vulnerability of human beings, independent of whether they find themselves in conformity or not with such border restrictions.

In the nineties, a phenomenon of even greater scale has created millions of victims around the world and accentuated this tendency even more, putting even greater attention on protection needs independent of State borders. There can be no return to the prior notion. The standards consecrated in international protection instruments can only, and should only, be elevated, as I maintained in the legal opinion I prepared for the Council of Europe in 1995 with regard to the co-existence of the European Convention on Human Rights and the Minsk Convention on Human Rights of the Commonwealth of Independent States (CIS, 1995).[222] Any regressions or even mere stagnation of the international protection standards would be, in my judgment, unjustifiable and inadmissible.

In conclusion, it is significant that throughout the entire preparatory consultation process for the Mexico Conference of November 2004 the achievements in the domain of the *right of individual protection* have been reiterated. I have closely followed this process and the three subregional preparatory meetings[223] — that of San Jose, Costa Rica of August 12-13, 2004; Brasilia, August 26-27, 2004; and Cartagena de Indias, September 16-17, 2004; preceded by the prior meeting of the legal consultants of UNHCR in Brasilia of March 27-28, 2004 — expressly recognizing, to my great personal satisfaction, three points that seem of fundamental importance:

1) the convergences between the three branches of international protection of the rights of the human person, namely, International Human Rights Law, International Refugee Law and International Humanitarian Law;

2) the central role and the great relevance of the general principles of the law; and

3) the *jus cogens* character of the basic principle of *non-refoulement* as a true pillar of International Refugee Law.

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220 Ibid., p. 116.

221 Ibid., pp. 96-98.

222 Cf. A. A. Cançado Trindade, "Analysis of the Legal Implications for States Intending to Ratify both the European Convention on Human Rights and Its Protocols and the Convention on Human Rights of the Commonwealth of Independent States (CIS)," 17 *Human Rights Law Journal* (1996) pp. 164-180 (also available in French, Spanish, German and Russian).

223 I have had the honor of presiding over the first two — that of San Jose, Costa Rica, of 12-13.08.2004 and of Brasilia of 26-27.08.2004 — which included the participation of both government representatives and organizations from civil society, which is ideal in advisory meetings of this nature, and on an issue that affects the entire population of the American continent and the Caribbean.

This means that despite new challenges and some worrisome regressions in our times (as, e.g., forced migrations and uprootedness, restrictive and abusive migratory policies, the closing of borders and xenophobia) the human conscience continues moving Law forward, as final source material. Thus, despite incongruent State practice the *opinio juris communis* continues lighting the path to be followed, which can be no other than the precedence of fundamental individual rights in each and every circumstance and the consolidation of *erga omnes* protection obligations. This implies the primacy of human reason over the reasoning of the State.

Mexico City,
November 15, 2004

BLANCA174

REFLECTIONS ON THE APPLICATION OF THE EXTENDED REFUGEE DEFINITION OF THE CARTAGENA DECLARATION IN INDIVIDUAL REFUGEE STATUS DETERMINATION PROCEDURES

Santiago Corcuera-Cabezut

INTRODUCTION

The purpose of this essay is to reflect on the interpretation of the "extended refugee definition" (hereafter "Definition") proposed by the 1984 Cartagena Declaration on Refugees (hereafter "Cartagena") relating to individual refugee status determination procedures. Additionally, some related issues are addressed in view of the situation facing Latin America today of general migrations and mixed migrant and refugee flows, among other aspects. Finally, briefly, the issue will be analyzed from a perspective of Mexican legislation.[1]

1 I wish to express my sincere gratitude to all those contributing to this essay either with comments or critiques of the drafts, or with documents and doctrinary research or ideas, or through style correction or editing. Thanks to Anna Paola Mansi, Gilda García, Cynthia Cárdenas, Alejandra Carrillo, Antonio Fortín and Francisco Galindo.

1. The legal character of Cartagena

The official Definition is contained in the third conclusion of Cartagena. The issue under discussion is the legal character of Cartagena in accordance with International Law.

Cartagena was adopted as a "Declaration" by a Colloquium meeting to discuss the issue of international protection of refugees in Central America and Mexico. This Colloquium was composed of governmental delegates from Belize and nine Latin American countries, as well as by some experts who participated on a personal basis and UNHCR officials. As has been previously mentioned,[2] Cartagena was not conceived as an instrument of a binding nature for the States in accordance with International Law.

We must also consider the discussion –within the broad range of "non-binding juridical instruments" of International Law– concerning the impact that such instruments have had on the practice of the States and on recent developments of International Law and doctrine among other issues.[3] There is no doubt that a resolution of an intergovernmental agency, such as the General Assembly of the United Nations or the Organization of American States, will always have more influence than a "declaration" from an academic Colloquium. It seemed during its creation, that Cartagena was nothing more than a pronouncement of a doctrinal nature,[4] despite the fact it was supported by regional governmental delegates and United Nations officials entrusted with the protection of refugees.

However, since its adoption, Cartagena has embodied and reaffirmed several principles of International Law derived from:

(i) Statements contained in international agreements not only directly related to the issue of refugees (such as the 1951 Convention and the 1967 Protocol) but also to other issues of International Law relative to the Protection of Persons (such as the agreements comprised in conventional Humanitarian International Law or other agreements on human rights, either regional or universal);

(ii) International practice, either regional or universal, and

(iii) General principles of law.

From this standpoint, we may state that Cartagena has reflected, although not entirely, the principles of International Law since its adoption.

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2 One might add to what has already been clearly and accurately written by other authors such as Héctor Gros-Espiell in *The Cartagena Declaration as a source of International Refugee Law in Latin America;* Ten Years after the Cartagena Declaration on Refugees. The 1994 San José Declaration on Refugees and Displaced Persons, First edition IIHR-UNHCR, 1995, p. 453 and following. However, we believe it is necessary to express our own view on the issue in order to contextualize the subsequent topics discussed in this essay.

3 We have tried to analyze the history of such difficult issue in *Derecho Constitucional y Derecho Internacional de los Derechos Humanos (Constitutional Law and International Human Rights Law)* Oxford University Press, Mexico 2002; pp. 42 to 68.

4 Héctor Gros Espiell; *Op. Cit*. Paragraph 14.

Twenty years later, the issue that remains to be resolved is whether the elements comprising Cartagena— which did not reflect the principles of International Law at the time of its adoption— can be considered today as principles of regional international customary law in view of their repeated practice by the Latin American States.

2. Just a definition

As to the Definition itself, it consists of two parts derived from its "extended" nature: the first component is the refugee definition contained in the 1951 Convention and the 1967 Protocol. The second component may be subdivided into two parts: those elements taken from the extended definition contained in the Convention of the Organization for the African Unity (OAU), governing the specific aspects of the refugee problems in Africa (hereinafter called "The African Convention") and those contributed solely and exclusively by Cartagena itself.

In fact, the third conclusion of Cartagena states that:

> "The definition or concept of a refugee to be recommended for use in the region is one which, **in addition to containing the elements of the 1951 Convention and the 1967 Protocol**, includes among refugees persons who 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.*"

The boldfaced phrase shows that the Definition includes the refugee enunciation provided by universal conventional instruments which are binding to any country party to those agreements. This corresponds to the first component mentioned above. The phrase in italics reflects the fact that the writers of the Definition were inspired by the extended refugee definition contained in the African Convention, which reads as follows:

> "The term 'refugee' shall also 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."

The African elements (considered above as the first subdivision of the second definition) are, within the context of Cartagena, an additional contribution to the Definition. Coming from an international agreement of a regional nature, they are binding only to States parties to the African Convention. However, in analyzing its influence, these elements could have a juridical "influence" beyond the elements contained in the Definition, which are exclusive to Cartagena (identified above as the second subdivision of the second definition).

Considering this, we must ask ourselves whether, twenty years after its adoption, the application of the Definition has reached the level of regional international customary Law. To shed light on this issue, it is necessary to analyze State practice.[5]

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5 See, for example, Chapter 5, *Panorama del procedimiento interno de calificación del refugio a nivel latinoamericano (Overview of domestic procedure for determining refugee status in Latin American) Patricio Rubio Correa; en Derecho Internacional de los Refugiados, Publication coordinated by Sandra Namihas. Copyright 2001 by the Editorial Fund of the Pontificia Universidad Católica del Perú.* http://www.acnur.org/biblioteca/pdf/2186.pdf.

Such practice may be "consistent" with the Definition either because there is a legal obligation to observe it, in cases where the Definition was incorporated into the applicable laws of domestic legislations (Belize, Bolivia, Brazil, Ecuador, El Salvador, Guatemala, Mexico[6], Paraguay and Peru), or simply because States may apply it as part of their public policies or actions (Argentina and Chile).

It appears that the Definition has not risen to the level of regional international customary law simply because only a handful of nations apply it, and some States persistently refuse to incorporate the Definition into their national legislation or to put it into practice. This undoubtedly shows the need, while commemorating the 20th anniversary of Cartagena, to promote the application of its Definition and urge States to incorporate it into their national legislation and enact pertinent laws to ensure its effective application.

Although we have differentiated two components of the Definition for the sake of clarity and pedagogic means, the Definition must be understood as a whole and not as two distinct principles.[7]

3. Asylum-seekers

We must first point out that the Definition refers to "each and every person"; that is, to every human being. Refugees are human beings regardless of race, gender, age, creed, political convictions or capacities. As such "…they are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another"[8]. For this reason, they are entitled to all human rights. Although this may seem obvious and not needing clarification, it unfortunately does not always translate into practice.

For this reason, the tenth conclusion of the San José Declaration on Refugees and Displaced Persons (hereinafter "San José") reaffirms that "refugees as well as those persons migrating for other reasons, including economic, have human rights which should be respected at all times and in all circumstances. These inalienable rights should be respected before, during and after their flight or return to their places of origin, with a view towards ensuring their well-being and human dignity."

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6 As Rubio Correa rightly stated, the case of Mexico is "particular" as the definition contained in the Population Law only includes the "extended" section of Cartagena, excluding the elements of the definition of the 1951 Convention and the 1967 Protocol. Op. Cit. page 113. As we will explain later, this situation changed in 2000 when Mexico finally ratified the 1951 Convention and the 1967 Protocol.

7 "In paragraph 3, the actual wording of the conclusion containing the "extended" definition would seem to suggest that, in the region, there should be an overall legal definition consisting of two limbs: the 1951 Convention definition, and the "extended" definition. This, however, would appear to be inconsistent with the stress placed in the preambular paragraphs and in paragraphs 1 and 2 on the importance of the 1951 Convention, the 1967 Protocol and the UNHCR Statute, and the recommendation in the Contadora Act that terminology in the Convention and the Protocol should be adopted with a view to distinguishing refugees from other categories of migrants. This in turn would seem to suggest that, in the Declaration, the "extended" definition should be seen not as something separate but as part of the 1950/51 definitions" Ivor C. Jackson, *The Refugee Concept in Group Situations*; Martinus Nijhoff Publishers; Vol. 3, Great Britain,1999, op. cit, page 404.

8 Article 1 of the Universal Declaration of Human Rights.

4. The right to seek and be granted asylum as a human right.

In addition, Article 14 of the Universal Declaration of Human Rights and Article 22.7 of the American Convention on Human Rights recognize the right to seek and be granted asylum. It is therefore not unreasonable to say that International Refugee International Law details and enforces the fundamental right to seek and be granted asylum. Consequently, it is relevant to insist, time and time again, as the third conclusion of San Jose does, on the integral nature, interrelation, and interdependence between Human Rights Law[9], Refugee Law and Humanitarian Law.

We must likewise insist, as Cartagena does in its fifteenth conclusion, on the necessary coordination, interrelation and interdependence between functions of international agencies and organizations responsible for human rights, asylum and armed conflicts.

Although elsewhere in this volume there are essays dealing extensively with the issue of the relationship between the right to seek and be granted asylum and international human rights principles,[10] it is always propitious to reaffirm relevant aspects.

First, we must remember and reaffirm that the right to seek and be granted asylum is a fundamental human right of a subjective nature, implying certain unavoidable State responsibility. In fact, as Manly rightly states: "the most significant achievement in the evolution of international law and the reciprocal influence of the Latin American regional system with the universal system is the transformation of the right to asylum from a state prerogative to a human right".[11] This right is embodied in Article 14 of the Universal Declaration of Human Rights and, at the regional level, in Article XXVII of the American Declaration on the Rights and Duties of Man and in Article 22.7 of the American Convention on Human Rights (hereinafter called "the San José Pact"). The binding character that the Universal Declaration of Human Rights did not posses initially, but which it unquestionably has acquired today, has been reiterated on countless occasions either in international practice or as a reflection of general principles of law.[12] As an agreement, the San Jose Pact is binding for the States parties to it. As to the American Declaration, its binding character for all OAS members has been confirmed by the Statute of the Inter-American Commission on Human Rights as set forth in its Article 1.1 b). We therefore believe that the right to seek, and be granted asylum is a recognized human right, at least in the Inter-American system.

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9 As we do later, we must also insist now on the interdependence and integral nature of human rights, so that when we speak of the human rights of refugees or of massive human rights violations as a cause for fleeing a country, we may not only think of discrimination or torture, or the wrongly so-called first generation rights, but we must also necessarily take into account economic, social and cultural rights.

10 Cançado, Antonio Augusto Cancado, "Approaches and Convergences Revisited: Ten Years Of Interaction Between International Human Rights Law, International Refugee Law, and International Humanitarian Law", (From Cartagena/1984 to San José and México/2004).

11 Manly, Mark; *The embodiment of asylum as a human right: comparative analysis of the Universal Declaration, the American Declaration and the American Convention on Human Rights;* in *Asylum and the International Protection of Refugees in Latin America, Critical Analysis of the "Asylum-Refuge" duality in light of the International Human Rights Law;* Leonardo Franco (Coordinator), Universidad Nacional de Lanus, ACNUR, Siglo XXI Editores Argentina, 2003. Page 156.

12 See Jaime Oraá-Oraá's analysis; *En torno al valor jurídico de la Declaración Universal*, en *La Declaración Universal de Derechos Humanos en su cincuenta aniversario. Un estudio interdisciplinario (On the juridical value of the Universal Declaration on Human Rights on its fiftieth anniversary: an interdisciplinary study)*, Universidad de Deusto, Bilbao, 1999.

At the universal level, it is fair to say that the Universal Declaration does not mention the right to seek and be granted asylum but "to seek asylum and enjoy it in any country". As Manly explains, the right to "receive" asylum was objected to by some countries, particularly by the United Kingdom, which was "opposed […] to any formulation that would have the effect of recognizing an obligation relating to asylum by the States […]"[13] However, since 1948, the Universal Declaration of Human Rights recognized this right, although not as categorically as its American counterpart did.

If the 1951 Convention went beyond the two later human rights covenants, it was for the well-known reasons arising from the Cold War and by the world division between the Western and socialist blocks. Since then we have become accustomed to speaking first of International Refugee Law, and fifteen years later—with the advent of the two covenants—we now speak of the International Human Rights Law, as if they were two different, or worse, separate areas of law.

Antonio Cançado has reiterated on several occasions that this distinction and separation of the three branches of International Law relative to the protection of human beings weakens the intended protection itself.

Cartagena, a declaration on refugees, continuously refers to human rights and its regulatory system, reinforcing the idea of the codependence of International Refugee and International Human RightsLaw, as if they were two different areas and not one, as is now considered.

Indeed, the eighth Conclusion of Cartagena makes a call to "to ensure that the countries of the region establish a minimum standard of treatment for refugees, on the basis of the provisions of the 1951 Convention and 1967 Protocol and of the American Convention on Human Rights". In addition, the eleventh conclusion refers to the need to guarantee economic, social and cultural rights for refugees. The seventeenth conclusion makes a call to "ensure that in the countries of Central America and the Contadora Group the international norms and national legislation relating to the protection of refugees, and of human rights in general, are disseminated at all possible levels. In particular, the Colloquium believes it especially important that such dissemination be undertaken with the valuable co-operation of the appropriate universities and centers of higher education." The fifteenth conclusion recommends "to promote greater use of the competent organizations of the Inter-American system, in particular the Inter-American Commission of Human Rights, with a view towards enhancing the international protection of asylees and refugees. Accordingly, to successfully complete this, the Colloquium considers that the coordination and cooperation between the Commission and UNHCR should be strengthened." This reaffirms the interdependence of legal norms relative to the matter and also the interdependence among the agencies responsible for applying and ensuring their compliance. Finally, the first recommendation of Cartagena states "that the commitments with regard to refugees included in the Contadora Act should constitute norms for the 10 States participating in the Colloquium and be unfailingly and scrupulously observed in determining the conduct to be adopted with regard to refugees in Central America". In the foreword, such commitments are elaborated including *clause o)* stating that countries must "institute appropriate measures in the receiving countries to prevent the participation of refugees in activities directed against the country of origin, while at all times respecting the human rights of the refugees."

13 Op. Cit. Pag. 131.

5. International Refugee Law as an integral part of International Human Rights Law

For these reasons, Cartagena reflects the need to ensure the effective application of regulations protecting the human rights of refugees. In fact, Cartagena considers that the regulations protecting refugees and human rights make up a regulatory body belonging to the same system and should therefore not be considered as two different, much less separate, branches. We now reach the crux of the matter and a well-known conclusion: if the right to seek and be granted asylum is a fundamental human right, the status of refugees is not constituent but declarative. In other words, what the State does is simply to recognize a condition by complying with the correlative obligation imposed on it by the subjective right of the asylum seeker,[14] a case in which any norm relating to this fundamental right belongs to Human Rights Law and not any another area.

Affirming otherwise, simply because there is a special Convention on the matter (the fact that it is prior to human rights covenants and particularly to the American Convention on Human Rights is accidental and irrelevant) would be equivalent to declaring that the principles relative to the rights of the child or the rights of women or those of the indigenous populations, migrant workers or people with disabilities are not intrinsic to Human Rights Law. Instead, they are different trends simply because there are special treaties tailored to protect those specific human groups in view of their vulnerable situations. The same applies to the 1951 Convention and the 1967 Protocol regarding refugee matters. We should therefore stop thinking about such a conceptual division, which, as others have rightly affirmed, weakens the protection of refugees. To affirm that the 1951 Convention and the 1967 Protocol are intrinsic to International Human Rights Law is to strengthen the protection of asylum seekers and refugees. This is even more evident if we attend to the clarification made by the 1993 Vienna Declaration:

> "All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be kept in mind. It is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."[15]

In other words, if all human rights are interdependent and indivisible, the norms protecting them should also be so. If the right to seek and be granted asylum is a human right, it must be interdependent and indivisible of other human rights. Consequently, the norms relative to the protection of asylum seekers and refugees must be an indivisible and integral component of Human Rights Law.

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14 We recognize that his statement is controversial at the universal level although it may not be so at the Inter-American level, which is the subject of this study. On the matter, we refer again to Manly's study, paragraphs 31 and 32, pages 133 and 134. We must also clarify that the aforementioned correlative obligation of the State does not necessarily imply that the State that considers that an asylum seeker, meeting the requirements to be recognized as refugee, must be granted asylum. The State must instead at a minimum recognize the person as refugee, not to return him to the country from which he fled, or to any other country where he may be at risk according to the terms specified in Article 22.8 of the American Convention on Human Rights; and it must take the necessary measures to ensure the resettlement of the refugee in a third country that accepts to grant asylum and where the refugee will not be at risk, in compliance with his right to receive asylum.

15 WORLD CONFERENCE ON HUMAN RIGHTS, Vienna, June 14-25, 1993; A/CONF.157/23 July 12, 1993, paragraph 5.

In addition, it is of paramount importance that States promote and develop International Law regulations in their national legislation with the purpose of applying them effectively at the domestic level. Special caution is necessary so that national regulations do not contradict or limit the scope of protection granted by International Law. Regardless of the hierarchic level granted to international treaties in domestic legislation, States may not invoke internal law provisions as an excuse to breach an international treaty. [16]

Indeed, as Dr. Jaime Ruiz de Santiago has rightly stated, on the one hand, there is a glimmer of hope in the fact that the number of States ratifying or signing Human Rights Conventions has increased considerably. On the other hand, a somber note of concern is that the conventions signed and ratified by the nations are not "internalized"; they are not made effective by domestic legislation within the States themselves". [17]

The issue of the effective application of International Refugee Law at the domestic level is of great relevance since the 1951 Convention and the 1967 Protocol do not contain effective mechanisms to oversee compliance of their provisions by contracting States. For example, legislation should enable individuals to file specific petitions or complaints to a supervisory body such as the Human Rights Committee or the Inter-American Commission and Court of Human Rights.[18] As Hathaway points out, "as we all know, the UNHCR is not in a position to apply significant enforcement measures on the States. The UNHCR is, after all, an entity with a small budget which depends on yearly, voluntary contributions from a small number of powerful States, none of which has been able to grant the UNHCR the authority to act on an independent and truly autonomous basis that would enable them to progress towards a strong regime of international refugee protection".[19] For this reason, the author recognizes the value of supervisory mechanisms contained in the human rights agreements to design a similar system to ensure the observance of the Refugee Convention. [20]

16 Article 27 of the 1969 Vienna Convention on the Law of Treaties.

17 Ruiz de Santiago, Jaime; *Diagnóstico de la Realidad de los Derechos Humanos en América Latina, tendencias y desafíos (Assessment of the Situation of Human Rights in Latin America);* in *La Nueva Dimensión de la Necesidades de Protección del Ser Humano en el Inicio del Siglo XXI (The new dimension of the protection needs of human beings at the beginning of the XXI century), Third Edition,* UNHCR/ACNUR, San José, Costa Rica, 2004. pp. 118 and 119.

18 Even though Article 35 of the 1951 Convention provides that Contracting States must cooperate with UNHCR in "supervising the application of the provisions of this Convention" and establishes the obligation of the Contracting States to submit reports under the terms set forth in said article, such means of ensuring observance are too far from achieving the effectiveness of the supervision and observance mechanisms contained in the human rights agreements that we have mentioned.

19 James C. Hathaway; *Taking Oversight of Refugee Law Seriously*; http://www.icva.ch/cgi-bin/browse.pl?doc=doc00000501.

20 "Our essential conclusion is that most of the discussion to-date has failed to recognize the value of these mechanisms to the design of a system to oversee the Refugee Convention. With creative adaptation, we recommend their use." Idem. See the essay *Who should watch over refugee law?* On the same issue and by the same author; http://www.fmreview.org/FMRpdfs/FMR14/fmr14.10.pdf.

6. Refugees as migrants

Refugees need to have crossed the border of their country of origin and be located in a country different from their nationality or habitual residence to be considered as such. This includes so-called *sur place* refugees. In other words, refugees are not only those whose circumstances have forced them to "exit" their country but also those who are already outside of their country and do not wish to return for reasons resulting from their exit. [21]

When refugees are not in their country of origin, they are different from other persons "fleeing" for the same reasons (such as a well-founded fear of persecution or threats) but who do not cross the border of their country of residence. [22] These persons have been called "internally displaced persons". Cartagena and San José distinguish sharply between these two categories. [23]

Refugees are also distinguished from other persons crossing the borders of their country of habitual residence but who do it for reasons different from refugees. In general terms, the latter category is known as "economic migrants".

7. Gray areas

> There is no doubt that the close relationship between the economic migratory phenomenon and asylum-seeking migration today causes what has been called "gray areas". The dividing line between one group and another begins to disappear or at least, as stated by Pérez-Sola, the division becomes blurred. This author states:
>
> "But this initially clear distinction between asylum and economic migration is increasingly less distinct as a result of displaced persons suffering the violation of their fundamental rights, not only political and civil rights but also economic and social rights, in the countries of origin. Both perspectives converge inevitably when the State affected by political or economic immigration at its own borders must respond to those

21 Chapter 2; Consideraciones sobre la determinación de la condición de refugiado (Considerations on the determination of the refugee status); Francisco Galindo Vélez, page 61 ; in Derecho Internacional de los Refugiados, publication coordinated by Sandra Namihas.; Copyright 2001 by the Editorial Fund of the Pontificia Universidad Católica del Perú. http://www.acnur.org/biblioteca/pdf/2183.pdf.

22 "The Conference [CIREFCA] adopted a definition of internally displaced persons which suggests that they should be understood to mean persons in a refugee-like situation within their own country. The definition they adopted states that displaced persons are persons who have been obliged to abandon their homes or usual economic activities because their lives, security or freedom have been endangered by generalized violence, massive violations of human rights, an ongoing conflict or other circumstances which have or are seriously disturbing the public order, but who have remained within their own countries. This formulation is, of course, patterned on the broader refugee definition contained in the 1984 Cartagena Declaration, rather than on the stricter definition of a refugee found in the 1951 Refugee Convention." Robert Kogod Goldman; *Global and Regional Initiatives, Specific Protection Needs and the Importance of an Inter-Agency Framework,* 10 years of the Cartagena Declaration on Refugees. The 1994 San José Declaration on Refugees and Displaced Persons. First edition IIHR-UNHCR, 1995, page 293.

23 Cartagena, ninth conclusion; San José makes reference to them through the entire Declaration by referring to "refugees and displaced persons" as one and the same.

> demanding entry, permanence and even work within their territory. (As Habermas has commented, "the willingness of a State for the political integration of fugitives will truly depend on the way that the indigenous population addresses socioeconomic problems" because of "the right of a political group to protect the integrity of their own way of living". - Habermas, J., Morale, Diritto, Politica, Torino, 1992, p. 126 and following-). It is not possible anymore to distinguish clearly between fugitives for economic reasons and politically persecuted persons as a result of the fast socio-political extension of the concept of asylum..." [24]

Although we will return to this issue in the section on "massive human rights violations" within the context of the Definition, it is convenient now to mention the increasing interrelationship between migration and asylum.

First, refugees migrate, and thefore they also become migrants.[25] The tenth conclusion of the San José Declaration "reaffirms that refugees as well as **those persons who migrate for other reasons**, including economic ones, have human rights which should be respected at all times and in all circumstances and places. These inalienable rights should be respected before, during and after their flight or return to their places of origin, with a view towards ensuring their well being and human dignity. (Emphasis added).

What are those "other reasons" causing migrants, aside from refugees, to abandon their country? There are several of them.

Let us analyze, for example, the reasons causing "migrant workers" to emigrate. What forces them to leave their country of origin are living conditions that do not guarantee a decent life. This factor makes them similar to refugees, although it turns them into refugees in the sense that their precarious economic conditions of extreme poverty entails a violation (perhaps massive) of human rights such as the right to work, health, housing, water, food, clothing, etc. Ten years ago we were reminded that "in the same innovative spirit of Cartagena and CIREFCA, we must seek proposals to eradicate elements of poverty which hinder durable solutions for refugees *(strictu sensu)* and generate an increasing number of uprooted persons ("economic refugees"), who are forced to displace themselves within their own countries or to third nations as a means of guaranteeing sustenance for themselves and for their families". [26]

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24 Nicolás Pérez Sola; *La Regulación del Derecho de Asilo Y Refugio en España (The Regulation of Asylum and Refuge in Spain),* Universidad de Jaén, Granada, Ediciones Adhara S.L., page 17.

25 "The term migration includes any movement of persons and therefore includes refugees, displaced persons and economic migrants", Report of the Working Group of intergovernmental experts on the human rights of migrants submitted pursuant to the Resolution of the Human Rights Commission 1997/15, E/CN.4/1998/76, March 10, 1998, paragraph 44.

26 Vitelio Mejía Ortíz; *Análisis histórico de la situación de los refugiados en América Latina que propició la adopción de la Declaración de Cartagena de 1984 sobre los Refugiados*; *10 años de la Declaración de Cartagena sobre Refugiados. Declaración de San José sobre Refugiados y Personas Desplazadas 1994*. First edition IIHR-UNHCR, 1995, pp 203 and 204.

As for migratory workers, the United Nations Intergovernmental Working Group of experts in the human rights of migrants from its initial meeting adopted the International Organization for Migration's definition which states that the term 'migrant' should be understood as covering all cases where the decision to migrate is taken freely by the individual for reasons of 'personal convenience' and without intervention of a compelling external factor." [27]

Some participants requested the Commission review the definition since there were workers forced to leave their countries for economic reasons, among others.[28]

We agree wholeheartedly with the latter statement. Migratory workers do not travel "moved by a desire of change or adventure" [29] but because they are forced to seek better living conditions than those offered in the country where they live. Their freedom is undermined by their inability to meet their basic food, health and housing needs, which constitutes a real threat to their health and even their lives and the lives of their dependents. This threat does not originate from a direct human act but instead from the lack of compliance of their country with its obligations to ensure economic and social rights. "The case may be that the economic measures affecting work may be so serious as to cause persecution, particularly if they are directed at a specific group for political, racial or religious reasons, in which case they could be considered refugees". [30]

This may seem to be another example of the "gray area" of what we understand by economic migrants and refugees or forced and voluntary migration. Migratory workers do not travel for pleasure. They are forced to migrate even if they do not meet the required characteristics to be considered refugees. [31]

Informative Newsletter No. 24 of the Office of the United Nations High Commissionner on Human Rights relative to the Rights of Migratory Workers reveals once again the close relationship between the migratory phenomenon and asylum:

> "Poverty and the inability to earn enough for the sustenance of the family are the main reasons why persons move from one State to another in search of work. These are not the only characteristics of migration from a poor to a rich State; poverty also channels movements from a developing country to other countries which seem to have better work perspectives, at least from afar. There are other reasons why people go abroad in search of work. War, civil conflicts, insecurity or persecution derived from discrimination on the basis of race, ethnic origin, color, religion, language or political opinion are all factors contributing to migratory flows of workers".

27 Report of the working group of intergovernmental experts on the human rights of migrants submitted pursuant to the Resolution of the Commission on Human Rights 1997/15, E/CN.4/1998/76, March 10, 1998, paragraph 44.

28 Idem. Paragraphs 85 and 86.

29 UNHCR Manual, Paragraph 62.

30 Paragraph 37 on Principles and Criteria for the protection and assistance of refugees, returnees and displaced persons in Latin America. Document prepared by the Expert Group for the International Conference on Central American Refugees. 1989 (CIREFCA) (herein after called the "CIREFCA Principles and Criteria").

31 Idem.

However, the migratory phenomenon is also related to asylum when the refugee attempts to arrive at a specific country to request asylum, the United States for example, and must cross Central America and Mexico to achieve this goal. There are countless cases of persons detained in Mexico as migrants in irregular situations. They claim that they are passing through Mexico on the way to the United States or Canada and request asylum in Mexico. This phenomenon is common in Latin American countries, which are mainly transit countries for migrants and refugees.

This is how an asylum seeker, choosing a country other than that through which he has transited may be an economic migrant, *prima facie*, without losing his refugee status. We must remember the act through which a refugee is recognized after the petitioner has made the request is simply declarative and not constitutive of the refugee status.[32] Even worse, as a general rule, the refugee crosses borders without a passport or documents "since refuge assumes, by its own nature, the irregular or illegal entry"[33] although we must not forget that "the mere possession of a passport may be considered neither as evidence of loyalty of the bearer nor as evidence of his lack of fear".[34] For these reasons, Article 31.1 of the 1951 Convention provides that:

> "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

This leads us to consider two additional issues:

8. When should asylum be requested?

First we must consider the point in time when the asylum seeker exercises his right to be recognized or declared a refugee. It is true that "It is therefore left to each Contracting State to establish the procedure it considers most appropriate with regard to its particular constitutional and administrative structure"[35] to identify and recognize refugees. Some legislatures establish certain peremptory terms or deadlines for requesting asylum after the refugee has entered the country.[36] These kinds of provisions may be considered compatible, at first sight, with the previously transcribed Article 31.1. However, the current circumstances call for a debate on how to interpret the words "providing that they appear without delay before the authorities and claim a justified cause of their illegal entry or presence".

32 UNHCR Manual, paragraph 28. Paragraph 40 of the CIREFCA Principles and Criteria.
33 Op. Cit. *Patricio Rubio-Correa*, page 117.
34 See paragraph 48 of the UNHCR Manual.
35 UNHCR Manual, paragraph 189.
36 Op. Cit. *Patricio Rubio-Correa*, page 117.

This may cause (and it indeed does) true refugees not to be recognized as such for not having submitted their request within the deadline established in the legal provision. In reality, these kinds of requirements, in refugee transit countries, go against the spirit of the institution of asylum and undermine or "soften" the principle of *non-refoulement* significantly, which, being a *jus cogens* norm, prohibits contrary practices.

In fact, a migrant in transit, for example, through a developing country (Third country), crossing the southern border in an irregular manner with the intention of arriving at the northern border to request asylum in a developed country (First country), does not request to be declared refugee by the Third country since his intention is to request asylum in the First country. After 50 days, the refugee is detained by the immigration authorities of the Third country, which identify him *prima facie* as a migrant in an irregular situation, and therefore proceed to send him to a detention center for repatriation. At that moment, the refugee requests asylum and begs not to be returned. Despite that in accordance with internal legislation the refugee should have made his request within 33 days upon arrival in the country, the refugee has been in the territory for 50 days already without having made such a request. The authority then denies the recognition of refugee status based on that legal requirement and returns him to his country.

The margin that each country exercises in establishing procedures for the recognition of refugee status should not undermine the objective and the aim of the institution and the right to request asylum. First, we must reiterate that "being a refugee presupposes, by its own nature, illegal or irregular entry".[37] We must also recall "that an applicant for refugee status is usually in a particularly vulnerable situation"[38] in addition to the fact that "a person who, because of his experiences, is in fear of authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case,"[39] and, rightly so, he may not even dare to approach authorities to request recognition of his refugee status; instead, he may do so until he has been detained and considered, *prima facie,* as a foreigner in irregular conditions by the authorities. To apply the "time limit" or "deadline" criteria rigorously leads us to evoke the principle statinig: *summum jus, summa injuria est*.

It seems then that countries with these kind of regulations should modify them so that, in the case of *prima facie* undocumented migrants who demonstrate to be true refugees, the deadline for submitting the refugee application does not begin to elapse at the moment one crosses the border, but instead, from the moment when the foreigner has been brought to immigration authorities, with the obvious exception of *sur place* refugees.

A measure of this kind, providing increased protection to refugees who have entered a country illegally, could not be considered contrary to the 1951 Convention to the extent that the *pro homine* principle would be applied (or as we prefer to call it, the *pro persona* principle, which is recognized by Article 5 of the Convention and reiterated and proclaimed on so many occasions by various international instruments and agreements of diverse nature.

37 Idem.
38 UNHCR Manual, paragraph 190.
39 UNHCR Manual, paragraph 198.

9. The authorities and eligibility state agencies

The second issue refers, on one hand, to migratory policies and on the other hand, to the qualifications of the authorities in charge of declaring refugee status, applying immigration law and border protection. The idea is to ensure that undocumented foreigners will be treated in such a way so as to facilitate their identification and provide them with due treatment according to their condition when they are recognized as refugees.

As for the state agencies responsible for considering applications of asylum seekers and declaring refugee status, we propose that, considering that the right to seek and be granted asylum is a human right, such agencies must then act with independence, guarantees, pluralism and modes of operation in accordance with the national institutions promoting and protecting human rights as outlined by the Principles of Paris. [40]

In applying *mutatis mutandis* of the Principles of Paris, the public institutions in charge of declaring refugee status should comply with the following elements and peculiarities:

1. The composition of the national institution and appointment of their members either through election or otherwise shall align with a procedure offering all the necessary guarantees to ensure a pluralist representation of social elements (of civil society). It should represent those interested in promoting and protecting *asylum seekers and refugees,* particularly through capacities aimed at achieving the effective cooperation or participation of representatives from:
   a) non-governmental organizations competent in the sphere of *protection to asylum seekers and refugees* and interested socio-professional organizations;
   b) the main schools of philosophical and religious thought;
   c) academics and qualified specialists;
   d) Congress;
   e) The government (if included, their representatives will only participate in the debates on an advisory basis).

2. The national institution shall have an adequate infrastructure, and adequate funds to ensure completion of its duties. These funds should be allocated mainly to staff endowment and to establishing their own facilities. This will ensure that the institution is autonomous from the government and independent of any kind of financial control.

3. In the interest of maintaining the stability of the mandate of the members of the national institution, without which there would be no true independence, their appointment shall be made through an official act specifying terms for their mandate. The mandate may be extended providing that plurality is always guaranteed.

40 National institutions that promote and protect human rights. Resolution 48/134 of the General Assembly, December 20, 1993; A/RES/48/134, March 4, 1994, Annex; Principles relating to the status of national institutions.

As for its activities, the national institution shall:

a) consider freely all issues within the scope of its competence submitted by […] any person requesting refugee status;
b) receive all the testimonies and gather all information and documents necessary to examine the situations within the scope of their competence;
[…]
d) meet on a regular basis and any time it deems necessary with the presence of all its members and with due notification;
e) adjourn working groups whenever necessary, as well as local or regional sections, to ensure the fulfillment of their responsibilities;
f) coordinate with legal agencies and other agencies responsible for promoting and protecting *asylum seekers and refugees* (particularly the ombudsman, mediator and other similar institutions);
g) liaise with non-governmental organizations responsible for promoting and protecting human rights, fostering social and economic development, fighting racism, protecting particularly vulnerable groups (especially children, migratory workers, refugees, people with physical and mental disabilities) or other specialized areas considering the key role that these organizations play in extending the scope of action of the national institutions.

Based on the above, these institutions must be independent of the executive power and have full administrative and budgetary autonomy so that their resolutions may not be tainted by political interests. Such political or interests of other kinds may jeopardize the merely declarative function of refugee status to be granted to the asylum seeker who meets the requirements. This is consistent with "the universally accepted principle that granting asylum, as well as recognizing refugee status, is of a peaceful, non-political and exclusively humanitarian nature. These same principles are contained in various legal documents and instruments such as the *Cartagena Declaration*." [41]

10. Other persons deserving protection

We must remember again that, until a person is identified as a refugee that person is usually, *prima facie*, a migrant in an irregular situation and almost surely a migrant worker as well. Moreover "special reference must be made to those persons who, although they fulfill the criteria to be considered refugees, have not been identified as such and their status has therefore not been formally recognized. These individuals are considered refugees given the declarative and not constitutive nature of the recognition of refugee status. Generally these persons live in a particularly precarious situation and therefore require special attention […]."[42]

41 CIREFCA Principles and Criteria, paragraph 42.
42 CIREFCA principles and Criteria, paragraph 40.

Migrants may find themselves in a situation of higher vulnerability. There are an increasing number of groups of persons who are outside of their country as irregular migrants, either because they entered the country in an irregular manner or because they committed some kind of act resulting in deportation or legal expulsion. However, they cannot be returned to any country where their lives and/or their personal integrity may be at risk. Article 22.8 of the American Convention on Human Rights declares in an imperative manner that "In no case may an alien be deported or returned to a country regardless of whether or not it is his country of origin, if in that country his right to life or to personal freedom is in danger of being violated because of his of his race, nationality, religion, social status or political opinion".

This provision is applicable not only to refugee and asylum seekers but also to any foreigner who is in this particular situation.

For this reason, it is imperative that officials, migrant and security agents, who are responsible for safeguarding borders and identifying foreigners located in a state in irregular conditions, be duly trained so that they can identify those foreigners entitled to the right provided for in Article 22.8 of the American Convention on Human Rights. This will ensure that foreigners receive the treatment and protection they deserve due to their condition of vulnerability, whether they are refugees or not.

At present, immigration authorities of some countries seem more concerned with tightening restrictions and security measures along the borders to avoid any and all migratory flow. These authorities also assume that some nationalities are not refugees and are not entitled to the right to seek and be granted asylum or to the protection established Article 22.8 of the American Convention on Human Rights. [43]

We must urge States to adopt effective measures aimed at training, specializing and sensitizing their immigration and security officials and agents. They must be forced to observe and make others observe the provisions relative to refugees and asylum seekers as well as those relative to other vulnerable foreigners who are entitled to the fundamental right of *non-refoulement*, even if they are not refugees.

11. Detention

One of the problems of greater concern among international human rights organizations, and particularly migrants' rights, is the issue of the detention of undocumented foreigners whose legal situation is under consideration by the corresponding immigration authorities, including asylum seekers and refugees. This detention, which may be euphemistically called desired (security, safeguard, custody, etc.), is simply detention resulting from an administrative breach conducted without evidence of any other misdemeanor penalized by law. It is indeed in violation of the law to enter the territory of a given country without required documentation. However, in spite of this, when migrants are not detained at the borders, they are frequently detained in a city by police agents simply because of their appearance, clothing or speech. That is they are detained on the basis of what they "seem to be" and not because of what they have done, which constitutes an arbitrary and discriminatory act.

43 Hathaway clearly states that: "States pay lip service to the importance of honoring the right to seek asylum, but in practice devote significant resources to keep refugees away from their borders." James C. Hathaway*; Can International Refugee Law Be Made Relevant Again?* http://www.refugees.org/world/articles/intl_law_wrs96.htm.

Undocumented migrants caught trying to cross a border or who are detained are frequently deprived of liberty and kept in detention centers similar to prisons.[44] As we mentioned previously, this situation has caused increasing concern among international organizations dedicated to protecting human rights, especially the rights of migrants. We must consider carefully the content of Deliberation number 5 of the Working Group on Arbitrary Detentions, making specific reference to the situation of immigrants and asylum seekers. [45]

The report of Special Rapporteur Gabriela Rodríguez-Pizarro on the rights of migrants, submitted pursuant to resolution 2002/62 of the Commission of Human Rights, refers to migrants deprived of freedom in chapter II. In this report, Rodríguez-Pizarro highlights the issue of the criminalization of irregular migration.[46] However, the report refers mainly to administrative detention. From her comments we may conclude that the differentiation between the concepts of administrative or criminal detention is not very useful since freedom is deprived in both cases. Although, as the rapporteur states, and in accordance to the legislation of many countries, those detained under judicial processes sometimes have more rights than those detainedunder administrative detention".[47] The rapporteur dedicates several paragraphs to analyzing the issue of arbitrary detentions according to fundamental principles of International Human Rights Law.[48] She points out that practices of an excessively discretionary nature and true arbitrariness in depriving undocumented migrants of their freedom are very frequent and extremely protracted on many occasions. [49]

12. Unaccompanied detained minors

We should not overlook the serious problem of unaccompanied minors, be they refugees or not. State immigration authorities must adopt effective measures to provide adequate protection to unaccompanied foreign minors.[50] A progressive and extensive interpretation of law must be applied in their case so that they are not returned. These persons may not be deported or expelled based on the same criteria applied to adults. State authorities must coordinate so that any underage unaccompanied minor will receive adequate assistance and protection based on their age and vulnerable situation whether they meet the requirements to be considered refugees or not. [51]

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44 Report of the Special Rapporteur, Mrs. Gabriela Rodríguez-Pizarro, submitted pursuant to the Resolution of the Commission on Human Rights 2002/62, E/CN.4/2003/85 of December 30, 2002, paragraphs 55 and 57.

45 The aforementioned document is attached as Annex II to the Report of the Working Group on Arbitrary Detention covering the period between January and December 1999 (E/CN.4/2000/4) December 28, 1999.

46 Idem, paragraph 17. "Migrants are detained in connection with criminal offences like any other citizens a State. The Special Rapporteur, however, is concerned by the fact that under the legislation of a considerable number of countries violations of the immigration law constitute a criminal offence. Undocumented and irregular migrants therefore become particularly vulnerable to criminal detention, which is punitive in nature, for such infractions as irregularly crossing the State border, using false documents, leaving their residence without authorization, irregular stay, overstaying or breaching their conditions of stay. The Special Rapporteur notes with concern that criminalization of irregular migration is increasingly being used by Governments to discourage it."

47 Idem, paragraph 19.

48 Idem, paragraph 22 and subsequent paragraphs.

49 Idem, paragraph 34.

50 The same is true of senior citizens who also require protection and special care because of their special condition. On this issue see *Focusing on Older Refugees;* by Linnie Kessely; http://www.fmreview.org/FMRpdfs/FMR14/fmr14.6.pdf.

51 "The UN, through various resolutions of the General Assembly [Resolutions of the General Assembly on the Assistance to unaccompanied refugee minors: A/RES/49/172, February 24, 1995; A/RES/50/150, February 9, 1996; A/RES/51/73, February 12, 1997; A/RES/52/105, February 11, 1998; A/RES/54/145, February 22, 2000; A/RES/56/136, February 15, 2002; A/RES/58/150 February 24, 2004.], has condemned all exploitation of unaccompanied refugee minors, including the use of children as soldiers or human shields within the context of armed conflicts. The UN has also given particular importance to the issue of refugee girls since the majority of refugees are children and women". Gilda García-Sotelo, Doctoral dissertation "Reasons and unreasonabless of soldier girls, legal framework for their international protection". Director: Sonia Hernández-Pradas; Tutor: Dr. Fernando Mariño-Menéndez. Doctor in Law, Program on Fundamental Rights, "Bartolomé de las Casas" Human Rights Institute, Universidad Carlos III de Madrid, May 2004. Page 156.

Unaccompanied minors must not stay in the same facilities as adults in irregular situations who are detained while their legal situation is resolved. Instead, they should be accommodated in adequate facilities and guarded by duly trained staff capable of supporting and satisfying all the physical and psychological needs of minors who are far from their country and family.[52]

Given the large number of unaccompanied minors who transit throughout Latin America with the intention of arriving in countries north of Rio Bravo, it is imperative to convince government authorities of the need to adopt effective measures to achieve greater protection for migrant minors, whether they are refugees or not.[53]

From the arguments outlined above we may infer that the principle of *non-refoulement* is applicable to asylum seekers as well as to refugees and some foreigners. These sectors of the population, even if they do not meet refugee status requirements, must be protected through the principle of *non-refoulement* under the terms established in Article 22.8 of the American Convention on Human Rights, which raises it to the level of a fundamental right.

This is an additional element to be considered in reiterating once again that the dividing line between the concepts of refugee and migrant is not as precise and clear as once was. For this reason, it is necessary to analyze and apply International Refugee Law in full conjunction with International Law relative to the Human Rights of Migrants.

13. International Law relative to the Human Rights of Migrants and its interdependence with International Refugee Law

The International Convention on the Protection of the Rights of All Migratory Workers and Members of Their Families, adopted by the General Assembly of the United Nations on December 18, 1990 (hereinafter called the "Convention on Migrants"), specifically states in Article 3 that: "This Convention shall not apply to: d)refugees and stateless persons unless such an application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned."

However, as already mentioned, refugees are considered at first sight as migrants until they are recognized as refugees in countries of transit. They therefore transit in a state of "limbo" in which International Migrant Law is applied to them until International Refugee Law is applicable only after they are recognized as refugees.

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52 As the following statement affirms: "What is required is a decision for and on behalf of the unaccompanied child, which takes account of the best interests of the child and effectively contributes to his or her full development, preferably in the environment of the family. To channel children in flight into refugee status procedures will often merely interpose another obstacle between the child and a solution." Guy S. Goodwin-gill; Children as Asylum Seekers; The Refugee In International Law; Second Edition, Clarendon Press - Oxford, 1996. Page 358.

53 On this issue, paragraph 62 of the Report submitted according to the 2000/48 resolution of the Commission of Human Rights, Document E/CN.4/2001/83 of January 9, 2001, Special Rapporteur Gabriela Rodríguez-Pizarro states that "These minors run the risk of being subjected to serious abuses and even sexual, degrading and slave labor. In other cases, they are detained, expelled or deported even though they are victims. These situations of detention, which last for months and even years in many cases, often involve violations of their fundamental rights."

This circumstance justifies a "detour" from the main topic of this essay in order to analyze International Law of the Human Rights of Migrants, which are applied to refugees until their special status is recognized.

Given their undeniable human condition, migrants are entitled to all human rights and all international instruments of a "general" character are applicable to them. In addition, and depending on the conditions and specific characteristics of each refugee, they will be protected under some other "special" instruments either because their special condition derives from the protection of a particular human right or from membership in a specific group.

International Human Rights Law of Migrant Workers is comprised, like General International Law, by International Conventions, Juridical Customs and General Principles of Law. They are supplemented by Jurisprudence, Doctrine and non-binding *strictu sensu* norms such as declarations, resolutions, and recommendations of international organizations.

One of the main legal systems on this issue is the Convention on Migrants, which entered into force on July 1, 2003. However, even before its enforcement, there was already a legal body constituted within the framework of International Law of the Human Rights of Migrant Workers.

Migrant workers and refugees were protected until then by the rights recognized under the International Pact of Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights; and by the American Convention on Human Rights and the San Salvador Protocol.

In addition, their personal characteristics allowed them to invoke some specific declarations and resolutions. Therefore, a migrant worker or refugee who was a torture victim could be protected by the provisions relating to torture contained in the conventions, both universal and regional (depending on the country where he was located). Someone, who in addition to being a migrant was also a woman, was then favored by the provisions of the Convention on Women. If such a person was a minor, the Convention on the Rights of the Child was then applied. If he or she was also subject to discrimination on the basis of race, color, national origin or any other cause, the Convention Against all Forms of Racial Discrimination was applied; and if such a person was subject to a practice analogous with slavery at work, the Supplementary Convention against Slavery was also applied, and so on and so forth. In other words, the applicability of the legal norms extends from general law, common to all persons given their human condition, to the most specific laws, depending on the particular characteristics of the person in question so as to provide them with the greatest protection possible.

In the case of migrant workers, specifically their condition as workers, the pertinent provisions of the International Covenant on Economic, Social and Cultural Rights are applicable to them, as well as the various conventions adopted by the International Labor Organization. We refer, for instance, to Convention 111 relative to employment and occupation discrimination; to Convention 100 on the equality of compensation for male and female labor of equal value; to Convention 87 on the freedom of association and the right to unionize; to Convention 98 on the right to unionize and collective bargaining; and in the case of indigenous persons, to Convention 169 on indigenous and tribal populations in independent countries. More specifically, in their capacity as migrant workers, Convention 97 on migrant workers is applicable in addition to Convention 143 on migration under conditions of abuse and the promotion of equal opportunities and treatment for migrant workers.

The above instruments refer only to international conventions. However, international custom on this matter may also be invoked in favor of the rights of migrant workers.

Jurisprudence has also been developed on the basis of the aforementioned conventions, which is applicable to migrant workers, as an ancillary source of International Law, to the extent that it refers to human beings in general. More specifically, the Inter-American Court of Human Rights has issued two advisory opinions referring directly to the particular rights of migrants. Opinion OC-16/99 refers to the right to information on consular assistance as part of the guarantees of due legal process, and Opinion OC-18-03 refers to the juridical condition and rights of undocumented migrants. It is important to underline, given the specific reference made to asylum seekers and refugees, the content of the concurrent vote of Judge Antonio A. Cançado-Trindade.[54] Also the Court itself has issued resolutions ordering the adoption of provisional measures in the case of massive deportations of Haitians and Dominicans of Haitian origin. As Cançado- Trindade reminds us: "the 1993 and 1994 reports of the Inter-American Court of Human Rights relative to Haiti contain a chapter on refugees. The former (1993) addresses the issue within the wider context of the 'serious deterioration' of the human rights situation in that country. (OAS/ICHR, Report on the Situation of Human Rights in Haiti (1993), pp. 47-53)." The second report (1994) identifies the causes of the Haitian massive displacement, namely, their precarious economic situation (worsened by the shortage caused by the commercial embargo) and the existence of a repressive political system. He also underlines the need to observe the "principle of the prohibition of deportation and refoulement of persons" (OAS/ICHR, Report on the Situation of Human Rights in Haiti, 1994, pp. 133-145)."[55]

There are many international resolutions and declarations dealing with the issues mentioned in the aforementioned international treaties. One should also note the Declaration on the Human Rights of the Individuals Who are Not Nationals of the Country in Which They Live, adopted by the UN General Assembly on December 3, 1985.

The various declarations and reports of the Working Group of intergovernmental experts on the human rights of migrants, discussed above, also deserve mention.

We should now turn to the importance of the Convention on Migrants in view of the vast amount and variety of existing international regulations that are either directly or indirectly applicable to the rights of migrant workers.

It is important to remember that, although all human beings should benefit from general protection, some groups nevertheless do not receive effective benefit from them. It is therefore important to implement special instruments to ensure their protection and reinforce their rights. Such groups require special and more rigorous protection to progress and "equalize" their rights alongside those groups in a more privileged position.

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54 Paragraphs 13 and following.

55 Antonio Cançado-Trindade; *Derecho internacional de los derechos humanos, derecho internacional de los refugiados y derecho internacional humanitario: aproximaciones y convergencias. (International Human Rights Law, International Refugee Law and International Humanitarian Law: approaches and convergence)*. 10 years of he Cartagena Declaration on Refugees. The 1994 San José Declaration on Refugees and Displaced Persons. First Edition, IIHR-UNHCR, 1995, page 108.

There is no doubt that in situations where there are disadvantaged groups it is necessary to apply the principle of distributive or social justice which calls for: "equal treatment for equals and unequal treatment for unequals". This principle should not be considered contrary to the principle of equality before the law. On the contrary, it must be understood as a principle necessary to "equalize" the advantages of those who are in a disadvantaged position. The objective of unequal treatment toward unequals is precisely to put them on equal footing with the rest.

Since the first meeting of the Working Group on migrants in November 1997, the vulnerability of migrant workers was addressed in discussing issues such as racial discrimination and xenophobia, repressive laws tending to discourage migration and their irregular condition, among others.[56] Workers' vulnerability is intensified when migrant workers are women, more so when the person is a minor, and even more if that person is also indigenous.

In addition to an initially disadvantageous situation, the particular conditions of some persons aggravate their situation.

The reasons discussed so far show the relevance of the entry into effect of the Convention on Migrants. It also shows the urgency of convincing as many States as possible of the importance of strengthening the Convention at the universal level. The Convention not only reiterates and reinforces human rights of this human group in particular and their as of yet unrecognized refugee rights, but also foresees specific mechanisms for defending their rights when they are violated.

To this effect, the 1999-45 Resolution of the United Nations Commission on Human Rights, approved at meeting 56 on April 27 of 1999, states the following:

"4. Calls upon all Member States to consider the possibility of signing and ratifying or acceding to the Convention as a matter of priority, and expresses the hope that this international instrument will enter into force at an early date."

However, the Working Group, in its fourth meeting in February 1999, recognized that some time may pass before this happens. For this reason, a proposal was made to designate a special rapporteur to oversee the situation of the human rights of migrants.

Most of the speakers at that meeting supported the recommendation to designate a special rapporteur (paragraph 74). The exception was the representative of the United States of America, who attended as an observer and stated that "his government had not signed the Convention on Migrant Workers because it believed that the existing instruments on human rights already granted workers all the protection required to guarantee their human rights". He also affirmed that "the problem, as in many other situations, was the lack of implementation, not the need for new standards". He underlined that "the United States did not support the establishment of a special rapporteur of the Commission on Human Rights for migrant issues. First, because such a mechanism would overlap considerably with other mandates and, second, because there was a lack of resources, including secretarial support for the existing mandates". Finally, his Government considered "that it was imperative to wait for the results of the revision of the mechanisms made by the Commission before establishing new thematic mandates". (paragraph 72)

56 Report of the Working Group of intergovernmental experts on the human rights of migrants subject to the Resolution of the Commission on Human Rigths 1997-15, E-CN.4-1998-76, March 10, 1998, paragraphs 45 and following among others.

Despite the above, the Commission on Human Rights adopted the 1999/44 resolution on the basis of the recommendation of the Working Group and decided to designate a special rapporteur on the human rights of migrants for a period of three years (paragraph 3 of the resolution). According to a press release issued on August 16 of 1999, such a position was assumed by the Chilean-Costa Rican Gabriela Rodríguez-Pizarro. Among other duties, the rapporteur made a visit to the United States and Mexico between February 25, and March 18, 2002. She also visited other countries such as Ecuador, the Philippines, Spain, Iran, Morocco and Canada and submitted several reports on the human rights situation of migrants. [57]

The eight components of the Convention on Migrants deal with the scope and definitions of the instrument, the establishment of the *non-refoulement principle*, a catalogue of human rights in general which are applied specifically to migrant workers and their families, to particular rights relating to documented migrant workers or workers in a regular situation. The Convention also refers to some provisions relative to special categories of migrant workers, the promotion of satisfactory conditions so as to ensure the efficiency of the provisions of the Convention itself, to the rules relative to the application of the Convention on Migrants and to general provisions.

Everything that we have said about the rights of migrant workers is founded or justified by the frequency with which refugees transit as undocumented migrants through one or more countries of the Mesoamerican region. For this reason, they would be subject to the application of the provisions relative to the human rights of migrants.

We have also pointed out that when refugees in transit are arrested by public forces of the transit country where illegal migrants are present they request asylum with the purpose of avoiding deportation. If they are recognized as refugees in that situation the Convention will then not be applied as established by the Convention on Migrants itself. They will instead be protected by the provisions of the 1951 Convention, which as we well know in addition to reiterating fundamental human rights also applies them specifically to refugees.

A detailed comparative analysis of the two instruments reveals that the instruments do not always protect rights to the same extent. On most occasions, the Convention on Migrants grants greater protection than the 1951 Convention either because it makes reference to rights not mentioned in the 1951 Convention, or because it specifies the rights that are recognized in greater detail. However, it is unfortunate that the Convention on Migrants states in Article 3 that "This Convention shall not apply to: d) refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned."

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57 Migrant workers - Report of the Special Rapporteur E/CN.4/2001/83, Visit to Canada - Report of the Special Rapporteur on the human rights of migrants E/CN.4/2001/83/Add.1, Migrant workers - Report of the Special Rapporteur E/CN.4/2002/94, Migrants workers: Mission to Ecuador E/CN.4/2002/94/Add.1, Migrant Workers - Report of the Special Rapporteur E/CN.4/2003/85, Migrant workers: Communications sent to the Governments and replies received - Report of the Special Rapporteur E/CN.4/2003/85/Add.1 and Corr.1 - Migrant workers: Report submitted by the Special Rapporteur, Visit to Mexico E/CN.4/2003/85/Add.2 - Migrant workers: Report submitted the Special Rapporteur Mission to the border between Mexico and the United States of America E/CN.4/2003/85/Add.3 and Corr.1 - Migrant workers: Report submitted the Special Rapporteur Visit to the Philippines E/CN.4/2003/85/Add.4 - Migrant workers - Report of the Special Rapporteur E/CN.4/2004/76, Report on Migrant Workers - Visit to Spain E/CN.4/2004/76/Add.2, Report of the Special Rapporteur on the human rights of migrant workers: Visit to Morocco E/CN.4/2004/76/Add.3, Report of the Special Rapporteur on the human rights of migrants - Mission to the Islamic Republic of Iran, E/CN.4/2004/76/Add.4.

It seems then necessary to urge countries party to the Convention on Migrants to issue legislation so as to make the provisions of the Convention applicable to refugees whenever the provisions of such a Convention are more favorable for the refugee. It also seems propitious to encourage the countries that are not yet party to the Convention on Migrants to sign on to it and to ratify it, despite its gaps and deficiencies, with the purpose of strengthening the juridical protection system of all migrants regardless of whether they are refugees or not.

14. The five causes

Let us now turn to an analysis of reasons why refugees flee their country according to the extended Definition. The reasons foreseen in the extended Definition have caused apprehension in some countries believing that given the situation prevailing in some countries and alleged vagueness of the aforementioned reasons, all the inhabitants of such countries should be considered refugees.[58] As we will see later, these fears are not well-founded since those reasons must be interpreted in light of the provisions of International Humanitarian Law, Human Rights Law and the principles and criteria that are well-known and proven by Universal Refugee Law and by UNHCR's practice.

a) <u>because their life, security or freedom has been threatened by generalized violence</u>

This is one of the causes raising concern in some States since the expression "generalized violence" is vague and could lend itself to an interpretation that considers all of the inhabitants of any country with a high degree of public insecurity and serious organized criminal situations or similar situations, as refugees as outlined by the Definition.

First we must point out that there must be a causal link between generalized violence and a threat against the life, security or freedom of the person in question. The threat must be real, current or foreseen; in other words, it must be so imminent that the persons are forced to flee to avoid the risk of losing their lives, security or freedom. A situation of generalized violence *per se* is not sufficient enough to consider all those persons leaving their country as refugees. The threat element must also be present under present and imminent circumstances putting their lives, security or freedom at risk.

This may be inferred in applying the analogous provision in paragraph 54 of the Manual of Procedures and Criteria to Determine Refugee Status pursuant to the 1951 Convention and the 1967 Protocol on the Refugee Status (hereinafter called the "UNHCR Manual") regarding discrimination. Paraphrasing the document: many societies today face situations of generalized violence (to a lesser or greater extent), and the persons living in such societies are not necessarily victims of persecution or directly threatened by such generalized violence.

58 La Situación de los Refugiados en América Latina: protección y soluciones bajo el enfoque pragmático de la Declaración de Cartagena sobre los refugiados de 1984 (The Situation of Refugees in Latin America: protection and solutions under the pragmatic approach of the 1984 Cartagena Declaration on Refugees). Discussion Document. UNHCHR/ACNUR, August 2004, pp. 15 and 16.

In addition, the above statement is clearly reiterated in paragraph 51 of the UNHCR Manual in the sense that a threat against life or freedom implies persecution. In other words, the "threat" concept must be interpreted in line with the concept of "persecution" elaborated in the 1951 definition. Consequently, the "threat" concept used by Cartagena is not a vague or unknown concept in International Refugee Law. Instead, such a notion must be included within the concept of persecution, which is subject in turn to the same rigor given that "there is not a universally accepted definition of the concept of "persecution" […]". Therefore, in order for the threat to be considered a risk jeopardizing life, security or freedom, within the context of the Definition, it must come from a "real or foreseen measure against that person". A paraphrase of paragraphs 42 and 53 of the UNHCR Manual reveals that there may be other threats or detrimental actions which, depending on each case, may represent a true threat to the life, freedom or security of that person.

These additional circumstances may derive from an objective situation of generalized violence which, as established in CIREFCA, must be seen in the light of International Humanitarian Law.[59] By this we refer to the principles and criteria for the protection and assistance of refugees, returnees and displaced persons in Latin America contained in a document prepared by the Expert Group for the 1989 International Conference on Central American Refugees (CIREFCA) (hereafter "Principles and Criteria of CIREFCA"). The aforementioned document, after addressing armed, internal or international conflicts, makes reference to "the third situation which consists of violence that is not an armed conflict and which includes internal turmoil and riots, detention or arrest such as riots, isolated acts of violence and others of a similar nature". Likewise, the footnote related to this statement makes reference to a comment of the International Red Cross Committee on Protocol II relating to "internal riots" and "internal turmoil", which concludes that "there are internal riots without an armed conflict when the State uses armed forces to maintain order; there is internal turmoil without internal riots when force is used as a preventive measure to ensure observance of law and order". [60]

However, immediately after that, the CIREFCA Principles and Criteria make an apparently contradictory statement in paragraph 31: "[…] it is clear that *'generalized violence'* refers to armed conflicts as defined by International Law. In order for violence to be generalized it must be continuous, general and sustained. In other words, internal riots and turmoil, as defined in Additional Protocol II, are not considered generalized violence".

It seems at first sight that while the Definition makes reference to internal conflict and external aggression on one hand and to generalized violence on the other, these concepts should not be considered synonymous. An analysis, for example, of the references that the supervisory bodies of the human rights instruments have made regarding the concept of "generalized violence", reveals that they repeatedly refer to internal or international armed conflicts.[61] Therefore, "[…] it is clear that *'generalized violence'* refers to armed conflicts as defined by international law".

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59 Paragraphs 28 and following of the CIREFCA Principles and Criteria.

60 Footnote No. 60 of the CIREFCA Principles and Criteria.

61 See for example Communication Nº 90/1997 of the Committee against Torture: Switzerland. 19/05/98. CAT/C/20/D/90/1997. (Jurisprudence), paragraph 5.7; Concluding observations of the Committee for the Elimination of Racial Discrimination: Colombia.20/08/99.CERD/C/304/Add.76. (Concluding Observations/ Comments), paragraph 14; Concluding Observations of the Committee for the Elimination of Discrimination Against Women: Colombia. 04/02/99. A/54/38,paragraphs.337-401. (Concluding Observations/Comments); *Concluding observations of the Commission on Human Rights: Yugoslavia. 28/12/92. CCPR/C/79/Add.16. (Concluding Observations/Comments*); *summary record of the 1149th session of the* COMMITTEE FOR THE ELIMINATION OF RACIAL DISCRIMINATION*: Burundi, Colombia, Denmark, Guatemala, Madagascar, and Zimbabwe. 16/05/97. CERD/C/SR.1149.(Summary Record*) paragraph 5.

We may state then that this element of the Definition is not necessarily a criterion exclusive to Cartagena. As Water Kälin has rightly expressed when referring to refugees who flee from civil wars, riots and generalized violence, "Article 1A, paragraph 2 of the Convention on Refugees allows for a liberal interpretation that provides protection to many of these persons."[62] However, Kälin says that this does not mean that "unlike the extended definition of the Convention on Refugees of the OAU and the Cartagena Declaration, the 1951 Convention on Refugees requires a case-by-case analysis and evidence of well-founded fear of persecution by the requesting party. Therefore, even the liberal interpretation of the refugee definition of the Convention on Refugees is, in the case of persons who flee from civil wars, narrower than the extended American and African definitions".[63] It is important to notice that Kälin seems to ignore that the Definition requires a threat derived from the situation of generalized violence with the connotation and scope that we have discussed above (there must be an element of persecution in the threat) and not just a situation of civil war or generalized violence in order for a person to be considered a refugee.

b) because his life, security or freedom has been threatened by […] other circumstances seriously disturbing public order

This is another cause that has raised fears in some States in the sense that the expression "other circumstances seriously disturbing public order" is vague. According to them, any inhabitant of a country where a natural disasters occur or with a high degree of public insecurity, serious organized crime or analogous situations, could be considered a refugee according to the Definition.

It is important to reiterate that there must be a causal link between the situations seriously disturbing public order and a threat against the life, security or freedom of the person in question. As we mentioned before, in the case of "generalized violence", the threat must be real, current or foreseen. It must be imminent in order to be able to consider that the person flees with the purpose of avoiding the risk of losing his life, security or freedom; in this case, due to several reasons that have seriously disturbed public order. Consequently, it would not be possible to conclude that a series of circumstances disturbing public order *per se* are enough to consider someone who leaves his country a refugee. Instead, the person must be threatened by present and imminent circumstances risking the person's life, freedom or

62 Walter Kälin, *Refugees and Civil Wars: Only a Matter of Interpretation?* in *International Journal of Refugee Law*, Volume 3, Number 3 1991, Special Issue, The 1991 Geneva Colloquium, The 1951 Convention relating to the Status of Refugees: Principles, Problems and Potential; Oxford University Press, pp. 450 and 451. "In this connection, the words 'in addition to containing elements of the 1951 Convention and the 1967 Protocol' call for some comment. They might be taken to imply that persons who have fled their country because their lives or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order, are per se, not covered by the 1950/51 definitions. Such an assumption must, however, necessarily be regarded as incorrect. In the first place, persons who flee their country in the circumstances mentioned may well have a 'well-founded fear of persecution' if their cases were to be individually determined. It has moreover been seen that in applying the 1950/51 definitions in group situations, regard was had principally to the objective situation existing in the country of origin resulting in a 'broad' application of the 1950/51 definitions. In view of this 'broad' application, the difference between the 1950/51 definitions and the 'extended' definition may in practice not be as great as might at first sight appear, and many situations could be qualified as 'refugee' situations whichever definition is adopted and, in any event, there could necessarily be a large measure of overlapping." Ivor C. Jackson, Op. Cit. Page 404.

63 Idem.

security. In reference to paragraph 54 of the UNHCR Manual, we could say that all societies face (to a greater or lesser degree), situations seriously disturbing public order and that the persons living in such an environment are not necessarily victims of persecution or are not necessarily threatened by such situations seriously disturbing public order.

In addition, as clearly stated by CIREFCA, the "circumstances seriously disturbing public order must result from human acts and not from natural disasters."[64] This concept includes internal riots and turmoil such as mobs, isolated and sporadic acts of violence and other similar acts provided that they seriously disturb public order. [65]

In fact, the CIREFCA Principles and Criteria make reference in footnote No. 60 to the comment by the International Red Cross Committee on Protocol II, describing "internal riots" and "internal turmoil" as follows: internal riots are described as "situations in which there is no armed conflict as such but there is a confrontation inside the country characterized by its intensity and duration and leading to acts of violence. The latter may occur in various forms ranging from spontaneous rebellious acts to fights among loosely organized groups and government authorities. In these situations, which do not necessarily degenerate into open fighting, the authorities in power mobilize the police forces or even the armed forces extensively with the purpose of re-establishing public order. The high number of victims has called for the application of minimum humanitarian regulations; and "internal turmoil" which includes "particularly intense situations" (political, religious, racial, social, economic, etc.) and the consequences of armed conflicts or internal riots. These situations have one or more of the following characteristics, if not all of them: large-scale arrests, large numbers of "political" prisoners; the existence of tough and inhuman detention conditions; the suspension of fundamental judicial guarantees either as part of the announcement of state of emergency or simply by fact; and allegedly missing persons. In conclusion, there are internal riots without armed conflict when the State uses the armed forces to maintain the order, and there is internal turmoil without internal riots when the force is used as a preventive measure to ensure observance of the law and to maintain the order".

In view of the above, a serious criminal situation, including organized crime, frequent kidnappings, robberies, street riots, etc. are not by themselves situations seriously disturbing public order. In order for these situations to qualify as such, they must present the characteristics indicated above according to the definition of internal riots or turmoil of International Humanitarian Law.

Similar to the element of generalized violence, we may say that the element of the Definition relative to the circumstances seriously disturbing public order is not a criterion exclusive to Cartagena. This element is also present in the refugee definition of the African Convention and, as Water Kälin explained when he referred to the issue of refugees fleeing from riot situations (in addition to situations of civil war and generalized violence), "Article 1A, paragraph 2 of the Convention on Refugees allows for a liberal interpretation which provides protection to many of these persons". [66]

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64 In this sense and regarding the same element contained in the African Convention, it has been said that: "The OAU *definition*, does not, for example, suggest that victims of natural disasters or economic misfortune should become the responsibility of the international community, as a shift away from concern about the adequacy of state protection if favor of a more generalized humanitarian commitment might have dictated." James C. Hathaway, Regional Organizations, Armed Conflict and Human Rights Abuses: New Definition of the Refugee, en Refugee Law And Policy A Comparative And International Approach; Karen Musalo, Jennifer Moore, Richard A. Boswell. Carolina Academic Press Second Edition, United States of America, 2002. pp. 458 and 459.

65 Paragraph 33 of the CIREFCA Principles and Criteria.

66 Op. Cit.

c) because their life, security or freedom has been threatened by […] foreign aggression

We will not delve into a detailed analysis of this element of the Definition since it is not one that raises concerns based on vagueness or inaccuracy. First, this element is not exclusive to Cartagena as it is also expressly mentioned in the African Convention. Nonetheless, this element has clear meaning in International Humanitarian Law, pursuant to the Geneva Conventions and Protocol I "which include all the cases of declared war or any other armed conflict that may arise between two or more parties even if the state of war is not recognized by one of them. An armed conflict comprises any dispute between two or more States which leads to the intervention of members of the armed forces of one of the two States". [67]

d) because their life, security or freedom has been threatened by […] internal conflicts

We will not make a detailed analysis of this element of the Definition both since it is present in the refugee definition of the African Convention and it is therefore not original to Cartagena. In addition, according to a liberal interpretation of the 1951 Convention, armed conflicts may be considered to be included within the refugee definition of the 1951 Convention. [68]

Above all, we are convinced that this element of the Definition may not be considered vague or inaccurate in terms of its meaning or scope since "*Additional Protocol II,* without modifying the existing conditions and applications of Article 3 common to the Geneva Conventions, defines them as all armed conflicts that are not covered by Article I of Additional Protocol I and "which take place in the territory of a Contracting State between its armed forces and the dissident forces or other armed and organized groups which, under responsible direction, exercise such control over a section of that territory that they can conduct sustained and concerted military operations as well as to apply the Protocol". [69]

> Repetitive as it might seem, but with the purpose of dispelling any doubts or fears that may wrongly arise from this element of the definition, it is important to underline that an internal armed conflict in any country is not enough to consider any of its inhabitants a refugee according to the definition. As we have already discussed about the other elements, particularly "generalized violence", there must be a causal link between the armed conflict and the threat against life, security or freedom of the person in question. Threat is understood as a situation of real, present and foreseen risk equivalent to persecution.

All that has been discussed thus far manifests the indissolubility of the relationship between International Refugee Law (belonging to International Human Rights Law as demonstrated above) and International Humanitarian Law. In addition, as we have also mentioned before, international organizations responsible for applying human rights regulations and actions related to refugees must necessarily coordinate their efforts. All of the above demonstrates the essential interdependence between protection measures of the international agencies in charge of enforcing the legal provisions of International Humanitarian Law and International Refugee Law.

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67 CIREFCA Principles and Criteria, paragraph 29.
68 See Walter Kälin, Op. Cit. and quotation of Ivor C. Jackson in note 52 *supra*.
69 CIREFCA Principles and Criteria, paragraph 30.

e) because their life, security or freedom has been threatened by […]massive human rights violations

This element is without doubt "the distinctive feature of the Cartagena definition" as it takes a "step beyond" the contents of the African Convention.[70]

The first issue to consider with respect to this element is that, unlike the others where the threat to the life, security or freedom of a person may come from private persons without the intervention of state agents, human rights violations *strictu senso* originate from state agents or private persons, who, acting either under the order of state agents, under their instigation or their tolerance, consent or acquiescence to such acts.

This criterion is confirmed by the Committee against Torture in a comment contained in the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment which are closely related to the *non-refoulement* principle of Refugee Law. In fact, Article 3 of the Convention reads as follows:

> "1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

Clause 2 refers to "gross, flagrant or mass violations of human rights" and General Comment No. 1 of the Committee against Torture states the following:

> "Pursuant to Article 1, the criterion stated in paragraph 2 of Article 3, that is, 'a consistent pattern of gross, flagrant or mass violations', may only be understood when they refer to violations by a public official or any other person in the exercise of a public position, upon their instigation or with their consent or acquiescence".[71]

As to the meaning of the concept of "massive violations of human rights", the aforementioned General Comment No. 1 does not provide criteria for determining such a situation although since CIREFCA we know that "the denial of civil, political, economic, social and cultural rights in a serious and systematic manner may be considered massive violations of Human Rights".[72] We will discuss this concept in further detail later by considering the statements made by international agencies relative to human rights in particular situations.

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70 Statement by Mr. Walzer, United Nations Deputy High Commissioner for Refugees, on the Occasion of the 10th Anniversary of the Cartagena Declaration on Refugees, 10 Years of the Cartagena Declaration on Refugees. San Jose Declaration on Refugees and Displaced Persons 1994. First Edition IIHR-UNHCR, 1995, p.32.

71 Paragraph 3, General Comment No. 01 of the Committee against Torture: Application of Article 3 relative to Article 22 of the Convention: 21/11/97. A/53/44, annex IX, CAT General Comment No. 01.

72 CIREFCA Principles and Criteria, paragraph 34.

For example, in accordance with the General Assembly of the United Nations, we may say that massive and serious human rights violations are committed when there is "an all-pervasive order of repression and oppression which is sustained by broad-based discrimination and widespread terror[73]; and when there are:

> "summary and arbitrary executions, the enactment and implementation of decrees prescribing cruel and inhuman punishments, torture and other cruel, inhuman or degrading treatment, arbitrary arrests and detentions, lack of due process, non/respect for the rule of law and the suppression of freedom of thought, expression and association, as well as the persistence of specific discrimination within the country as regards access to food and health care, which amounts to violation of the economic and social rights."[74]

The Committee against Torture has considered basically the same criteria to determine whether in a particular country there exist massive human rights violations. At times this leads the Commission on Human Rights to appoint a special rapporteur to analyze the human rights situation in those countries.[75] For example, the Committee against Torture made the following statement:

"The Committee takes note of the serious concerns expressed by the Commission on the matter, particularly on the persistent practice of arbitrary detentions and imprisonments, torture and inhuman treatment at detention centers, missing persons and summary and arbitrary executions, which led the Commission to appoint, in March of 1994, a Special Rapporteur expressly in charge of analyzing the human rights situation in Zaire and to submit a report on the matter. Therefore, the Committee cannot but arrive at the conclusion that there is indeed a consistent pattern of gross, flagrant or mass violations of human rights in Zaire and that the situation might be deteriorating". [76]

> A deficient human rights situation in a particular country in which there are probably frequent violations does not necessarily constitute massive violations of human rights, as stated by the Committee against Torture:

"8. The Committee takes note of the statements of the State Party which says that, although the situation of human rights in Venezuela is still poor, particularly with regard to detention conditions, there are no reasons to affirm that there is a consistent pattern of gross, flagrant or mass violations of human rights in Venezuela". [77]

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73 A/RES/50/191, March 6, 1996. Fiftieth meeting period, peel , Point 112 c) of the agenda, RESOLUTION APPROVED BY THE GENERAL ASSEMBLY, [on the basis of the report submitted by the Third Commission (A/50/635/Add.3)], 50/191. Situation of Human Rights in Iraq. Paragraph 2.

74 Idem, Foreword.

75 As of this writing, Mandates existed in the following countries, where there were situations of massive human rights violations. Such mandates were entrusted to rapporteurs or independent experts appointed by the United Nations system: Afghanistan, Belarus, Burundi, Cambodia, Chad, Cuba, Korea, Congo (former Zaire), Haiti, Liberia, Myanmar, Palestine territories occupied since 1967, Somalia, Sudan and Uzbekistan.

76 Paragraph 9.3 of Communication No. 13/1993 of the Committee against Torture: Switzerland. 27/04/94. CAT/C/12/D/13/1993. (Jurisprudence).

77 Paragraph 8 of Communication Nº 164/2000: Sweden. 15/05/2002. CAT/C/28/D/164/2000. (Jurisprudence).

Particular attention must be paid to the lack of economic, social and cultural rights since "the case may be that the economic measures that affect the labor activity are serious enough to constitute persecution, particularly if they are directed at a particular group for political, racial or religious reasons, who may then be considered refugees". [78]

The foregoing "economic measures" cannot be deliberately aimed at affecting particular persons in the way of fraudulent or premeditated persecution. However, we must remember that the obligations imposed on States by the human rights instruments:[79] to observe and make others observe human rights; to respect and guarantee human rights; to take appropriate measures and avoid impropriety; they must be fulfilled regardless of their intention. This means that governmental authorities may incur serious and massive violations of human rights without the deliberate intention of causing the serious damage that they indeed cause. This is the case, for instance, when States adopt contradictory measures in pursuing the respect for human rights, particularly those of a socioeconomic nature, which materially "destroy the economic means of a particular sector of the population. Such is the case when a specific ethnic or religious group is deprived from the right to trade or when excessive or discriminatory taxes are levied on them.[80] For this reason, the UNHCR Manual states that "other serious violations of human rights would also be considered as persecution for the same reasons"[81] (for example, to threaten the life or freedom of a person on the basis on race, religion, nationality, membership to a particular social group or for political opinions).

It is revealing that, although within the context of crimes against humanity, Article 7.2 g) of the Rome Statute, which created the International Criminal Court, defines the concept of "persecution" as "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity". This means that massive violations of human rights are considered persecutions. The intentionality element is essential within the context of crimes against humanity,[82] although, as we have already mentioned, such an element is not fundamental to determine whether there are massive violations of human rights at a particular point in time and within a specific social and historic context.

It is important to underline that, as in the previous cases, a situation which truly implies a massive violations of human rights in itself, does not imply that all the persons living in the country in question be considered refugees. In such a situation, there must be a causal link between the respective situation and the threat against life, freedom or security of the person in question.

On this matter, but more specifically on the risk of being tortured, the Committee against Torture has stated that:

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78 CIREFCA principles and criteria, paragraph 37.

79 For further sources on the obligations of the States established by international regulations protecting economic, social and cultural rights, see: Magdalena Sepúlveda; *La Justiciabilidad de los Derechos Económicos Sociales y Culturales frente a la supuesta dicotomía entre las obligaciones impuestas por los pactos de Naciones Unidas (Application of justice and the economic, social and cultural rights vis-à-vis the alleged dichotomy among the obligations imposes by the United Nations agreements) ;* in *Derechos Económicos Sociales y Culturales, Ensayos y Materiales;* Coordinators: Octavio Cantón J. and Santiago Corcuera C.; Editorial Porrúa México and Universidad Iberoamericana; Mexico 2004.

80 UNHCR Manual, paragraph 63.

81 UNHCR Manual, paragraph 51.

82 Rodger Haines QC, Deputy Chair, Refugee Status Appeals Authority, *The Intersection of Human Rights Law And Refugee Law: On or Off the Map? The Challenge of Locating Appellant S395/2002,* paragraphs 11 and 12. http://www.refugee.org.nz/Sydney04.html.

> "The Committee cannot but conclude that a consistent pattern of gross, flagrant or mass violations of human rights is not a substantial reason in itself to affirm that a person may be subject to torture upon returning to that country; there must be supplementary reasons to think that the interested party would be personally in danger". [83]

In this same vein it has been said that "according to the definition of the Cartagena Declaration, adverse economic conditions do not usually constitute a threat to life, security and freedom of the individual. However, the case might be that the economic measures affecting the working activity are so severe that they may be considered as persecution, particularly if they are targeted against a specific group for political, racial or religious reasons, in which case those persons could be considered refugees". [84]

15. A perspective from Mexican Law

We will now analyze the challenges facing the application of the extended refugee definition of the Cartagena Declaration, particularly the procedures to determine individual refugee status from the perspective of Mexican law.

Dr. José Antonio Guevara, who represented the Mexican government at the I Preparatory Sub-regional Meeting of Mexico, Central America and Cuba relative to "The International Protection of Refugees to commemorate the 20th Anniversary of the Cartagena Declaration on Refugees", shared Mexico's positive experiences with regard to the recognition of refugee status based on the historic, generous and cooperative approach of the Mexican tradition of asylum.

I can attest to the veracity and application of the statements made by Mr. Guevara on the procedures for the individual determination of refugee status. I have had the opportunity of witnessing the "working group"[85] meetings and can attest to the professionalism, caution, scrupulous analysis and juridical rigour in the application of norms as well as the objective study of factual situations and personal cases. I have also witnessed the serene yet profound debates among government officials, civil society, and UNHCR members during the meetings of the working group. I have been able to personally verify the human quality and professionalism of protection officials who interview asylum seekers. All these are, from my point of view, very positive experiences of the Mexican process in determining individual refugee status.

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83 Paragraph 9.5 of Communication No. 13/1993 of the Committee against Torture: Switzerland. 27/04/94. CAT/C/12/D/13/1993. (Jurisprudence). This same criterion has been consistently reiterated by the Committee in paragraph 7.2 of Communication Nº 201/2002 Netherlands. 13/05/2003. CAT/C/30/D/201/2002. (Jurisprudence), in paragraph 7 of Communication Nº 164/2000 Sweden. 15/05/2002. CAT/C/28/D/164/2000. (Jurisprudence), in paragraph 7.2 Communication No. *36/1995: Netherlands. 08/05/96. CAT/C/16/D/36/1995. (Jurisprudence*), among many other cases.

84 CIREFCA principles and criteria, paragraph 37.

85 The so-called "working group of the Committee on Refugee Eligibility" is the first instance in the eligibility process and is composed of representative of the National Migration Institute, a representative of the Ministry of Foreign Affairs, a UNHCR representative, a representative of a civil society organization specialized in migrant and refugee matters, and by the coordinator or substitute of the Mexican Committee on Aid for Refugees, who presides over the meetings. This body submits its "decisions" to the Eligibility Committee for its consideration and resolution. The creation of the Eligibility Committee is established in the Regulations of the General Law on Population. Unfortunately, the working group does not have juridical existence. In our opinion, it should be regulated by the Regulations of the General Law on Population just as it works at present and it should be endowed with autonomy under the terms of the Principles of Paris invoked earlier in this essay.

Notwithstanding the above, the Mexican juridical framework on this matter faces serious challenges, although I am convinced that such challenges may be easily overcome if addressed with the proper will.

The General Law on Population and its Regulations embody the extended definition of refugee proposed by the 1984 Cartagena Declaration. However, the legislation only establishes the "extension" but does not incorporate the definition foreseen in the 1951 Convention and the 1967 Protocol, which is part of the Cartagena definition. Since this definition was incorporated into the Mexican legislation in 1990 and was in effect until 2000 when Mexico signed on to the aforementioned international agreements, our legislation maintained a significant gap. However, as already mentioned, Mexico ratified the international agreements in 2000. Since the Mexican Constitution establishes that the international agreements signed by the president of the Republic and approved by the Senate are part of the Mexican legal order, we now have a complete definition, although not all of it is contained in one single instrument. The harmonious and integral interpretation of the juridical systems enables us to have a definition in line with the proposal made by the third conclusion of the Cartagena Declaration.

To avoid confusion, the Regulations of the General Law on Population should be modified so as to include only one definition with the provisions of the Law on Population as well as those of the international conventions already ratified by Mexico.

Another challenge for Mexican legislation is that the General Law on Population establishes a definition of "political asylee" in addition to the definition of refugee, and maintains that those persons falling under the category of the political asylee definition are not covered by the "migratory characteristic" of refugees.

First and without delving too deeply into the issue, we must highlight the phrase "migratory characteristic of refugees" used by the regulation described. Refugee status is not in any way a migratory characteristic. It is instead a condition that must be simply "declared" by the competent authority whenever the conditions to be considered as such are met. We must insist on the fact that the asylum seeker meeting the required conditions is a refugee and is therefore entitled to the right to be recognized as such. For these reasons, it is inaccurate and contrary to the spirit of refugee status to say that such status is a migratory characteristic given that the migratory characteristic is "granted" by an act of authority while refugee status is "recognized" by a merely declarative act of authority. The amendments proposed to the Regulation of the General Law on Population could use the proper terminology, in spite of the inaccuracies of the law, without contravening the Constitution for reasons that will be explained later.

In spite of the fact that we believe that the definition of political asylee contained in the General Law on Population is deficient and is far from reflecting a harmonious interpretation of the various international instruments on the matter- an aspect that we will not examine now as it is strays from the objectives of this essay- we must point out that the "exclusion" provided in the law may result contrary to International Law in practice.

The act of authority by which refugee status is recognized is an act of a merely declarative and not constitutive nature, a consolidated legal principle that is widely and universally recognized.

Additionally, Article 22.7 of the American Convention on Human Rights provides that every person has the right to seek and be granted asylum. However, Mexican legislation believes that "granting" the status of political asylee is a merely discretional act which is not compatible with the American Convention on Human Rights.

The Regulations of the General Law on Population could well be amended so as to establish that the status of political asylee receive equal treatment to that attributed to refugees. This should be done without detriment to the principle that Regulations may not go beyond the Law it regulates. In this way, since the American Convention on Human Rights is part of the Mexican juridical system and, as dictated by the Supreme Court of Justice, it is juridically superior to federal laws, such as the General Law on Population. Furthermore, a regulatory provision granting greater benefit to individuals in a way that supersedes the benefits granted by the applicable law, could not be considered unconstitutional under any circumstance because of the *pro persona* principle that has been clearly accepted by the jurisprudence and the juridical doctrine of Mexico.

Another challenge for Mexican legislation is the provision contained in the General Law on Population providing that "the Ministry of the Interior 'may' exempt a foreigner from the penalty resulting from illegal entry into the country provided that the person has been granted such migratory status thus heeding the humanitarian spirit that underlies the refugee institution". This is acceptable if the "penalty" mentioned by the law will be limited to an administrative sanction. However, we know that Mexican legislation unfortunately is one of those that shamelessly criminalizes irregular entry and stay of migrants. The discretional power granted to the Ministry of the Interior in this case of criminal character might seem contrary to the categorical provision of Article 31.1 of the 1951 Convention stating that:

"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

> However, in line with the interpretation of the Supreme Court of the National Justice, the 1951 Convention must prevail since it is higher in the hierarchy than the General Law on Population. A judge may not therefore impose criminal penalties in the cases mentioned by Article 31.1 of the 1951 Convention. This could well be reiterated in a regulatory provision by merely clarifying Mexican Law on this matter. It could even go further in the spirit by thoroughly recognizing the humanitarian and protective nature underlying the refugee institution embodied by the General Law on Population. It should also provide that no administrative penalties be imposed in those circumstances. A provision of that nature granting greater protection to the person could not be considered unconstitutional in spite of the apparent contradiction to the law it regulates.

Another challenge facing Mexican legislation is the provision establishing that refugees lose their right to return when they leave the country unless the exit has been authorized by the Ministry of the Interior. This again refers to the erroneous terminology used by the legislator. As stated above, refugee status is not a migratory category. Even more serious is the fact that the causes for cessation in Mexican law are incompatible with the causes for cessation contemplated by International Law. Even though the causes for cessation consist of voluntary return to the country from which the refugee fled for fear of persecution, this does not mean that any exit from the asylum country to a country where there is no fear constitutes a cause for cessation. The Regulations of the Law on Population should establish rules to "limit" this unjustified restriction. They should clarify that cessation will apply only when the refugee exits the country and goes back to the country of origin without authorization from the Ministry of the Interior. In any other circumstances free exit and entry into the country should be permitted.

Finally, the General Law on Population partially covers the principle of *non-refoulement* establishing that "refugees may not be returned to their country of origin or any other country where their life, freedom and security are threatened". The first significant difference is that asylum seekers are excluded while only refugees are included. The term "refugee" refers to recognized refugees for the purposes of the law in question. The second gap is that, given the incomplete refugee definition contained in the General Law on Population (as it does not include the elements of the 1951 Convention), it does not state that the person must not be returned to any country where they might have well-founded fears of persecution for the reasons specified in the definition of the 1951 Convention. With the purpose of complying with Article 22.8 of the American Convention on Human Rights, the principle of *non-refoulement* would have to be applicable to any foreigner (and not only to asylum seekers or refugees) if the right to life or personal freedom is at risk of being violated in the host country for reasons of race, nationality, religion, social status or political opinion regardless of whether it is the country of origin or not.

The Regulations of the General Law on Population asserts that the request for asylum must be formulated upon entry into the territory within the following fifteen days. This kind of provision may be considered compatible at first sight with Article 31.1 of the 1951 Convention to which we referred to above. However, present circumstances raise questions about how to interpret the words "provided that the persons appear before the authorities without delay and claim justified cause of their illegal entry or presence".

This issue may cause, and in fact it does result in a situation where many legitimate refugees are not recognized as such since they have not submitted the request within the term established by the juridical provision setting the time limit. In reality this kind of requirement in refugee transit countries runs contrary to the spirit of the asylum institution and undermines or "softens" to a large extent the principle of *non-refoulement* which, being a *jus cogens* morm, does not allow contrary decrees or practices.

The next problem that must be overcome by the Regulations of the General Law on Population, as it lacks support by International Refugee Law, is the provision establishing that anyone coming from a country where their asylee or refugee status has been denied shall not be admitted as a refugee. This provision seems to assume that all of the countries of the world address the matter identically, that there are no countries that are not party to the Conventions on Refugees and that all legislations provide for uniform norms on the matter. Mexico thus acts on the wrong assumption that the denial of a government of another country to recognize refugee status is correct, well founded and justified.

Nothing could be further from the truth considering that nations are currently tightening migratory policies and intensifying unjustified exclusion causes. Mexico's responsibility, as a State party to the 1951 Convention and the 1967 Protocol, is to analyze each request individually and evaluate its merits in light of the refugee definition. If the asylum seeker meets the refugee requirements, Mexico must recognize him regardless of the fact that another country may have wrongly not declared him a refugee and violated International Law.

Exactly the same argument is applicable to the provision of the Regulations of the General Law on Population establishing that the refugee status may not be granted to anyone who has acquired a different migratory status during his stay in the country. This provision has no way of assuring that a refugee has not entered the country in an irregular manner, as a tourist for example, and then requested asylum, proving that he was a refugee. To deny the recognition of such status on the basis of

documents is contrary to International Law, and more clearly, to the interpretative spirit of international instruments on the matter. It is true that refugees, as a general rule, are *prima facie* undocumented migrants. However, this does not mean that it is acceptable to presume *jure et de jure* that every migrant in an irregular situation is not a refugee. In any case, the legal treatment that should be given to that person is that of *juris tantum* presumption, which allows evidence to the contrary, after applying the individual interview procedure and thorough case-by-case analysis, should the country not wish to incur international responsibility.

To this end, it is necessary to review and correct the ill practice of "detaining" asylum seekers while their refugee status petition is being resolved.[86] They should be granted temporary migratory status, with reasonable restrictions on mobility that enable them to lead a normal life within the precarious circumstances typically affecting asylum seekers.

16. Reservations formulated by Mexico to the 1951 Convention

Finally, it is important to underline the fact that Mexico, upon ratifying the 1951 Convention, formulated the following interpretative declarations and reservations:

INTERPRETATIVE DECLARATIONS

> "It will always be the task of the Government of Mexico to determine and grant, in accordance with its legal provisions in force, refugee status, without prejudice to the definition of a refugee provided for under article 1 of the Convention and article 1 of its Protocol."
>
> "The Government of Mexico has the power to grant refugees greater facilities for naturalization and assimilation than those accorded to aliens in general, within the framework of its population policy and, particularly, with regard to refugees, in accordance with its national legislation."

RESERVATIONS

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

86 This practice, as we discussed in the general section of this essay, may be considered an arbitrary detention according to the standards of international human rights law as interpreted by the Working Group on Arbitrary Detentions and the Special Rapporteur on the human rights of migrants.

> On the other hand, since the Government of Mexico is unable to guarantee refugees who meet any of the requirements referred to in article 17, paragraph 2 (a), (b) and (c), of the Convention, the automatic extension of the obligations for obtaining a work permit, it lodges an express reservation to these provisions.
>
> The Government of Mexico reserves the right to assign, in accordance with its national legislation, the place or places of residence of refugees and to establish the conditions for moving within the national territory, for which reason it lodges an express reservation to articles 26 and 31 (2) of the Convention.

The Government of Mexico lodges an express reservation to article 32 of the Convention and, therefore refers to the application of article 33 of the Political Constitution of the United Mexican States, without prejudice to observance of the principle of *non-refoulement* set forth in article 33 of the Convention."

The reservations formulated by Mexico raise particular concerns since they are aimed at limiting the scope of protection granted by the Convention.

Particularly alarming is the reservation relative to Article 32 which prohibits the arbitrary deportation of refugees. In spite of clarifying that such reservation is made "without prejudice to observance of the principle of *non-refoulement* set forth in Article 33 of the Convention," it permits the deportation of any foreigner in application of Article 33 of the Mexican Constitution without the existence of any legal recourse against such act.

Article 13 of the International Covenant on Civil and Political Rights has similar effects to those of Article 32 of the 1951 Convention. In fact, the Article states:

> "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

Mexico formulated a reservation to this article in the following terms:

> "The Government of Mexico makes a reservation to this article in view of the present text of article 33 of the Political Constitution of the United Mexican States".

In addition, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ratified by Mexico in December of 1998 provides the following:

Article 22.

1. Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.
2. Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance to a decision taken by the competent authority in accordance with law.

3. The decision shall be communicated to them in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.
4. Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.
5. If a decision of expulsion that has already been executed is subsequently annulled, the person concerned shall have the right to seek compensation according to law and the earlier decision shall not be used to prevent him or her from re-entering the State concerned.
6. In case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements due to him or her and any pending liabilities.
7. Without prejudice to the execution of a decision of expulsion, a migrant worker or a member of his or her family who is subject to such a decision may seek entry into a State other than his or her State of origin.
8. In case of expulsion of a migrant worker or a member of his or her family the costs of the expulsion procedures shall not be borne by the expelled. The person concerned may be required to pay his or her own travel costs.
9. Expulsion from the State of employment shall not in itself prejudice any rights of a migrant worker or a member of his or her family acquired in accordance with the law of that State, including the right to receive wages and other due entitlements.

Mexico made the following reservation to paragraph 4:

> "The Government of the United Mexican States makes an express reservation to paragraph 4 of Article 22 of this Convention, exclusively with regard to the application of Article 33 of the Political Constitution of the United Mexican States and Article 125 of the General Law on Population".

As we have already discussed, in our opinion, the reservations formulated by Mexico to Article 13 of the International Covenant on Civil and Political Rights and to paragraph 4 of Article 22 of the International Convention on the Protection of the Rights of all Migrant Workers and their Relatives are null and should be considered as "not-recorded". The same reasons may apply *mutatis mutandis* to the reservation formulated by Mexico to Article 32 of the 1951 Convention. However, we recognize that Article 33 of the Mexican Constitution grants the Executive Power the authority to expel any foreigner arbitrarily, that is, without explaining the reasons for such a decision and without granting the affected party the right to defence which, regardless of the aforementioned reservations, is contrary to Article 8.1 of the American Convention on Human Rights ratified by Mexico and to which Mexico made no reservations with respect to the issue of the expulsion of foreigners.[87]

87 This issue is discussed in detail in our book *Derecho Constitucional y Derecho Internacional de los Derechos Humanos (Constitutional Law and International Human Rights Law),* Oxford University Press, México 2002; pp. 209 to 247

Regardless, it would be propitious for Mexico to heed the call made by the General Assembly of the Organization of American States in its resolution approved at the fourth plenary session, June 10, 2003 -AG/RES. 1971 (XXXIII-O/03)- relating to the Protection of Refugees, Returnees, Stateless Persons and Internally Displaced Persons in the Americas:

"2. To urge those Member States […] to consider the possibility of withdrawing the reservations entered at the time of ratification or accession, and to consider adopting procedures and institutional mechanisms for their effective implementation, in keeping with the principles established in international and regional instruments".

Mexico City, November 2004

IV. Papers prepared by invited experts

ASYLUM IN LATIN AMERICA: USE OF REGIONAL SYSTEMS TO REINFORCE THE UNITED NATIONS SYSTEM FOR THE PROTECTION OF REFUGEES

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I. INTRODUCTION

1. The Institute of international law defined asylum as the protection that a State provides in its territory or in another place under the control of one of its bodies, to a person who arrives in search of it.[1] This definition includes the fundamental distinction between *territorial asylum* and *diplomatic asylum*. The protection provided within the territory is known as territorial asylum, while that provided in diplomatic delegations is referred to as diplomatic asylum.

2. As is, the institution of asylum goes back to antiquity, when its expression was also religious.[2] States have been exercising the right to grant asylum since ancient times, but it is interesting to note that they are still interested in keeping it within their own authority, emanating from their sovereignty, and in avoiding that it becomes a right which individuals can invoke and which States are obliged to grant; that is, a *subjective right*. The international community has sustained this tendency in contemporary times. The initiatives toward recognizing asylum as a subjective right have not met with much success, and despite approaches regarding this *desideratum*, the final decision regarding asylum remains with each State.

3. The Latin American part of this Continent has been developing its own asylum system since the earliest days of the independent republics following their break from Spain and Portugal. The history of the young republics was very convulsive and it became necessary to develop a system to provide protection to political opponents. Codification started in the second half of the Nineteenth Century, which makes it a system that precedes even the efforts made by the League of Nations in the early part of the 20th Century. The system is open to the rest of the countries on the Continent, namely countries with different historical roots and legal systems, for example, the English speaking countries in North America and the Caribbean. In practice, however, some of them have expressed strong reservations regarding this institution and have not joined it.[3] In this sense, although generally referred to as *Inter-American System of Asylum*, because of its membership, it may be argued that it is best to refer to it as the *Latin American System of Asylum*.

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1 *Institut de droit international,* Bath meeting (11 September 1950), *Annuaire*, 1950, article 1. Unofficial translation from the text in French.

2 For example, in the Hebrew tradition, asylum is found in the book of *Numbers* where Moses indicates places of asylum for involuntary killers. The *Deuteronomy* stipulates that if the refugee were guilty of intentional homicide provoked by hatred, the elders of the city could request his extradition. It also establishes that the city of asylum determines if the individual acted intentionally or involuntarily. *La Sainte Bible*, Alliance Biblique Universelle, Paris, 1978.
The principle and the practice of asylum are also found in Christianity. Asylum is based on the Doctrine of Christ, and it has been practiced throughout the centuries. It was recognized and later revoked by many States. For example, France abolished asylum in churches in 1539, England in 1625, and Spain in 1760. Regarding Spain, it should be noted that the *Concordato* celebrated with the Holy See in 1737 recognised religious asylum with certain restrictions. It should also be noted that the *Codex iuris canonici* of His Holiness Benedict XV, of 1917, established that "churches enjoy the right of asylum" (Canon 1179) and that "holy places are exempt from civil authority" (Canon 1160). *Código Canónico y Legislación Complementaria,* 4th edition, Biblioteca de Autores Cristianos, Spain, 1952.
The Koran establishes the treatment that should be accorded to persons who have had to abandon their lands due to their religious faith and determines that Medida, whose inhabitants were the first to receive the faith, should welcome those who arrive in search of asylum (Verses 8 and 9, Surata LIX, called *Emigration*). N. J. Dawood (transl.), *The Koran,* Penguin Books, Harmondsworth, England, 1983.

3 For example, when signing the 1928 Convention on Asylum, the United States included the following reservation: "The Delegation of the United States of America, in signing the present Convention, establishes an explicit reservation, placing on record that the United States does not recognize or subscribe as part of international law, the so-called doctrine of asylum". It made a similar reservation to the 1933 Convention on asylum. It should be emphasized that both conventions deal with diplomatic and not territorial asylum.

4. Since the advent of the United Nations system for the protection and assistance of refugees in the early 1950s, two systems have co-existed in Latin America: the universal and the regional. Today, most Latin American countries are parties to both systems. It may be argued, however, that since the adoption of the *American Convention of Human Rights*[4] in 1969, a third asylum system has come into being. The purpose of this paper is to try to determine if indeed there are now three asylum systems in Latin America, analyze their scope, and attempt to identify if there is a way to achieve coordination among them in order to reinforce, not a system *per se*, but the institution of asylum; the point of departure being that they are not antagonistic, but rather complementary; their purpose being to provide protection.

II. ASYLUM IN THE UNITED NATIONS SYSTEM

5. The United Nations has always been conscious of the importance of asylum for the protection of refugees. To accomplish this objective, the organization has taken a series of measures providing guidelines for States, including the codification of asylum in an international treaty. Within this system, asylum is granted on a universal level to refugees recognized under the terms of the definition of a refugee established in the 1951 *Convention*[5] and the 1967 *Protocol Relating to the Status of Refugees*.[6] According to these instruments, a refugee is any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it" (Convention, article 1, A (2), Protocol, Article 1, paragraph 3).

6. On a regional level, in Africa and Latin America, asylum is also granted to recognized refugees under the *Convention of the Organization of African Unity Governing the specific aspects of refugee problems in Africa*[7], and the *Cartagena Declaration on Refugees*[8], respectively. It is interesting to

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4 Approved in San Jose, Costa Rica, on 22 November 1969, by the Specialized Inter-American Conference on Human Rights.

5 Approved in Geneva on 28 July 1951; entered into force on 22 April 1954.

6 Approved in New York on 4 October 1967; entered into force on 4 October 1967. The Protocol was an initiative of the Carnegie Endowment for International Peace; its purpose being to remove the irreducible time limit on the application which the Convention established (applicable only for events occurring before 1 January, 1951 – Article 1, A (2)), as well as the optional limitation on the space of application (events occurring in Europe only – Article 1, B (1), (a)).

7 Approved by the Assembly of Heads of State and Government at its Sixth Ordinary Session, Addis Ababa, 10 September, 1969. It entered into force on 20 June 1974.

8 Adopted by the *Coloquio sobre la protección de los refugiados en América Central, México y Panamá: Problemas jurídicos y humanitarios*, Cartagena de Indias, November, 1984.
This Declaration is not an international treaty in the strict sense of the term; nevertheless, it has been applied by some States as a practical guide. In addition, a number of Latin American countries have incorporated its definition into their national legislation, are considering doing so, or apply it in practice. For example, Mexico, Guatemala El Salvador and Ecuador have included the Cartagena refugee definition in their domestic legislation.
According to the Cartagena Declaration, "the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who 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" (3rd Conclusion).
An análisis of the Cartagena Declaration and subsequent declarations that develop its provisions may be found in Galindo Vélez, Francisco, *Protección de Refugiados, Repatriados y Desplazados Centroamericanos, 1981-1999*, Alto Comisionado de las Naciones Unidas para los Refugiados, Protección y Asistencia de Refugiados en América Latina: Documentos Regionales 1981-1999, volumen III, Mexico, 2000, pp. 19-58. and *Reflexiones sobre el Derecho de los Refugiados en América Latina y el Caribe*, *Ibid*., pp. 69-102.

note that the Cartagena Declaration, although Latin American in scope and origin, is a regional development of the UN system for the protection of refugees and not of the Latin American system of asylum. It should be added that the UN system includes the question of stateless persons and that the General Assembly has called on UNHCR to play a role in the application of the provisions of the two conventions dealing with this matter, namely, the 1954 *Convention relating to the Status of Stateless Persons* and the 1961 *Convention on the Reduction of Statelessness*.[9]

2.1 The Universal Declaration of Human Rights and the Declaration on Territorial Asylum

7. The *Universal Declaration of Human Rights* establishes that *"Everyone has the right to seek and to enjoy in other countries asylum from persecution"* (article 14, paragraph 1).[10] From this formulation, it is quite clear that individuals have a right to seek asylum without any geographical limitation, and to enjoy it, but there is nothing concerning the intermediate step, namely, the granting of asylum. Indeed, States are under no obligation to grant it. Thus, the *granting of asylum* remains carefully beyond the subjective rights which the Universal Declaration recognises, and as such, is transferred to the rule of customary law, which stipulates that the granting of asylum is a sovereign right of States.

8. The General Assembly requested the Commission on International Law to codify the right to asylum,[11] and the Commission included the issue in its work program.[12] Nevertheless, the United Nations Commission on Human Rights and the Third and Sixth Commissions of the General Assembly also took up the issue and, in 1967, the General Assembly adopted the *United Nations Declaration on Territorial Asylum*.[13]

9. The Universal Declaration of Human Rights and the Declaration on Territorial Asylum present the search for asylum as a right of persons. Again, it is important to underline the difference between the *right to seek asylum* and the *obligation to grant asylum*. It is not difficult for States to recognize the right of individuals to seek asylum, even the right to avail themselves of it; the problem lies in an obligation to grant asylum. This is the fundamental point, as has already been indicated, States prefer to keep the grant of asylum as a prerogative which emanates from their sovereignty.

10. This principle is recognized in the Declaration on Territorial Asylum which establishes that a State may grant asylum "in the exercise of its sovereignty" (Article 1, paragraph 1). The same Declaration also stipulates that it is the responsibility of the "State granting asylum to evaluate the grounds for the grant of asylum" (Article 1, paragraph 3).

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9 The 1954 Convention Relating to the Status of Stateless Persons was adopted on 28 September 1954 and entered into force on 6 June 1960. The 1961 Convention on the Reduction of Statelessness was adopted on 30 August 1961 and entered into force on 13 December 1975.

10 General Assembly, Resolution 217 A (XXX), of 10 December 1948.

11 General Assembly, Resolution 1400 (XIV), of 21 September 1959.

12 United Nations Document A/CN.4/245.

13 General Assembly, Resolution 2312 (XXII), of 14 December 1967.

11. As in the Universal Declaration (Article 14, paragraph 2), the Declaration on Territorial Asylum denies the right to invoke asylum "in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations". Nevertheless, the Declaration on Territorial Asylum develops this principle further, establishing that "the right to seek and enjoy asylum may not be invoked by any persons with respect to whom there are serious reasons for considering he has committed a crime against peace, a war crime or a crime against humanity…" (Article 1, paragraph 2). Similar exclusion clauses are contained in the 1951 Convention (Article 1, C, d, e and f), the 1967 Protocol (same article as the Convention), and the *Stature of the United Nations High Commissioner for Refugees* –UNHCR (paragraph 7).[14] It may be noted that the 1954 Convention on statelessness contains similar provisions.

12. In the Declaration on Territorial Asylum, the United Nations defined the nature of asylum as "a peaceful and humanitarian act and that, as such, it cannot be regarded as unfriendly by any other State" (Preamble, 4th paragraph).

13. It is important to recall that the Declaration on Territorial Asylum is not a treaty establishing obligations for States. In the 1970's, the Carnegie Endowment for International Peace, recalling the positive and encouraging experience it had had with the 1967 Protocol relating to the Status of Refugees, considered that there were favorable conditions for promoting a convention on asylum, and perhaps for taking a decisive step toward making asylum a subjective right. Hence, the Carnegie Endowment decided to repeat the experience, and the experts called forth produced a document,[15] which the General Assembly considered.

14. The General Assembly decided that UNHCR should consult governments to determine whether it was appropriate to convene an international conference. The opinions expressed by governments indicated the need to modify the document and the appropriateness of an international conference. A United Nations Group of Experts modified the document produced by the Carnegie Endowment and proposed a new document, which the International Conference considered when it met in Geneva from 10 January to 4 February, 1977.

15. The Conference ended in failure and, during its final meeting, decided to request the General Assembly to call for another conference at an appropriate date.[16] Since then, no further efforts have been made to fill the void on the subject of asylum through a contractual instrument.

2.2 Asylum in the UN Refugee Instruments

16. In accordance with the rule of customary law, the power to grant asylum lies with States. Pursuant to the 1951 Convention and the 1967 Protocol, States committed themselves to respect certain fundamental principles regarding the protection of persons seeking asylum and the determination of their status as refugees. From there, the 1951 Convention and the 1967 Protocol go on to the

14 Annex to General Assembly Resolution 428 (V), of 14 December 1950. UNHCR started to work on 1 January 1951.
15 United Nations Document A/8712, Appendix, Annex 1.
16 UN Document A/32/352.

subject of the rights and obligations of refugees in countries which grant them asylum, without touching on the act of the *grant of asylum*, namely, the permission to reside in the territory of a State.

17. In fact, the word asylum is only mentioned in the preamble of the 1951 Convention in reference to the principle of international cooperation in cases in which the burden is too onerous for a State (Preamble, 4th paragraph). It is also mentioned in the Final Act of the Conference of Plenipotentiaries which adopted the 1951 Convention, recommending that States "continue to receive refugees in their territories and that they act in concert in a true spirit of international cooperation in order that these refugees may find asylum…" (Recommendation 'D').

18. Recognition of *refugee status* and *granting asylum* are two different things; and establishing the former does not oblige States to grant the latter. No doubt this is the weakest point in the United Nations structure for the protection and assistance of refugees, due to the uncertainty of its granting. It should be borne in mind that in the United Nations system, the grant of asylum comes once a person has been recognized as a refugee, whether this is done by a State or by UNHCR. Asylum gives refugees permission to reside in the territory of a State.

19. In addition to protection against forced return to a country where his or her life, liberty and physical security are in danger or may be in danger (principle of *non refoulement)*, a refugee needs a place where he or she can lead a normal life. It may be argued, as has been the case, that asylum is implicit in the 1951 Convention, because this instrument contains numerous provisions concerning the treatment of refugees in countries which allow them to remain in their territories. The difficulty with this interpretation is that even if asylum were implicit in the Convention, it clashes with a customary rule, and the only way to change a norm of this nature is through an international treaty with clear and explicit, rather than implicit, language.

20. The situation is different if it is approached from the point of view of the obligations of States, as contained in the 1951 Convention concerning the principle of *non refoulement* (Article 33).[17] This provision establishes exceptions for reasons of security or public order (Article 33, paragraph 2). If it is considered that the exceptions to the principle of *non refoulement* are to be applied in truly exceptional circumstances, the only way for the principle of *non refoulement* to be applied is by allowing the asylum seeker to remain in the territory of the State until his or her refugee status has been determined and a durable solution has been found. This clearly leads to an obligation of *temporary asylum*, without implying in any way that the State is obliged to accept the refugee beyond the time needed to determine his or her refugee status and to find a durable solution.

21. Here it is important to consider asylum as considered both by International Refugee Law and International Extradition Law. The latter conceives asylum against extradition; in the former, asylum has three elements:

17 The Cartagena Declaration considers the principle of *non refoulement* as part of *jus cogens* (Part III, 5th Conclusion).

- Protection against forced return (*refoulement*) of a person to a country of persecution, including protection against extradition:
- Permission for the person to remain in the territory of the country concerned, at least temporarily; and
- Compliance with international human rights standards in the treatment of the person concerned.

22. A State may deny an asylum seeker the possibility of legal entry in its territory and may detain him/her while the refugee claim is considered. In such a case, there would be no temporary asylum from the point of view of International Refugee Law, but there would be from the point of view of International Extradition Law.

23. Asylum (residency) which States grant to refugees is different from the residency which is provided to foreigners, as the latter enjoy the diplomatic protection of their country. Refugees, with or without asylum, lack this recourse and cannot be returned to a place where their life, liberty or physical security are in danger. "A refugee is an unprotected foreigner, that is, a person who lacks the diplomatic and consular protection of his or her country of origin".[18] There is an important evolution on this point, namely, that in the extremely complex contemporary world there are agents of persecution who are outside the control of the government and the government is simply not in a position to provide protection. This is the case of Colombia, for example, where some people are persecuted by guerrillas or paramilitary groups and the government is unable to provide protection to them. Human history on this Planet is not frozen in time and these are new developments which require protection regimes to evolve and adapt in order to achieve their objectives. Instruments such as the Cartagena Declaration are extremely useful and important in such circumstances (see paragraph 108).

2.3 Role of the UN in Refugee Matters

24. What is interesting in the United Nations system is that the world organization decided since its earliest days to play a direct role in refugee issues. The United Nations system is thus a system in which both States and the United Nations participate. Therefore, the United Nations is an active actor in this system. In order to meet this purpose, the General Assembly established the Office of the United Nations High Commissioner for Refugees (UNHCR) and, based on the Statute which it conferred to UNHCR, charged it with the following duties:

- To provide international protection to refugees (paragraphs 1 and 8);
- To seek durable solutions to refugee problems (paragraphs 1 and 8, 'b');
- To supervise the application of provisions contained in refugee instruments (paragraph 8, 'a')[19]; and
- To undertake any additional activity assigned by the General Assembly (paragraph 9).

18 Guilherme Da Cunha, "Protección internacional de los refugiados en América Latina", in Ministerio de Relaciones Exteriores y Culto de Bolivia and UNHCR, *Asilo político y situación del refugiado*, (*memoire* of the seminar carried out in La Paz, Bolivia, 19-22 April, 1983), Empresa Editora Universo, La Paz, 1983, p. 19. Unofficial translation.

19 This supervisory function is also found in the 1951 Convention (Article 35) and in the 1967 Protocol (Article II).

25. The role of international protection is of the utmost importance as it makes up for the absence of national protection which characterizes refugees. This function of UNHCR is "entirely non-political", "humanitarian and social" (paragraph 2), and despite the fact that international protection is not defined, the tasks which UNHCR should undertake to accomplish it are enumerated in its Statute.[20] Also, the Executive Committee of the UNHCR Program has developed measures for refugees in situations of mass influx.[21]

26. Refugee protection also includes questions of detention,[22] the protection of refugee women as they face particular protection problems due to the vulnerability which very frequently exposes them to physical violence, sexual abuse, discrimination, etc.[23] The situation of refugee minors has also led to the development of protection measures,[24] as well as issues concerning extradition of refugees.[25]

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20 "The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by:
"(a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
"(b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;
"© Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
"(d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;
"(e) Endeavoring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;
"(f) Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;
"(g) Keeping in close touch with the Governments and inter-governmental organizations concerned;
"(h) Establishing contact in such a manner as he may think best with private organizations dealing with refugee questions;
"(i) Facilitating the coordination of the efforts of private organizations concerned with the welfare of refugees" (paragraph 8).

21 For example, Conclusion No. 22 (XXXII), 1981, titled *Protection of Asylum-Seekers in situations of Large-Scale Influx*. The Cartagena Declaration on Refugees contains similar provisions for situations of mass-scale influx.
For an analysis of EXCOM Conclusions see Galindo Vélez, Francisco, *Breve análisis de las Conclusiones del Comité Ejecutivo del ACNUR sobre la protección de refugiados*, Conclusiones del Comité Ejecutivo del ACNUR, 1975-2000, Tomo IV, Alto Comisionado de las Naciones Unidas para los Refugiados, Universidad Iberoamericana, Comisión Nacional de Derechos Humanos, Mexico, 2002.

22 See for example Conclusion No. 44 (XXXVII), 1986, titled *Detention of Refugees and Asylum Seekers*.

23 Conclusion 39 (XXXVI), 1985, titled *Refugee Women and International Protection*.
Regarding the recognition of refugee status for transgressing social customs, in this Conclusion, the Executive Committee "*recognized* that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention" (paragraph 'k').

24 Conclusion No. 47 (XXXVIII), 1987, titled *Refugee Children*. See also Conclusion No. 59 (XL), 1989, also titled *Refugee Children*.

25 Conclusion No. 17 (XXXI), 1980, titled *Problems of Extradition Affecting Refugees*.

27. In this system, refugee status determination corresponds to State parties to the international instruments, in accordance with the definition which the said instruments contain of the term refugee. Latin American States which have decided to incorporate the definition of a refugee contained in the Cartagena Declaration also determine refugee status based on that definition.[26]

28. The United Nations has also given UNHCR the right to determine refugee status. In effect, the Statute contains a definition of the term refugee which UNHCR applies.[27] While UNHCR has this function, it cannot decide where a refugee is to reside. The decision to grant asylum (residency) is an attribute of States. Nevertheless, as part of the system, UNHCR petitions and lobbies States to grant asylum to refugees and, in cases where refugee camps have to be set up, it recommends to States what their location should be.

2.4 Other Provisions of the UN Refugee Instruments

29. The 1951 Convention and the 1967 Protocol present refugee rights and obligations for States which grant them asylum. With regard to rights, three basic types of treatment are established:

    - *The most favorable treatment afforded to foreigners*, for example, concerning movable and immovable property (Article 13), right of association (Article 15), wage-earning employment (Article 17), self-employment (Article 18), liberal professions (Article 19, paragraph 1), housing (Article 21), and non-elementary education (Article 22, paragraph 1).
    - *The same treatment afforded to foreigners in general*, for example, exemption from reciprocity (Article 7, paragraph 1), freedom of movement (Article 26), fiscal charges (Article 29).
    - *The same treatment afforded to nationals*, for example, freedom of religion (Article 4), artistic rights and industrial property (Article 14), access to courts (Article 16, paragraph 2), rationing (Article 20), elementary education (Article 22, paragraph 2), public relief (Article 23), labor legislation and social security (Article 24).

30. The instruments under consideration also establish that none of their provisions "shall be deemed to impair any rights and benefits granted…" independently of these instruments (Article 5), prohibit discrimination, stipulating that their measures are to be applied without discrimination based on race, religion or country of origin (Article 3), and establish that the personal status of refugees is governed by the law of the country of domicile, and lacking a domicile, by the law of the country of residence (Article 12, paragraph 1).

31. The issue of identity and travel documents is addressed in the 1951 Convention and the 1967 Protocol. The Convention presents it as an obligation of States, by stipulating that they "shall issue" identity documents to refugees "in their territory" (Article 27) and travel documents "to

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26 See Galindo Vélez, Francisco, *Consideraciones sobre la determinación de la condición de refugiado, Derecho Internacional de los Refugiados*, Pontificia Universidad Católica del Perú, Instituto de Estudios Internacionales, y Alto Comisionado de las Naciones Unidas para los Refugiados, Lima, 2001.

27 In fact, the Statute contains two definitions of the term refugee. One definition is very close to that of the 1951 Convention including the limitation in the time of application (paragraph 6, A (ii)). A second definition does not contain such a limitation (paragraph 6, B).

refugees lawfully staying their territory" (Article 28, paragraph 1). Regarding travel documents, an exception is made for "compelling reasons of national security or public order". This should be understood as a safeguard for States which face this type of situation and not as an excuse to avoid issuing travel documents to any refugee.

32. The Convention and the Protocol establish procedures for resolving controversies that may arise between State parties. According to this measure, any dispute relating the interpretation or application of the instruments that has not come to a solution by any other means, may be submitted to the International Court of Justice by any one of the parties (Convention, Article 38; Protocol, Article IV).

33. Concerning reservations, the 1951 Convention establishes that reservations may not be formulated to the provisions concerning the definition of the term refugee (Article 1), the prohibition of discrimination (Article 3), freedom of religion (Article 4), access to courts (Article 16, paragraph 1), the principle of *non refoulement* (Article 33), information on national laws and regulations which concern refugees (Article 36), the Convention's relation to previous conventions (Article 37), settlement of disputes (Article 38), signature, ratification and accession (Article 39), the territorial application clause (Article 40), the federal clause (Article 41), reservations to the Convention (Article 42), its entry into force (Article 43), its denunciation (Article 44), its revision (Article 45), and notification by Secretary General of the United Nations (Article 46).

34. The Protocol stipulates that reservations may not be formulated to the definition of the term refugee (article 1), the prohibition of discrimination (Article 3), freedom of religion (Article 4), access to the courts (Article 16, paragraph 1), and the principle of *non refoulement* (Article 33). It is interesting to note that while the procedure for the settlement of disputes is the same in both instruments is the same, under the Convention, reservations may not be formulated to this provision, while the Protocol does allow it. It is for this reason that some States have only ratified the Protocol.[28] The purpose of clearly indicating which provisions admit reservations and which do not, is to have at all times, a minimum rules, applicable among all parties.

35. As seen, in the United Nations system, the organization itself has a fundamental duty with regard to refugee protection, the search for durable solutions, and material assistance for persons, as well as for States which receive significant numbers of refugees and lack the means to meet their needs. Furthermore, in this system, the United Nations and States work together to interpret the norms in refugee law in unforeseen situations or cases, such as the protection of refugee women and minors, issues of extradition, etc. It should be emphasized that it is not a system which is put in place only when a person presents him or herself. It is a system which functions every day in every part of the world.

36. It is important to highlight, however, that some States are taking a much tougher attitude towards refugees and migrants, laws and treaties notwithstanding. It is true that more people are migrating from the South to the North in search of better lives, and that many times they also come from countries going through convulsions that produce refugees. It is also true that some migrants apply

28 For example: Venezuela.

for refugee status when they see no other way of remaining in developed countries, but the answer to control migration will not come by making refugee status so restrictive that genuine refugees will not be allowed to benefit from it. The migration issue no doubt brings with it a debate about economic and social development, which is not part of this paper.

2.5 Asylum in the Absence of a Convention

37. In the absence of a contractual obligation on the matter of asylum, efforts have been made to fill this void through practice. The practice of States is fundamental. If States address asylum with a humanitarian spirit, the protection and assistance role which they assigned the United Nations can be met.

38. Bodies such as UNHCR's Executive Committee have made important efforts to interpret the instruments in force, have prepared clear guidelines for States in order to avoid confusion and facilitate the granting of asylum, as well as to untiringly remind States that they created the United Nations system for refugee protection, and that the only way to be consistent with this objective is by addressing issues such as asylum with a humanitarian spirit.

39. The Executive Committee has also expressed concern for refugees whose life, liberty and physical security are in danger because they are unable to find asylum in any country, that is, *refugees in orbit*. They are persons who meet all the conditions of refugee status, but who wander from one country to another, not finding asylum.[29] This is a sad example of the lack of respect for asylum, even the temporary kind, which can lead to grave consequences for the individuals involved.

2.6 Weakness of the UN System

40. The instruments also include a supervisory role for UNHCR, making it clear that in this system refugee issues are not solely in the hands of States. The 1951 Convention thus establishes that: "the Contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees…in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention" (Article 35, paragraph 1). It adds that "in order to enable the Office of the High Commissioner…to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with the information and statistical data requested concerning: (a) the condition of refugees, (b) the implementation of this Convention, and (c) laws, regulations and decrees which are, or may hereafter be, in force relating to refugees" (Article 35, paragraph 2). The 1967

29 Two Executive Committee conclusions are of great importance to the issue of asylum. Conclusion No. 5 (XVIII), 1977, titled *Asylum*, in which this body expressed concern for persons who do not receive asylum, not even temporary (paragraph 'b'), urged States to apply liberal practices in granting asylum (paragraph 'd'), and to cooperate with UNHCR in issues regarding asylum (paragraph 'e').
In Conclusion No. 15 (XXX), 1979, titled *Refugees without a Country of Asylum*, the Executive Committee referred to the *humanitarian obligation* of coastal States to grant at least temporary asylum to refugees who arrive by sea (paragraph 'c'), emphasizing that asylum should be granted without discrimination based on race, religion, political opinion or country of origin (paragraph 'd'); provided States with clear guidelines on granting asylum in individual cases, in an attempt to eliminate the problem of *refugees in orbit* (paragraphs 'h' and 'n').

Protocol contains the same provision, and the UNHCR Statute a similar although not identical provision.[30]

41. This is a clear strength of the system, but only a partial strength. UNHCR certainly has an on-going dialogue with States for the protection of refugees and in some cases it works better than in others. The supervisory role, however, is quite limited in many cases because States do not want that UNHCR singles them out as not complying with their international obligations concerning refugees. Sometimes, even through private and highly discreet channels States get extremely upset when UNHCR points out their shortcomings and failures. Thus, UNHCR is put in an extremely difficult situation as complying with its supervisory role in a given country can jeopardize the work that its protection staff is carrying out, even if limited and far from satisfactory, in that same country. In such situations, NGOs can play an important complementary role, as can regional systems for the protection of refugees and human rights.

III. ANALYSIS OF THE LATIN AMERICAN SYSTEM

42. As already stated, for the purpose of this document it is argued that there are two regional systems in Latin America, namely, the system as established in treaties and conventions on territorial and diplomatic asylum as well as extradition, being codified since 1889; and the system of human rights developed by the 1948 *American Declaration on the Rights and Duties of Man*,[31] and the 1969 American Declaration of Human Rights, which contain principles regarding asylum. In general, both systems are referred to as Inter-American, rarely making an effort to separate them. Concerning the first regional system, it is argued that since only Latin American countries are parties to it because countries with other languages and different legal traditions have not joined it, it may be advisable to refer to it as the Latin American System of Asylum and Extradition. The second system, which develops from regional human rights instruments, could indeed be referred to as the Inter-American System because some non-Latin American countries from the Caribbean are already parties to it.[32]

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30 The Statute stipulates that UNHCR will carry out its work, *inter alia*, by "promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto" (paragraph 8 (a)).

31 Approved by the Ninth International American Conference, Bogotá, Colombia, 2 May 1948.
Concerning this Declaration, the Inter-American Court of Human Rights, in an advisory opinion, considered: "that the Declaration is not a treaty does not, then, lead to the conclusion that it does not have legal effect, nor that the Court lacks the power to interpret it…" Inter-American Court of Human Rights, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89, July 14, 1989, paragraph 47.

32 A detailed study of the asylum systems, including that of the United Nations is found in Alto Comisionado de las Naciones Unidas para los Refugiados, *El Asilo y la protección internacional de los refugiados en América Latina*, 1ª edición, Buenos Aires, Siglo XXI Editores, Argentina. This is a very complete study carried out under the direction of Leonardo Franco, former director of the Americas' Bureau and the Department of International Protection at UNHCR.
See also, Galindo Vélez, Francisco, *El asilo en el sistema de las Naciones Unidas y en el sistema Interamericano, Compilación de instrumentos jurídicos regionales relativos a derechos humanos, refugiados, asilo diplomático, asilo territorial, extradición y temas conexos*, Tomo II, Alto Comisionado de las Naciones Unidas para los Refugiados, Universidad Iberoamericana, Comisión Nacional de Derechos Humanos, Mexico, 2002.

43. For the purposes of this paper, the following instruments of the Latin American system are retained:

- The *Treaty on International Penal Law* of 1889; deals with territorial asylum in articles 15, 16 and 18, with diplomatic asylum in article 17 and with the denial of extradition for political crimes or common crimes linked to political crimes in article 23;[33]
- The *Agreement on Extradition* of 1911; generally known as the *Bolivarian Agreement*, deals with the right to seek asylum in article 1, with the denial of extradition for political crimes or common crimes linked to political crimes in article 4, and recognizes the institution of asylum in article 18;[34]
- The *Convention on Asylum* of 1928; deals with diplomatic asylum;[35]
- The *Code of Private International* of 1928; generally known as the *Bustamante Code* in honor of Dr. Antonio Sanchez de Bustamante y Sirven, a well known and highly respected Cuban jurist. Deals with the denial of extradition for political crimes or common crimes linked to political crimes in articles 355 and 356;[36]
- The *Convention on Political Asylum* of 1933; deals exclusively with diplomatic asylum;[37]
- The *Treaty on Political Asylum and Refuge* of 1939; deals with diplomatic asylum in articles 1 to 10, and with territorial asylum in articles 11 to 15;[38]
- The *Treaty on International Penal Law* of 1940; deals with the denial of extradition for political crimes, for common crimes committed with political ends and with common crimes in which, in the opinion of the judge or court there is a political intention in requesting the persons extradition (article 20, paragraphs *d*, *e* and *f*, respectively);[39]

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33 Signed in Montevideo, Uruguay, on 23 January 1889, during the First South American Congress on Private International Law. It has been ratified by Argentina, Bolivia, Paraguay, Peru (which later denounced it) and Uruguay.

34 Signed in Caracas, Venezuela, on 18 July 1911, during the Bolivararian Congress. The parties are: Bolivia, Colombia, Ecuador, Peru and Venezuela. The *Interpretative Agreement of the Extradition Agreement of 18 July 1911* was signed on 10 August, 1935 in Quito, Ecuador.
The purpose of the Interpretative Agreement was to limit the time of provisional detention which can be required by a demanding State as part of an extradition procedure, not established in the 1911 Agreement (Article 9, No. 2). The time limit was set at 90 days for Bolivarian countries with common borders and 120 days for non-bordering countries.

35 Signed in Havana, Cuba, on 20 February 1928 during the Sixth International American Conference. It has been ratified by Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay, and Peru. It was signed but not ratified by Argentina, Bolivia, Chile and Venezuela. The Dominican Republic denounced it in 1954; Haiti did so in 1967, but revoked its denunciation in 1974.

36 Signed in Havana, Cuba, on 23 February 1928. It has been ratified by Bolivia, Brazil, Costa Rica, Cuba, Chile, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Dominican Republic and Venezuela.
The number of reservations and declarations made by the countries at the time of ratification makes for an extremely complex situation, which really makes it extremely difficult to know which provisions are in force between which States.

37 Signed in Montevideo, Uruguay on 26 December 1933 during the Seventh International American Conference. It has been ratified by Brazil, Colombia, Costa Rica, Cuba, Chile, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Dominican Republic. Argentina and Uruguay signed but did not ratify. The Dominican Republic denounced it in 1954; Haiti did so in 1967, but revoked the denunciation in 1974.

38 Signed in Montevideo, Uruguay on 4 August 1939 during the Second South American Congress on Private International Law. It was ratified by Paraguay and Uruguay.

39 Signed in Montevideo, Uruguay on 19 March 1940 during the Second South American Congress on International Law. It revised the Treaty of 1889. It has been ratified by Uruguay.

- The *Convention on Territorial Asylum* of 1954;[40]
- The *Convention on Diplomatic Asylum* of 1954;[41]
- The *Inter-American Convention on Extradition* of 1981; deals with the denial of extradition for political crimes, common crimes linked to political ends and common crimes persecuted with political objectives in article 4, paragraph 4, and when it can be inferred that there is intention to persecute for reasons of race, religion on nationality, in article 4, paragraph 5.[42]

44. A first remark about this system is that numerous treaties make it up. All are still in force and the rule that the latter takes precedence over the former has not been followed. Furthermore, since not all countries are parties to the same instruments, nor have they made the same reservations, some are obliged by certain provisions, while other provisions oblige others. It should also be noted that there are instruments with region-wide scope, in the sense of the Latin American region, while others are circumscribed to certain sub-regions of Latin America. Thus, it can be said that there are regional and sub-regional instruments.[43] Finally, most treaties are not directly linked to each other and, therefore, one does not really build upon the other. This sheds doubt on the notion that they indeed make-up a system.

45. A second remark is that asylum in the Latin American System has two forms, namely, *diplomatic asylum*, also known as *political asylum*; and *territorial asylum*, also known as *refuge*.

46. Concerning diplomatic asylum, it may be recalled that it can be granted in legations, airplanes or ships and military camps.[44] On the other hand, territorial asylum is granted within the territory of the State where the person has arrived after leaving his or her country. While territorial asylum is practiced throughout the world, diplomatic asylum is currently recognized as an institution, in a formal sense, only by Latin American countries.

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40 Signed in Caracas, Venezuela, on 28 March 1954 during the Tenth Inter-American Conference. It has been ratified by Brazil, Colombia, Costa Rica, El Salvador, Guatemala, Haiti (which denounced it, but later revoked the denunciation), Mexico, Panama, Paraguay, Uruguay and Venezuela. It was signed but not ratified by Argentina, Bolivia, Colombia, Chile, Honduras, Nicaragua, Peru and Dominican Republic.

41 Signed in Caracas, Venezuela, on 28 March 1954 during the Tenth Inter-American Conference. It has been ratified by Brazil, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Panama, Paraguay, Peru, Dominican Republic, Uruguay and Venezuela. It was signed but not ratified by Argentina, Bolivia, Colombia, Cuba, Chile, Honduras and Nicaragua. Haiti denounced it in 1967, but revoked the denunciation in 1974.

42 Signed in Caracas, Venezuela on 25 February 1981 during the Specialized Inter-American Conference on Extradition. It has been ratified by Costa Rica, Ecuador Panama and Venezuela. Has been signed but not ratified by Argentina, Bolivia, Chile, El Salvador, Guatemala, Haiti, Nicaragua, Paraguay, Dominican Republic and Uruguay.

43 This is, for example, the opinion of Dr. Hector Gross Espiel in his article titled "El derecho internacional americano sobre asilo territorial y extradicion en sus relaciones con la Convencion de 1951 y el Protocolo de 1967 sobre el estatuto de los refugiados"*, Asilo y proteccion de refugiados en America Latina,* Universidad Autonoma de México, 1982, pp. 33-81.

44 Treaties such as the 1939 treaty foresee, for example, that when the number of asylees is significant, diplomatic agents can adapt other places, under the protection of their flag, to provide shelter to asylees, keeping the government of the territorial State informed (Article 8).

47. Nevertheless, with regard to the practice of diplomatic asylum, it should be recalled that many countries outside Latin America have granted it at different times in their history.[45] Within the United Nations system, at the request of the General Assembly,[46] the Secretary General distributed a report which confirmed the limited practice of diplomatic asylum.[47] Since then, the United Nations has indefinitely postponed the matter.[48]

48. Having diplomatic asylum is an important advantage of the Latin American system. It has proven to be of the utmost importance, although in some cases highly controversial, for providing protection to persons who need it in extremely difficult situations. There is not always enough time to get to a border and enter another country to request protection. In fact, there are well known cases of persons saved thanks to the institution of diplomatic asylum, but the names and numbers of those who were not saved because this institution was not recognized, are unknown.

49. A third remark is that the system does not limit itself to asylum and also deals with extradition. Indeed, some instruments make no specific mention of the word *asylum*, but rather refer to the inapplicability of extradition, when this is motivated by political reasons, common causes related to political reasons or some purely common causes that the instruments specify.

3.1 Nature of Asylum in the Latin American System

50. The Latin American instruments refer to asylum and to the nature of asylum in different ways, but its *humanitarian, apolitical* and *inviolable* nature is indisputable. It is a protection system for persons persecuted for political reasons, political crimes, common crimes committed with a political purpose, etc. There is, therefore, no single terminology from one instrument to the other.

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45 According to Francisco Parra, cases of diplomatic asylum are known to have taken place in Spain, for example, from 1833 to 1876, after the death of Fernando VII, when several cases were recorded. In 1841 and 1843, the Caballero d'Alborgo, who was Denmark's commercial *attaché* in Madrid, gave refuge to several of Esparpeto's adversaries, and when his colleagues came to power, they gave him the title of *Baron de Asilo*. In 1875, by providing asylum to Mr. de Castro, the Unites States Minister in Madrid justified his action to his government arguing that this was a common practice in Madrid. In 1911, the United States Consul in Matamoros, Mexico, provided temporary refuge to General Estrada. Francisco Parra (Minister of Venezuela in Peru), *El derecho de asilo: A los estudiantes del Perú,* Libreria e Imprenta Gil, S.A., Perú, 1936, pp. 9-10.
Other examples can be found, according to Carlos Torres Gigena: in 1865, the U.S. Delegation gave asylum to General Canseco, Vice-President of the deposed Peruvian government. Furthermore, France granted asylum during the same events to several officials of the deposed government. In 1852, the United Kingdom gave asylum to General Juan Manuel de Rosas on a war ship located in Argentina. One year earlier, the U.K. had granted asylum to several Argentinean officials in its delegation in Buenos Aires. Carlos Torre Gigena, *Asilo diplomático: Su práctica y su teoría,* La Ley, S.A., Buenos Aires, 1960, pp. 50 and 154.

46 General Assembly Resolution 3321 (XXIX), of 14 December 1974.

47 United Nations Document A/10139, Part I and Add. 1, and Part II. Debates concerning this issue may be found, *inter alia*, in the following documents: A/C.6/SR.151 of 28 October 1975; A/C.6/SR.1552 of 29 October 1975; A/C.6/SR.1554 of 31 October 1975; A/C.6/SR.1555 of 3 November 1975; A/C.6/SR.1556 of 4 November 1975; and A/C.6/SR.1557 of 4 November 1975. Diplomatic asylum was considered under agenda item 111.

48 General Assembly Resolution 3497 (XXX), of 15 December 1975.

51. Concerning diplomatic asylum, the different instruments define it as a "right or…humanitarian toleration" (1928 Convention on Asylum, Article 2), or an "institution of humanitarian character" (1933 Convention, Article 3), adding that it must be granted "without distinction of nationality" (1939 Treaty, Chapter 1, Article 1) and that it "shall be respected by the territorial State" (Article 1). It also establishes that "every State has the right to grant asylum; but it is not obligated to do so or state its reasons for refusing it" (1954 Convention on Diplomatic Asylum, Article 2).

52. Regarding territorial asylum, the instruments of the Latin American system establish that "political refugees shall be afforded an inviolable asylum" (1889 Treaty, Title II, Article 16, and 1911 Agreement, Chapter II, Article 1, paragraph 1), that "every State has the right, in the exercise of its sovereignty, to admit into its territory such persons as it deems advisable" (1954 Convention on Territorial Asylum, Article 1), and that "any violation of sovereignty that consists of acts committed by a government or its agents in another State against the life or security of an individual, carried out on the territory of another State, may not be considered attenuated because the persecution began outside its boundaries or is due to political considerations or reasons of state" (1954 Convention on Territorial Asylum, Article 2, paragraph 2).

53. When it comes to extradition, the Convention of 1981 stipulates, for example, that "no provision of this Convention may be interpreted as a limitation on the right to asylum when its exercise is appropriate" (Article 6).

54. Despite the fact that the terminology differs among the various Latin American treaties and conventions on asylum and extradition, and that it is not as clear and straightforward as the UN system, there is no contradiction among them, and several important principles can be identified:

    - Territorial or diplomatic asylum is an non-political, humanitarian and inviolable institution;
    - Granting asylum is not cause for objection by other States;
    - All persons, whatever their nationality, may benefit from asylum, which indicates that it is open to persons who are not Latin Americans;
    - A State is not obliged to grant asylum, in accordance with the customary rule;
    - Violations of the sovereignty of States are inadmissible;
    - Qualifying the reasons for asylum corresponds to the State which grants it (which is, in fact, not specifically mentioned in all the instruments, and its existence as a regional Latin American custom was denied by the International Court of Justice in the *Asylum Case*, (Colombia *vs*. Peru).

3.2 Persons who May Benefit from Asylum

55. The Latin American instruments concur in that both territorial and diplomatic asylum may proceed for political reasons or other reasons linked to them. The instruments establish which motives preclude extradition, and among these are found political reasons or motives. Nevertheless, there is no uniformity with regard to the political aspect and its relation to the individual. There is only one instrument in this system, which broadens the causes for granting asylum or denying extradition, namely, the 1981 Convention. Indeed, this Convention specifically establishes that extradition is

not applicable "when, from the circumstances of the case, it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the position of the person sought may be prejudiced for any of these reasons" (Article 4, paragraph 5).

56. According to the instruments, asylum may be granted to "political refugees" (1889 Treaty, Title II, Article 16 on territorial asylum, and 17 on diplomatic asylum), to "political offenders" (1928 Convention, Article 2), to "persons pursued for political reasons or offences, or under circumstances involving concurrent political offences, which do not legally permit extradition" (1939 Treaty, Chapter 1, Article 2), and to "persons being sought for political reasons or political offences" (1954 Convention on Diplomatic Asylum (Article 1). They add, however, that it is not lawful to grant asylum "to those accused of common offences who may have been duly prosecuted or who may have been sentenced by ordinary courts of justice, nor to deserters of land or sea forces" (1933 Convention, Article 1, paragraph 1).

57. The instruments also stipulate that extradition cannot be granted for political crimes and crimes connected to them, or if it were proven that the request had been in fact formulated for the purpose of trying and punishing the accused for a crime of a political nature, according to the same determination (Bustamante Code, Articles 355 and 356 respectively). Exceptions are made "when, in the opinion of the judge or tribunal receiving the request, the common character manifestly predominates"; and when "in the opinion of the judge or tribunal of the requested State, it can be inferred from the attendant circumstances that the purpose in making that request is preponderantly political"; and for "essentially military crimes, exclusive of those governed by common law" (1940 Treaty, Title II, Chapter I, Article 20, Clauses 'd', 'e', 'f', and 'g' respectively). Furthermore, It is established that extradition is barred "when, from the circumstances of the case, it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the position of the person sought may be prejudiced for any of these reasons" (1981 Convention, Article 4, paragraph 5).

58. A reading of the Latin American instruments and the reasons therein for granting territorial or diplomatic asylum, or for denying extradition, reveals that there is no common basis for their formulation. The following figures appear in these instruments:

- Persons pursued for political reasons or offences;
- Persons being sought for political reasons or political offences;
- Political refugee;
- Political crime;
- Political crime or motive;
- Political offence;
- Common crime related to a political offence;
- Common crime pursued with a political end.

59. The emphasis on the singling out of the person, which appears throughout the figures of *political crime*, *politically persecuted person*, and *common crime related to a political crime*, responds to the historic development of Latin American countries, which developed and later codified

their practice of asylum in the region. The system of asylum was developed on the basis of the experience "of persons who were socially and politically significant and who sought to escape persecution by going voluntarily or forcibly to another country, and who, defeated at the time, later governed or served as members of the governing party".[49]

60. It may be concluded that the difference in terminology is essentially due to what has been understood to be political at each moment in Latin American history, and to the prevailing political concerns of the time. These political considerations have led to the development of a varied, even disorderly legal system, in the sense that there are norms that appear in some instruments but not in others, reflecting an unfortunate and quite widespread tradition in many Latin American countries of using the law to support political regimes.

3.3 Right of Qualification

61. Whoever qualifies the motives that lead to asylum plays a fundamental role in ensuring that needy persons truly benefit from this institution. As the pursuer cannot reasonably be expected to be objective, the right to qualification necessarily corresponds to the State that grants asylum. This seems logical, and is reflected in most, although not all, of the Latin American instruments regarding asylum and extradition.

62. Some instruments establish that qualification "is incumbent upon the nation upon which the demand for extradition is made" (1889 Treaty, Title III, Article 23, paragraph 2), that in case of doubt, the decision of the authorities of the State which is demanded or which grants asylum shall be definitive (1911 Agreement, Article 14), that "the judgment of political delinquency concerns the State which offers asylum" (1933 Convention Article 2, and 1939 Convention Chapter I, Article 3, paragraph 2, for diplomatic asylum, and Chapter II, Article 11, paragraph 2, for territorial asylum), and that the State granting asylum determines "the nature of the offence or the motives for persecution" (1954 Convention on Diplomatic Asylum, Article 4).

49 Galindo-Pohl, Reynaldo, "Refugio y asilo en la teoria y en la practica política y jurídica", *La protección internacional de los refugiados en America central, México y Panama: Problemas Jurídicos y Humanitarios* (Memorias del Coloquio de Cartagena de Indias – 1984), Universidad Nacional de Colombia, Centro Regional de Estudios del Tercer Mundo y Alto Comisionado de las Naciones Unidas para Los Refugiados (ACNUR), 1985, p. 155.
Along these same lines, in its 1981-1982 report to the General Assembly of the Organization of American States, the Inter-American Commission on Human Rights expressed that until 1960, political exiles of American countries (referring to Latin America), traveled with relative ease to neighboring countries, which generally granted them asylum in accordance with the provisions established in international agreements and national legislation in force. A report on political refugees in the Americas, prepared for the Inter-American Commission on Human Rights, indicated that several factors ensured the acceptance and absorption of most Latin American refugees in the region. These factors included: 1) a long tradition of exile movements, for political reasons, from one country to another; 2) a common language, culture and traditions, which facilitated adaptation; 3) the fact that political exiles frequently belonged to the wealthiest and best educated sectors of the population, and usually kept investments and property in their country of origin, and thus did not become an economic burden to the State which received them. Quoted in Monroy Cabra, Marco Antonio, *El sistema Interamericano y la protección de los refugiados, Ibid.*,pp. 245-246 (unofficial translation from the text in Spanish).

63. The 1928 Convention, however, does not resolve which country should qualify the nature of the facts that led to asylum. The absence of this point in the Convention was the subject of much debate in the case of asylum granted to the well-known Peruvian politician Dr. Victor Raul Haya de la Torre, which Colombia and Peru took to the International Court of Justice.[50]

64. Compared to the UN system where both States and UNHCR can determine refugee status, the Latin American system is more restrictive as only States can determine who may or may not be granted asylum. In any case, in the UN system there is one universal definition of the term refugee with two important regional developments in Africa and Latin America, making it a truly universal system both in terms of scope and content.

3.4 Situation of Persons who Benefit from Asylum

65. For analytical purposes it may be said that in the system developed by the United Nations, there are essentially two phases:

- Recognition of refugee status by State parties to the instruments, or, depending on the circumstances, by UNHCR; and
- Granting asylum, through which a State decides to allow the refugee to reside in its territory.

66. When refugee status is recognized, the person is removed from the jurisdiction in which he or she faces a *well-founded fear of persecution*; when asylum is granted, the refugee becomes a resident of the country which granted it and exercises rights and obligations in the new country of residence. Removal should not be understood in a physical sense.

67. In the Latin American system of asylum and extradition, granting diplomatic or territorial asylum, or deciding to deny extradition, is the act of removing the person from the jurisdiction, which threatens him or her. The Latin American instruments vary with regard to the determination of what happens to the person once he or she has been removed, in a legal and not a physical sense, from the jurisdiction that threatens him or her.

50 Dr. Haya de la Torre entered the Colombian Embassy in Lima in early 1949 but was only able to leave the diplomatic premises in 1953. The case before the International Court of Justice was a long drawn affair that in the end was not able to provide the solution sought by Colombia and Peru. In the process, the Court denied the existence of a regional Latin American custom concerning the right of qualification by the State granting diplomatic asylum. In its final judgment the Court called on the parties to solve the problem through negotiations. There were a total of three judgments on this case: 20 November 1950, 27 November 1950, and 13 June 1951. Cour Internationale de Justice, Plaidoiries et documents, *Affaire de droit d'asile (Colombie/Perou), Arrets du 20 et 27 novembre 1950*, volume I, requete, exposés écrits, demande en interpretation, No. de vente: 63; et volume II, procécure orale, documents, correspondance, No. de vente 65. Cour Internationale de Justice, *Recueil des arrets, avis consultatifs et ordonnaces, Affaire du droit d'asile* (Colombie/Perou), A. W. Sijthoff, 1950, No. de vente: 50. International Court of Justice, *Haya de la Torre Case: Judgment of 13 June 1951*, case summary in the Court's webpage.

68. Concerning diplomatic asylum, it is established that it may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to leave the country and his/her safety is ensured in some other way (1928 Convention, Article 2, First, 1954 Convention on Diplomatic Asylum, Article 5), but that "the State which grants asylum does not thereby incur an obligation to admit the refugees into its territory, except in cases where they are not given admission by other States" (1939 Treaty, Article 1, paragraph 2).[51] The issue of the future residence of the asylee is thus not resolved, but an important clarification is made with regard to the meaning of diplomatic asylum: It is an act limited in time, motivated by the urgency of the case, and lasts until the person is secure. In this sense, diplomatic asylum also means the act of removing the person from the jurisdiction which threatens him or her. Furthermore, it is also quite clear that the asylum State is not obligated to receive the person unless no other State is willing to do so,[52] but this is only clearly stipulated in one instrument.

69. In the case of the Peruvian politician Victor Raul Haya de la Torre, for example, asylum was granted by Colombia in its embassy in Lima, but Dr. Haya de la Torre settled in Mexico. In any case, it is difficult to believe that Latin American countries, which have codified the institution of diplomatic asylum, would limit themselves to removing the person from the threatening jurisdiction, without solving the problem of the person's residency once this has occurred. "In the spirit of the vast Latin American experience on this matter, and with the application of codified norms, when the asylee leaves the diplomatic premises and arrives at the asylum country, he or she becomes an inhabitant of the same, and as such, should obey its laws".[53]

70. Regarding territorial asylum, only one instrument establishes that "the grant of asylum does not entail, for the State which makes the grant, any obligation to admit the refugees indefinitely into its territory" (1939 Treaty, Article 11, paragraph 2), adding that "discontinuance of the benefits of asylum does not imply authorization to place a refugee in the territory of the pursuing State" (Article 12, paragraph 2). With regard to the latter measure, it may be noted on the one hand, that cessation of the benefits of asylum are mentioned, and on the other hand, that it is forbidden to return the person to the persecuting State. Thus the benefits of asylum may cease, even though the causes which gave rise to granting it may still be present, hence the reference to *non refoulement* to the territory of the persecuting State.

71. There is another point related to the notion of the non-obligation of the State to indefinitely admit within its territory persons to whom asylum has been granted. The word indefinitely is key to concluding that there is an obligation to grant a temporary stay. It is also worth noting that after cessation of the benefits of asylum, the persons concerned are no longer referred as asylees but

51 It is worth noting that the 1939 Treaty is the only instrument in the Latin American system which establishes the State's obligation to allow the person to remain in its territory, if no other State is willing to receive him or her. It is also the only instrument that includes a similar obligation in cases of territorial asylum.

52 The 1954 Convention on Diplomatic Asylum stipulates that the "State granting asylum has the right to transfer the asylee out of the country. The territorial State may point out the preferable route for the departure of the asylee, but this does not imply determining the country of destination" (Article 13, paragraph 2).

53 Torres Gigena, Carlos, *Asilo Diplomatico: Su practica y su teoria,op. cit.*, p. 225.

rather as *political emigrants* (Article 12, paragraph 1), and in case of surveillance or internment[54] requested by the country of origin, they are referred to as *political internees* (Article 13). For the latter it is also established that they shall give advise to the government…when they decide to leave its territory, and that their departure will be allowed under the condition that they not go to the country of their origin (Article 15, also, 1954 Convention on Territorial Asylum, Article 10).

72. The idea that the asylee *decides* to leave the territory of the State of asylum indicates that it is a personal decision. This brief analysis leads to the conclusion that territorial asylum or refuge means the removal of the person from the jurisdiction which threatens him or her, which in turn implies granting the person at least a temporary stay.

73. Freedom of expression and association are included as rights for asylees, but not in all instruments. Furthermore, it is stipulated that the exercise of the freedom of expression "may not be ground of complaint by a third State on the basis of opinions expressed publicly against it or its government by asylees or refugees, except when these concepts constitute systematic propaganda through which they incite to the use of force or violence against the government of the complaining State" (1954 Convention on Territorial Asylum, Article 7). Concerning freedom of association, it is established that "no State has the right to request that another State restrict for the political asylees or refugees the freedom of assembly or association which the latter State's internal legislation grants to all aliens within its territory, unless such assembly or association has as its purpose fomenting the use of force or violence against the government of the soliciting State" (1954 Convention on Territorial Asylum, Article 8).

74. In analyzing the issues discussed in the previous paragraphs, that is, asylee freedom of expression and politically interned persons who may receive permission to leave the territory whenever they wish, under the condition that they not go to their country of origin, it may be concluded that the person's stay in the territory of the State of asylum is more than temporary.

75. It is possible that the codifiers of the institution of asylum in Latin America judged that it was not necessary to be more explicit with regard to asylees' residence, since practice indicates that the asylum country generally allows persons to remain within its territory or that there is another country willing to receive them and to allow them to remain within its territory. The same is true in cases where extradition is denied. [55] Thus, the situation of a person once he or she has been granted asylum under this system seems to present less uncertainty than under the UN system. In the UN system the practice of States also provides such a solution to recognized refugees, but not all refugees and, thus, the problem of refugees in orbit or of refugees who spend years in camps, some of them without freedom of movement.

54 Internment should be understood to mean distancing from the border.

55 It may be recalled that extradition is not applicable in relation to certain crimes of a purely common nature, among them, dueling, adultery, libel and slander, crimes against worship (1889 Treaty, Article 22; 1940 Treaty, Article 20), or when the defendant has completed his or her sentence, has been pardoned or absolved, or when the crimes are not officially processed in the demanded State (1981 Convention, Article 4).

76. To recapitulate, pursuant to the Latin American instruments, asylum and the decision to deny extradition mean, on the one hand, the removal of the person from the jurisdiction which persecutes him or her, and on the other hand, granting permission to remain within the territory of the asylum State or the State which denies extradition. This meaning requires resorting to practice. This being so, asylum in the Latin American system corresponds both to refugee status determination and to the grant of asylum (residency) in the United Nations system.

3.5 Protection and Other Issues under the Latin American System

77. Concerning protection principles, the Latin American system does not present them in a clear manner, nor are the same principles repeated in all instruments. It is established that there is no sanction for entering the territory of a State "surreptitiously or irregularly" (1954 Convention on Territorial Asylum, Article 5), and that no State is obliged to surrender to another State, or to expel from its own territory, persons persecuted for political reasons or offences (1954 Convention on Territorial Asylum, Article 3). As far as diplomatic asylum is concerned, it is stipulated that "if as a consequence of a rupture of diplomatic relations the diplomatic representative who granted asylum must leave the territorial State, he shall abandon it with the asylees" (1954 Convention on Diplomatic Asylum, Article 19, paragraph 1. The 1939 Treaty contains a similar provision in Article 10).

78. In the UN system, protection principles are clearly established and presented, for example, *non refoulement* (1951 Convention Article 33, paragraph 1), procedures for the expulsion of refugees (Convention Article 32), no sanctions for illegal entry into the territories of States (Convention Article 31), identity and travel documents (Convention Articles 27 and 28, respectively). In this sense, the Latin American system is not as highly developed in terms of the contents of the instruments. Nevertheless, as mentioned above, some instruments do contain clear provisions.

79. Regarding persons who must be excluded from the benefits of asylum, army and navy deserters are excluded (1889 Treaty, Article 18; 928 Convention on Asylum, Article 1, paragraph 1). Some instruments add an exception to this exclusion "when the act is clearly of a political character (1939 Treaty, Article 3, paragraph 3; 1954 Convention on Diplomatic Asylum, Article 3), while other treaties also state that an attempt to take the life of a Head of State will not e considered a political crime (Bustamante Code, Article 361; 1940 Treaty, Article 23).

80. Who is excluded from the benefits of refugee status and asylum is more clearly specified in the UN system, for example, in the 1951 Convention, the 1967 Protocol, the UNHCR Statute and the 1967 Declaration on Territorial Asylum. In the Latin American system some instruments mention reasons for exclusion while others do not. Both systems exclude persons who have committed crimes of a purely common nature. The UN system also excludes persons for crimes they may have committed and which are contrary to universally recognized humanitarian and legal principles regarding war crimes, crimes against humanity, violations of human rights, etc. The Latin American system does not foresee exclusion for these reasons.

81. On the issue of reservations to the instruments, the Latin American system does not contain any specific rules to ensure a minimum regime, as is the case with the UN system. All instruments are in force and given the fact that not all States have made the same reservations and that they are not all parties to the same instruments, it is difficult to know what provisions are in force between what

States. Therefore, there is no unique and minimum system of rules applicable in all countries, as in the case of the United Nations system.

IV. ANALYSIS OF ASYLUM UNDER THE AMERICAN CONVENTION ON HUMAN RIGHTS

82. The instruments of the Inter-American system of human rights are:

- The *American Declaration of the Rights and Duties of Man* of 1948;
- The *American Convention on Human Rights* of 1969.[56]

83. Pursuant to the American Convention on Human Rights, "every person has the right to *seek*[57]and *be granted*[58] asylum in a foreign territory, in accordance with the legislation of the State and international conventions, in the event he is being pursued for political offences or related common crimes" (Article 22, paragraph 7).[59] By explicitly stating that every person has a right to seek and be granted asylum in a *foreign territory*,[60] diplomatic asylum is not included.

84. The right to be granted asylum has been interpreted by some analysts as indicative that this Convention recognizes asylum as a subjective right, and thus represents a significant step forward with regard to the traditional situation, ruled by the customary law. The formula that most closely resembles the American Convention appears in the Universal Declaration of Human Rights, which establishes the *right to seek asylum* and *to enjoy* asylum (Article 14, paragraph 1). The issue lies in determining if the change from the *right to seek and to enjoy* (Universal Declaration) to the *right to seek and be granted* (American Convention) implies recognizing the subjective right to asylum, with the subsequent State obligation to grant it.

85. In order to avail oneself of something, it is necessary to have or to receive, and whoever receives does not necessarily have a legal claim, but rather may depend on the good will of the subject who grants or delivers. It would not appear that the right to receive is very different from the right to enjoy. The interpreters of the Universal Declaration generally agree that the right to enjoy is a far cry from establishing a subjective right before the State. The same can be concluded from the expression *right to be granted* in the American Convention. To be granted does not include a State obligation to grant. To date, a State obligation to grant does not appear in any international treaty. In any case, it is interesting to note that the drafters of the regional document decided to make an important change in relation to the Universal Declaration, which indicates that they had an intention to go beyond the custom law formula. Hopefully this will be achieved sometime in the future.

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56 The following countries are parties to the Convention: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago (denounced it in 1998), Uruguay and Venezuela.

57 Author's emphasis.

58 *Ibid*.

59 With regard to asylum, the *American Declaration of the Rights and Duties of Man* establishes that "every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements" (Article XXVII). This formula also excludes diplomatic asylum.

60 Author's emphasis.

86. If the subjective right to asylum were declared one day with all the legal requirements, it would have to be formulated in such a way as to establish, first, the *right to asylum* and second, the *obligation to grant it*. The long and well-established customary rule whereby the State has the last word, with great discretionary power regarding the granting of asylum, could not be modified through indirect or ambiguous language. It would have to be the object of unequivocal and conclusive language. It would thus appear appropriate to moderate the enthusiasm to which the American Convention gave rise; and this is said with all due respect for those who consider that it established the right to asylum as a subjective right.

87. It should be highlighted that the American Convention designates or creates bodies for the purpose of supervising the application of its provisions. These bodies are:

- The Inter-American Commission on Human Rights;[61]
- The Inter-American Court of Human Rights.[62]

88. The Convention establishes the attributes of the Commission and the Court, which have also adopted their respective statutes and procedures. All rights recognized by the American Convention come under the purview of these bodies. It may be noted that concerning the provision on asylum contained in the American Convention, the Inter-American Commission has considered important that States in the Americas become parties to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,[63] and called on them to do so. This is a fundamental conclusion which clearly recognizes the importance of both systems working together and in a complementary manner to achieve the protection of refugees and the correct application of asylum.

4.1 Use of the Inter-American Commission and the Inter-American Court of Human Rights to reinforce the Protection of Refugees under the UN System

89. What is important for the objectives and purposes of this paper is to indicate that "any person or group of persons, or nongovernmental entity legally recognized entity in one or more member states of the Organization [of American States], may lodge petitions with the Commission containing denunciations or complaints of violations of this Convention by a State Party" (Article 44). This includes the Convention's provision on asylum.

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61 The Inter-American Commission was created in 1959 as a Charter body of the Organization of American States. Since the advent of the American Convention, it also functions as a body of that Convention.

62 The following countries have recognized the jurisdiction of the Court: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago (denounced the Convention in 1998), Uruguay and Venezuela.
The Convention has two additional protocols, on Economic, Social and Cultural Rights, and to abolish the death penalty.

63 Inter-American Commission of Human Rights, *Annual Report 1993*, Chapter V.

90. The Commission may grant precautionary measures[64] and the Court may adopt provisional measures,[65] extremely important for the protection of human rights in order to prevent irreparable harm.

91. The strength of the system is in the Commission and specially the Court. There has been important progress in recent years, as many countries have recognized the competence of the Court. In the past, many Latin American States in the Continent used the Convention to improve their international image, intentionally withholding from public opinion the fact that they had not recognized the jurisdiction of the Court. This is not exclusive of Latin American States, since many States in other continents do the same with other human rights instruments, and while it may be tolerated in other matters, such an approach to human rights is unacceptable.

92. This Convention establishes an international body to oversee the application of its measures, but of a different nature of what has been done in the United Nations system for the protection of refugees; the difference lies in that the latter does not have a specialized court of human rights. No doubt, the application of the provision regarding asylum (Article 22, paragraph 7), can be overseen by the Commission and the Court. It is worth recalling that the Convention also includes the principle of *non refoulement* (Article 22, paragraph 8).[66]

93. Regarding measures to ensure that the regional system and the universal UN system can work together, the Commission has declared, for example, that it "recognizes that the 1951 Convention and the 1967 protocol on the status of refugees are the only international human rights instruments offering a global, uniform and specific framework for the protection of refugees…[It] notes with satisfaction that most of the OAS members have acceded to or ratified the 1951 Convention and the 1967 Protocol and recommends that the States that have not yet done so incorporate these instruments into their national legal systems and that they adopt the necessary regulatory or supplementary legislation. They will, by these means, contribute to the universal application of the principles and provisions enshrined in these instruments, and confirm the commitment to treat the refugee question as a shared international responsibility".[67]

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64 The Commission's capacity to grant precautionary measures is not contained in the American Convention in the same manner that it is established for the Court. Rather, this capacity is the result of interpretation by the Commissioners themselves and was included in the Regulations of the Commission. Article 29 of the regulations stipulates that the Commission may grant precautionary measures: "(1) On its own initiative or at the request of a party, it may take any action that it considers necessary for the performance of its functions; (2) In urgent cases, when necessary to prevent irreparable harm to persons, the Commission may request that precautionary measures be taken to prevent the occurrence of irreparable harm, where the facts giving rise to the complaint are true; (3) If the Commission is not in session, the Chairman or, in his absence, one of the Vice-Chairmen, shall consult via the Secretariat with the other members regarding application of the provisions of paragraphs 1 and 2 above. Where it is not possible to undertake the consultations in time, the Chairman shall take the decision on behalf of the Commission and shall communicate it immediately to the other members; and (4) any request for such measures and their adoption shall not prejudice the final decision".

65 Article 63, paragraph 2 of the American Convention establishes that: "In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission".

66 The American Convention also prohibits the collective expulsion of foreigners (Article 22, paragraph 9).

67 Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission of Human Rights*, 1993, Recommendation 10.

4.2 Decisions taken by the Inter-American Commission of Human Rights

94. The Commission and the Court have taken a number of decisions that directly benefit the protection of refugees, their right to return to their countries and their right to remain in those countries so that they not have to become refugees in the first place. The Commission has considered, for example, in the case of Chilean exiles, that the expulsion of nationals is a violation of the right to residence and transit established in Article VIII of the American Declaration of the Rights and Duties of Man, adding that it is worse than a sanction for a crime because such sanctions carry a time limit and an expulsion decision is indefinite.[68]

95. It has also reiterated that persons have a right to seek asylum and reiterated this right, for example, in the case of Cubans who were denied by their government the possibility of going abroad and join their close relatives (family reunification). It concluded that this was a violation of Article XXVII of the American Declaration.[69]

96. The Commission has also granted precautionary measures in a number refugee of cases. For example, on 27 October 1999, it granted such measures on behalf of, a Peruvian citizen who had been legal resident in Argentina for eight years, to prevent his extradition to Peru for a period of six months until his case was reviewed. Simultaneously, the Argentinean Committee on the Eligibility of Refugees (CEPARE) granted him refugee status.[70]

97. Similar measures were granted, on 12 March 2001, on behalf of Colombian refugees in Venezuela when it determined, based on reports the Commission had received, "that these persons were in great danger", and that such measures were necessary "to prevent irreparable harm" to them.[71] This case is no longer under consideration by the Commission because the institutions that brought it to its attention had not consulted directly with the interested individuals, but rather through the Vicariato de Machiques in Venezuela. When consulted the individuals preferred not to continue with the case.[72]

98. It has also granted precautionary measures in cases of expulsion of foreigners, for example, on 3 March 1999, the expulsion ordered by Chile of Spanish, an American and a French national for having allegedly participated in and expressed their support and solidarity for a demonstration organized by the Pehuenches indigenous population on 18 February 1999 in *Alto Bio-Bio*. Subsequently Chile announced that the expulsion order had been rescinded.[73]

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68 *Resolution No. 24/82* of 8 March 1982, and *Resolution No. 11/85*, Case 9269 of 5 March 1985.
69 *Resolution No. 11/82*, Case 7898, 8 March 1982, and *Resolution No. 6/82*, Case 7602 of 8 March 1982.
70 *Precautionary measures granted or extended by the Commission in 1999*, Julio Mera Case, paragraph 9.
71 *Precautionary measures extended or adopted by the Commission in 2000-2001*, paragraph 60.
72 The Center for Justice and International Law (CEJIL), and the Venezuelan Program for Human Rights Education and Action (PROVEA), the social action office of the vicariate of Machiques, presented the case to the Commission.
73 *Precautionary measures granted or extended by the Commission in 1999*, paragraph 16.

99. It adopted similar measures on 3 December 1999 to protect a family expelled by the Dominican Republic to Haiti in a violent, illegal and arbitrary manner when they were confused with Haitians. With the expulsion, the family was separated The Commission requested that the Dominican Republic allow the family to return to its territory and to return to them their personal documents which had been unlawfully seized. The Dominican Government reported on 16 December 1999 that definitive measures would be adopted to protect this family and prevent their separation. On 28 February 2000 the Government added that a request for official residence for the family was being processed.[74]

100. The Commission has also expressed its concern in cases of massive expulsions of foreigners. It has stated, for example, "collective expulsions are a flagrant violation of international law that shocks the conscience of humankind. Individual expulsions should be carried out in accordance with procedures that offer a means of defense that is in line with the minimal rules of justice, and that prevent errors and abuses."[75]

101. Concerning statelessness, the Commission has also granted precautionary measures. On 27 August 1999, it granted precautionary measures on behalf of two individuals who had been denied Dominican nationality despite the fact that they had been born in the Dominican Republic and that its Constitution establishes the principle of *ius soli*. According to the Commission, by denying them this right, they were exposed to the imminent threat of expulsion from their country of birth and requested the Dominican Republic to adopt immediate measures to prevent their expulsion. For one of the individuals it added that the State had to prevent that she be deprived of her right to attend school and to receive the education provided to other Dominican children. During the 104th session of the Commission the Dominican Government reported that the measures requested were being implemented, and the parties agreed to seek a friendly settlement through the good offices of the Commission.[76]

102. The Commission has also provided important support to agreements reached between refugees and the Government of their country to provide guarantees for their voluntary return and reintegration. This was the case of the agreement reached, in October 1992, between Guatemalan refugees in

74 Case: Eddy Martinez and family, Precautionary measures granted or extended by the Commission in 1999, paragraph 30.

75 Inter-American Commission of Human Rights, *Report on the Situation of Human Rights in the Dominican Republic*, 1999, Chapter IX ("Situation of Haitian Migrant Workers and their Families in the Dominican Republic"), paragraph 366.

76 Case: Dilcia Yean and Violeta Basica, *Precautionary measures granted or extended by the Commission in 1999,* paragraph 16.
In another report, the Commission stated: "The Commission observes that some 500,000 undocumented Haitian workers reside in the Dominican Republic. In several cases these persons have lived in the Dominican Republic for 20 to 40 years, and many were born there. Most of them confront permanent illegality, which is passed on to their children, who cannot obtain Dominican nationality, because according to the restrictive interpretation of the Dominican authorities of Article 11 of the Constitution, they are the children of 'foreigners in transit'. It is not possible to consider persons who have resided for several years in a country in which they have developed innumerable contacts of all types to be in transit. Consequently, numerous children of Haitian origin are denied fundamental rights, such as the right to nationality of the country of birth, access to health care, and access to education." *Report on the Situation of Human Rights in the Dominican Republic*, 1999, *op. cit*., paragraph 363.

Mexico and the Government of Guatemala, under the auspices of the UN High Commissioner for Refugees. The Commission stated that "it is undoubtedly true that the Agreements signed in October 1992 will only be carried out if all Guatemalan State institutions discharge their role in guaranteeing the refugees' rights to the fullest".[77] This type of support strengthened the agreements as it signaled to all parties that the Commission was observing their behavior and the application of the provisions contained in the said agreements.

103. Another important issue emphasized by the Commission is the principle of Continental solidarity on refugee matters. It declared: "the Commission would like to observe that the member countries of the Organization of American States have an obligation, whenever a major crisis…occurs in the hemisphere to confront the resulting problems jointly. The refugee question gave rise to grave human rights problems that demanded positive action from all States subject to the obligations enshrined in the Charter of the Organization of American States, the American Declaration of the Rights and Duties of Man and the American Convention of Human Rights".[78]

104. Furthermore, the Commission has addressed the root causes of refugees, displaced and stateless persons, rightly emphasizing that they are the result of violations of human rights: "persecution, violations of human rights, and infractions of international humanitarian law contribute to forced displacement and the flow of refugees, and to preventing their voluntary, safe return to their homes. To prevent and solve the problem of refugees, it is therefore imperative to protect human rights and humanitarian norms in the countries of origin. Respect for human rights in the countries of destination is also essential to the protection of refugees and stateless persons. The right to nationality is a basic right that is closely allied to other fundamental liberties. Loss of nationality impairs international human rights law and leads directly to forced displacement, exile and stateless status".[79]

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77 In the same report, the Commission stated: "The Commission views with satisfaction the return to their homeland of the refugees and hopes that their rights and the agreements reached between the Government and the refugees are rigorously respected. In this sense the Commission calls the attention of the Government to: a) the necessity of providing all the documents of identification that pertain to them as citizens; b) the registration and certification as nationals of the children born during their tenure as refugees; c) the effective fulfillment of the promise by the Government to postpone for three years the completion of military service for those concerned; and d) the Commission also hopes that the growing climate of 'détente' among the parties involved will be consolidated, and the agents of the State avoid taking any actions that may injure their physical, psychological and moral integrity, or that would discriminate against them". *Ibid., Report on the Situation of Human Rights in Guatemala*, 1993, Chapter VII ("The situation of refugees and displaced persons in Guatemala and their human rights").

78 *Ibid., Report on the Situation of Human Rights in Haiti*, 1995, Chapter IV ("Refugees, Boat People"), paragraph 239.

79 Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission of Human Rights*, 1993, Recommendation 10.
Concerning statelessness, the "Commission notes the changing political context that has left thousands of persons without nationality and without the legal protection of any State. The 1954 Convention dealing with the status of stateless persons provides a legal framework for dealing with legal stateless residents. The objective of the 1961 Convention on the Reduction of Statelessness is to reduce statelessness in general. The Commission therefore recommends to the member States that have not yet done so that they incorporate the conventions on statelessness into their domestic legislation as to make a concrete contribution to strengthening the international system for the protection of this extremely vulnerable group". *Ibid*.

105. Finally, the Commission has deemed appropriate to make a recommendation in a case of diplomatic asylum, establishing a link with the Latin American system. In the Commission's opinion, "the purpose in seeking asylum, territorial as well as diplomatic, is to safeguard the liberty, security and physical integrity of persons. Asylum can be sought by an individual who considers himself to be the object of persecution, even though its grant corresponds to the State…, but the Commission considers that prolonged reclusion in a site under diplomatic immunity is also a violation of the liberty of the asylee and it becomes an excessive sanction".[80]

4.3 Decisions taken by the Inter-American Court of Human Rights

106. The Court has a number of decisions concerning violations of human rights can have a direct impact on refugees and displaced persons. For example, when it emphasized the obligation of States to adopt measures that "ensure the free and full exercise of the rights recognized in the [American] Convention to every person under its jurisdiction. This obligation implies the duty of State Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the State must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible to attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation".[81]

107. This decision of the Court is applicable to refugees and displaced persons in a preventive sense, because by having a regime respectful of human rights, individuals do not have the need to seek protection in another country (refugees), or in another part of their own country (internally displaced). But the Court goes beyond prevention through the effective respect and exercise of human rights, and considers that in case of violation victims have a right to reparation, which also applies to persons who have had to become refugees or internally displaced persons.

108. In the same judgment, the Court emphasized the importance of the behavior of the State: "the obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation – it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights". The Court goes further and states that the Convention is violated "whenever public power is used to infringe rights recognized therein", and then refers to the responsibility of the State for violations committed by agents which are not its own: "An act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international

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80 Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Argentina,* 11 April 1980, p. 183. Unofficial translation from the text in Spanish.
The Commission was referring to the case of former Argentinean President Héctor Cámpora, his son Héctor Pedro Cámpora and Juan Manual Abad Medina who remained several years in the Mexican Embassy in Buenos Aires because the Argentinean military Government refused to issue a safe-conduct for them to leave the country. Serrano Migallón, Fernando, *El asilo político en México*, Editorial Porrua, México, 1998, p. 193.

81 Inter-American Court of Human Rights, *Velasquez Rodriguez Case, Judgment of July 29, 1988*, paragraph 166.

responsibility of the State , not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention". This position is important when considering issues related to refugees and internally displaced persons because it refers to agents of persecution. Indeed, in many instances the agents of persecution do not belong to the State but to armed opposition groups, for example. In any case, for the Court States are also responsible in these cases because of their "lack of due diligence to prevent the violation or to respond to it"[82] (see paragraph 23).

109. The Court has also adopted provisional measures in cases of expulsion of foreigners; important because when such measures are taken in some cases they may affect refugees or asylum seekers. It adopted such measures, for example, on August 18, 2000, in the case of Haitians being expelled from the Dominican Republic. It considered that while policy concerning immigration is the attribute of the State, it must "be compatible with the human rights protection rules established in the American Convention".[83] The Court required the State, *inter alia*, "to abstain from deporting or expelling" the persons in question from its territory, to "permit the immediate return to its territory" of two other persons who had been deported, to permit "within the shortest possible time, the family reunification" of a separated family, and to collaborate with a named individual "to obtain information on the whereabouts of his next of kin".[84] The Court adopted similar measures and for the same reasons on 14 September 2000.[85]

110. It has also adopted provisional measures to prevent persons from having to flee their place of origin in order to find protection. This is the case of the Peace Community of San José de Apartadó, Colombia, which declared itself neutral in the conflict and was "the object of serious acts of violence and harassment by paramilitary groups in the area". The Court required, *inter alia*, "the State of Colombia to extend, forthwith, any measures as may be necessary to protect the lives and personal integrity of all the…members of the Community of Paz de San José de Apartadó", to take measures to guarantee that the people "may continue living in the usual place of residence", and "to guarantee the conditions necessary for the people of the Community of Paz de San José de Aparatadó who had been forced to move to other areas of the country to come back

82 *Ibid.,* paragraphs 171 and 172.
The Court also considers measures to prevent violations of human rights: "This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party. Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures. On the other hand, subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or those facts cannot be proven in a concrete case". *Ibid.,* paragraph 175.

83 Inter-American Court of Human Rights, *Order of the Inter-American Court of Human Rights of August 18, 2000, Provisional Measures requested in the matter of the Dominican Republic*, Case of Haitian and Haitian Origin Persons in the Dominican Republic, considerations, paragraph 4.

84 *Ibid.,* Decisions, paragraphs 1 to 5, inclusive.

85 *Resolution of the President concerning Provisional Measures taken by the Court*, 14 September 2000.

to their homes".[86] These measures are extremely important because they seek to prevent internal displacement and to solve the situation of those who were already internally displaced by allowing them to return to their community.[87]

111. The Court has also had to deal with issues concerning nationality and statelessness, for example, when the Peruvian Government decided to cancel the nationality of a naturalized citizen of Israeli origin, who was majority owner of a local TV channel which was critical of the Fujimori regime, and, as the law required that nationals own such media, he lost his property. On 21 November 2000, the Court adopted measures calling on the Peruvian Government to protect the individual's physical, psychical and moral integrity, as well as that of his wife and daughters. As the case went before the Court, the Peruvian Government declared that it was withdrawing its recognition of the contentious jurisdiction of the Court, which the Court found to be inadmissible.[88] In its final judgment, the Court found, *inter alia*, that the Government had violated the individual's right to nationality, violated his right to private property, ordered the State to help him recover his property, to pay him USD 20,000 as moral reparation and USD 50,000 to cover legal fees.[89]

112. Finally, the Court has considered, in an advisory opinion, the right of foreigners to consular assistance. It decided unanimously "that Article 36 of the Vienna Convention on Consular Relations confers rights upon detained nationals, among them the right to information on consular assistance, and that said rights carry with them correlative obligations for the host State".[90] This opinion is certainly important for the protection of foreigners, but it led to some confusion concerning foreigners that were asylum seekers and were running away from their government. In at least one country, following the opinion of the Court, authorities automatically took all detained foreigners to their country's consulate and it took a great deal of effort on UNHCR's part to impress the importance of not doing so in the case of asylum-seekers.[91]

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86 Inter-American Commission of Human Rights, *Provisional Measures Requested in the Matter of the Republic of Colombia*, Peace Community of San José de Apartadó Case, 24 November 2000, paragraphs 3, 5 and 6, respectively.

87 Concerning the principle of *non refoulement* and internally displaced persons, it was included in the Guiding Principles on Internal Displacement prepared by the Representative of the Secretary General on Internal Displacement, Dr. Francis Deng. The statement of the President of the Inter-American Court of Human Rights also highlights the importance of this principle. While considering that it is the cornerstone of refugee law, part of custom law and even *jus cogens*, he added that it can be invoked also in different contexts, such as the mass-expulsion of illegal migrants and other groups. This is an important interpretation of the principle of *non refoulement* which considerably broadens its scope of application. Cancado Trindade, Antonio Augusto and Ruiz de Santiago, Jaime, *La Nueva Dimensión de las Necesidades de Protección del Ser Humano en el Inicio del Siglo XXI*, UNHCR, San José, Costa Rica, 2001, footnote No. 5.

88 Inter-American Court of Human Rights, Ivcher Bronstein Case, *Competence Judgment of September 24, 1999*, 1999, paragraph 1 b.

89 Inter-American Court of Human Rights, Caso Ivcher Bronstein, *Sentencia de Fondo del 6 de febrero de 2001*.

90 Inter-American Court of Human Rights, Advisory Opinion, *The Right to Informatoion on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, OC-16, 1 October 1999, decisions, paragraph 1.

91 This was the case, for example, in a country in which the authorities actually took an Iranian Bahai asylum seeker to the Iranian Consulate. It took great effort to convince them not to do so in such cases because the asylum seekers feared persecution from the government. In a conversation with the President of the Court, Dr. Antonio Augusto Cancado Trindade, he stated that in the opinion of the judges it had not been necessary to specify exceptions for asylum seekers, but that based on such examples it might have been useful to add an exception. This conversation took place in San José, Costa Rica, in March 2001.

V. CONCLUSIONS AND RECOMMENDATIONS

113. The different Latin American instruments on asylum worked while the political reality in Latin American countries corresponded to the experience which gave rise to the practice of territorial and diplomatic asylum, and to their development and codification. Toward the nineteen-sixties and seventies, due to, for example, the events that took place in South America (Chile, Argentina, Uruguay), it became evident that these instruments no longer responded to the new political, social, economic and ideological reality. It was then that UNHCR became fully involved in Latin America, and of course, applied the universal instruments.[92]

114. During the second half of the seventies, refugee problems shifted to the Central American region. Again, it became clear that the Latin American instruments could not address this situation, and the United Nations system began to operate fully in the region.

115. New events surpassed the system developed to deal with individual cases, generally of recognized politicians with their own means of subsistence. The new events gave rise to large numbers of refugees, in some cases entire communities, without the means to subsist in a foreign country, with documentation problems and dispersed families, often persons who were not known or recognized as politicians in their own countries.

116. The Latin American system lacks an international body to oversee its application, as is the case of UNHCR in the United Nations system. In the Latin-American system, the Pan-American Union and later the Organization of American States (OAS) have served only as depositories, and thus the application of these instruments is left totally to the discretion of State parties. It also lacks an independent body with recognized authority on protection, recognition of asylee and refugee status, or assistance, as in the case of UNHCR in the United Nations system. On the other hand, the Inter-American system established by the American Convention of Human Rights has the Commission and the Court of Human Rights.

117. Modernizing the Latin American system so that it could respond to the new reality is one possibility that has led to long discussions and numerous studies. But it should be borne in mind that "now, looking at the problems the Inter-American system faces, among them the dual legal systems as a result of the Caribbean States entering [the OAS] and the political discrepancies which would be particularly acute in subjects such as territorial asylum, extradition and refuge, one cannot seriously consider the possibility of drafting a new text, the success of which would be measured in terms of signatures and ratifications, to update, modernize and provide a new opportunity for the institution of asylum in America."[93]

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92 See Galindo Vélez, Francisco, *Consideraciones sobre la protección de refugiados a cincuenta años de la fundación del ACNUR*, Derechos Humanos y Refugiados en América Latina: Lecturas seleccionadas, Instituto Interamericano de Derechos Humanos y Alto Comisionado de las Naciones Unidas para los refugiados, San José, Costa Rica, 2001, pp. 105-120.

93 Héctor Gross Espiel, "El derecho internacional americano sobre asilo territorial y extradición en su relación con la Convención de 1951 y el Protocolo de 1967 sobre el Estatuto de los Refugiados", *Asilo y Protección Internacional de Refugiados... op. cit.,* p. 74.

118. There has also been a great deal of discussion about finding practical ways to make the UN system and the Latin American system work together as the latter, for example, contains important provisions concerning extradition which could reinforce the former. In practice, however, complementarity has proved to be difficult, if not impossible to achieve. The problem resides in that the Latin American system is in fact confidential because few States make the effort to inform public opinion about the cases they consider under it in any given year. To find practical ways to make the systems complementary, openness is required on the part of States, since lacking this, the treaties are known to be in force, but it is not known how or when they are applied.

119. Transparency in their application, with timely information provided to public opinion, would make the system more tangible and closer to people, and not something dark and distant. At present, States do determine when it is appropriate to use one system as opposed to another, for example, when to consider a person under the Latin American system rather than the UN system.[94] But again, it is a State initiative and not one that can be undertaken, suggested or even observed by an international body or civil society. Thus, complementarity, although wished by many, has proven not to be realistic, at least thus far.

120. For its part, the UN system in Latin America can continue to be strengthened by the work of the Inter-American Commission and the Inter-American Court. The question of supervision, for example, despite the fact that it is included in the international refugee instruments, is something that UNHCR is not able to carry out to the fullest, because the reaction of States may have practical implications for the protection of refugees. Thus, both the Latin American and the UN systems can benefit from the work of Inter-American Commission and the Inter-American Court of Human Rights.

121. To achieve this objective, it may be appropriate to revive the recommendation that the Commission made to the General Assembly of the OAS in the sense of creating an Inter-American authority to "work closely" with the UN High Commissioner for Refugees (UNHCR). As recommended by the Commission, the purpose of such an authority would not be to duplicate the efforts of the UNHCR, but rather to work closely with that UN agency in achieving its purposes and objectives for the protection of refugees and displaced persons.[95] Clear measures would have to be adopted to avoid duplication, as it makes no sense to have a sort of regional UNHCR. Such a regional authority could, by working closely with UNHCR, contribute to making complementary work effective and to suggest measures to States on how to improve asylum in Latin America. At present there is no such body in this region of the world and efforts are dispersed or simply not undertaken because it is not clear where to start. This regional body, working together with UNHCR, could coordinate new and on-going activities that lead to complementarity of the systems in actual practice. These could include:

94 Mexico, for example, decided in 2000 to consider a former Ecuadorian government Minister who worked with the Mawad Government, under Latin American instruments rather than under the UN system. As the individual had been in contact with the UNHCR office in Mexico City, the Vice Minister of Interior (*Gobernación*) called UNHCR to inform it of the Government's decision and to request that UNHCR stop considering the case. It is not clear whether the person in question would have been considered under the UN instruments as he was accused in his home country of embezzlement and of using his post to improve his personal finances.

95 Inter-American Commission of Human Rights, *Annual Report 1993*, Chapter V.

(a) Continue the work of the Inter-American-Commission and the Inter-American Court as their decisions have a direct impact in terms of individuals who seek asylum, in terms of improving the asylum regime and in terms of recalling the right of individuals to seek asylum. Furthermore, their decisions also have an impact in terms of statelessness and the right of individuals to a nationality. Bringing cases to the attention of the Commission and the Court is in the interest of an organization such as UNHCR, as they strengthen the asylum regime and fill an important gap, although partial as has been seen, of the UN system, namely, its supervisory role of the application by States of the provisions of the international refugee instruments. The decisions of the Court have the added advantage of being obligatory for States.

(b) Publicize and disseminate the complementary work being achieved, in terms of measures taken by the Commission and the Court to protect refugees, stateless persons, internally displaced persons, etc. The Commission and the Court could work together with UNHCR to publicize the work being done by both systems in a complementary manner and carry out joint training of government officials, NGOs, etc., to inform them about this work and create awareness. In some countries in Latin America training and capacity building are endless and frustrating tasks because of the high turn over of Government officials, which means that every time there is a change, these activities have to start again from zero. The American Convention, however, needs to be ratified by more countries in the Continent and more countries have to recognize the jurisdiction of the Court. Only in this manner will it become a Continent-wide instrument.

(c) Open the Latin American system to public scrutiny so that civil society is aware of how it is applied and can participate in it by making recommendations for its improvement. The days when everything could be kept confidential alleging the *raison d'état* are now over and the Latin American countries could make take an important step in opening their system to public scrutiny. In this manner, realistic and practical ways could be found to make it complementary with the UN system and the Inter-American human rights system. The complementary use of the three systems can put Latin America at the forefront of refugee protection. There is progress, but more coordination is necessary.

(d) Use diplomatic asylum, unique to the Latin American system, to provide protection in Latin America to those persons who are not able to leave their countries and reach another State. Such use would considerably broaden the scope of protection in Latin America, compared to other regions of the world.

(e) In the absence of a new Latin American convention that would cover both diplomatic and territorial asylum, develop, through guidelines for States, one regime out of the provisions of the many treaties now in force and include recommended measures for their application.

122. In any case, asylum in Latin America needs the strict application of provisions established in the existing treaties, whether regional or universal in scope. This necessarily leads to the relationship with the law, not the content and nature of the law, as much as the application of the law. While the situation differs in each Latin American country, in many countries there has been a fundamental gap between the written law and its application. It has been tradition, in many countries, to adopt laws and constitutions which are truly good and even excellent, but which are not applied in practice. This relationship with the law is the same whether it refers to domestic legislation or

international treaties. In practice, law has been used to support the government in power rather than as an instrument of justice. Progress has been achieved, but there is still a long road ahead to reach societies based on the rule of law, as opposed to societies based on power, which has been the tradition. International pressure has been essential and will continue to be so if more progress is to be achieved. Thus, the oversight and decisions of Inter-American bodies such as the Commission and the Court are of the utmost importance and the international community and national societies should insist on the application of the said decisions.

San Salvador, October 2004

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BLANCA254

DOCTRINAL REVIEW OF THE BROADER REFUGEE DEFINITION CONTAINED IN THE CARTAGENA DECLARATION

September 2004

Antonio Fortín

FOREWORD

This study has been commissioned by the Office of UNHCR under the following terms of reference:

> The consultant will review relevant international instruments, opinions and decisions from international supervisory bodies, including the UN Human Rights Commission and human rights organs of the Inter-American system, and UNHCR doctrine in order to identify norms and principles which may be relevant to the interpretation and application of the enlarged refugee definition contained in the 1984 Declaration of Cartagena; and,

The first section will review the efforts made at regional level since the mid 1960s to ensure international protection to certain categories of refugees not covered by the protection regime instituted under the 1951 Convention and 1967 Protocol. The second section will review the Inter-American instruments on asylum, refugee protection, as well as the humanitarian law instruments to which Latin-American countries have adhered, with a view to identifying rules and/or principles which may be useful for, may provide guidance to, or may inform the interpretation of the enlarged refugee definition. The third section will examine the constitutive elements of the Cartagena definition. The fourth and fifth sections will respectively consider exclusions and cessation of refugee status under the Cartagena definition. Finally, the sixth section will examine other issues relevant to the determination of refugee status under the Cartagena definition, including those of internal flight alternative, cancellation of refugee status, the status of members of the family of Cartagena refugees, and the procedures for the determination of Cartagena refugee status.

1. GENESIS OF THE BROADER REFUGEE DEFINITION

(a) The 1951 United Nations Convention's regime and the protection gap

The expression "war refugees" is sometimes used to refer to people who have fled their countries to escape serious threats to their life or security arising in the context of war or conflicts. The legal position regarding the applicability of the 1951 Convention to this category of refugees is stated in paragraphs 164 to 166 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereinafter "the UNHCR Handbook"). Paragraph 164 states that

> "[p]ersons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol".

Paragraph 165 goes on to say:

> "However, foreign invasion or occupation of all or part of a country can result –and occasionally has resulted– in persecution for one or more of the reasons enumerated in the 1951 Convention. In such cases, refugee status will depend upon whether the applicant is able to show that he has a "well-founded fear of being persecuted" in the occupied territory and, in addition, upon whether or not he is able to avail himself of the protection of his government, or of a protecting power whose duty it is to safeguard the interests of his country during the armed conflict, and whether such protection can be considered to be effective".

And in connection with the latter requirement (the availability of protection), paragraph 166 remarks that:

> "[p]rotection may not be available if there are no diplomatic relations between the applicant's host country and his country of origin. If the applicant's government is itself in exile, the effectiveness of the protection that it is able to extend may be open to question. Thus, every case has to be judged on its merits, both in respect of well-founded fear of persecution and of the availability of effective protection on the part of the government of the country of origin".

It should be noted that the position reflected in the above paragraphs was set out by the very drafters of the Convention at the 1951 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.[1] During the discussion of the draft article on non-discrimination, the President of the Conference recalled that part of the language contained in that text had been inserted by the Ad Hoc Committee on Refugees and Stateless Persons[2] "in order to provide for cases of mass movements of populations across a frontier, for instance, in time of war", and went on to say that "[i]t might well be that among all the persons fleeing from such peril, some might be refugees as defined in the Convention".[3] Also, during the discussion of the refugee definition formulated in draft Article 1(A) 2, the delegate of Israel, Mr. Robinson, stressed that that text "obviously did not refer to refugees from natural disasters, for it was difficult to imagine that fires, floods, earthquakes or volcanic eruptions, for instance, differentiated between their victims on the grounds of race, religion or political opinion. Nor did that text cover all man-made events. There was no provision, for example, for refugees fleeing from hostilities unless they were otherwise covered by Article 1 of the Convention".[4]

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1 The Conference of Plenipotentiaries, where the 1951 Convention was adopted, was convened by resolution 429(V) of 14 December 1950 of General Assembly of the United Nations and was held in Geneva from 2 to 25 July 1951.

2 This Committee, consisting of representatives of thirteen Governments, was appointed by ECOSOC (resolution 248 (IX) B of 8 August 1949), to consider the desirability of preparing a Convention relating to the international status of refugees and stateless persons and, in the affirmative, to draft the text of such a convention.

3 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Fourth Meeting, UN Doc. A/CONF.2/SR.4, p.18.

4 Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Twenty-Second Meeting, UN Doc. A/CONF.2/SR.22, p.6.

An assertion to the same effect is found in Conclusion No. 74 (XLV) of 1994 of the Executive Committee of UNHCR's Programme (EXCOM), where it is stated that "persons who are unable to return in safety to their countries of origin as a result of situations of conflict may or may not be considered refugees within the terms of the 1951 Convention and 1967 Protocol, depending on the particular circumstances".

It is apparent from the above that, in the case of refugee movements arising in the context of war or conflicts, the criterion to differentiate between 1951 Convention refugees and other persons in need of protection is the nature of the threat which the persons concerned are fleeing from. While 1951 Convention refugees are people fleeing persecution, the other category of refugees are exclusively fleeing the indiscriminate effects of violence. This point was made by UNHCR in the Note on International Protection submitted to the 1994 session of EXCOM; in that Note it was stated that

> "[t]he lack of a complete correspondence between the categories of persons covered by the 1951 Convention and the 1967 Protocol and the broader class of persons in need of international protection is not simply a matter of a broad or narrow interpretation of the elements of the refugee definition ... However liberally its terms are applied, some refugees fleeing the civil wars and other forms of armed conflict that are the most frequent immediate causes of refugee flight fall outside the letter of the Convention. Although many refugees from armed conflict do have reason to fear some form of persecution on ethnic, religious, social or political grounds at the hands of one or more of the parties to a conflict, others typically are fleeing the indiscriminate effects of armed conflict and the accompanying disorder, including the destruction of homes, harvests, food stocks and the means of subsistence, with no specific element of "persecution". While it is clear that such victims of conflict require international protection, including asylum on at least a temporary basis, they clearly do not fit within the literal terms of the 1951 Convention refugee definition as it has been generally applied for the past forty years".[5]

The emphasis on the indiscriminate nature of the threat is essential here because, as UNHCR has also pointed out, "[p]ersecution always involves some form of discrimination. Victims of persecution are targeted because they have a particular racial or national background, or because they hold certain religious beliefs or political opinions, or because they are members of a particular social group".[6] Conversely, if a town is shelled in the course of an armed conflict, it is quite possible that among those affected by this action there may be persons of different religions, of different ethnic backgrounds, of different political opinions and of different social groups; those persons would not be in a position to make valid claims for refugee status under the 1951 Convention based exclusively on the harm befalling them as a result of that action, because the discriminatory element inherent in the notion of persecution would be missing.[7]

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5 UN Doc. A/AC.96/830 of 7 September 1994, para.30.

6 1998 Note on International Protection, cited above.

7 One important point must, however, be made to avoid misunderstandings regarding this issue. As has been stressed both by UNHCR and EXCOM, some wars (or some specific acts of violence carried out in the course of them) may be in themselves persecutory –hence, may provide basis for refugee claims under the 1951 Convention. This idea is for instance set forth in UNHCR's 1998 Note on International Protection, which states that "[w]ar may well be the very instrument of persecution, the method chosen by the persecutors –whether part of the State apparatus or not– to repress or eliminate entire groups of people because of their ethnicity or other affiliations"; the idea is also present in EXCOM Conclusion No. 85 (XLIX) of 1998, EXCOM, which expresses "deep concern about the increasing use of war and violence as a means to carry out persecutory policies against groups targeted on account of their race, religion, nationality, membership of a particular social group, or political opinion". A very clear exemplification of the above is found in UN General Assembly resolution 48/143 of 20 December 1993, by which the Assembly expressed "its outrage that the systematic practice of rape is being used as a weapon of war and an instrument of "ethnic cleansing" against the women and children in the areas of armed conflict in the former Yugoslavia, in particular against Muslim women and children in Bosnia and Herzegovina".

In the same vein, the 1995 Note on International Protection of UNHCR states: "[i]t is recalled that in many situations, persons fleeing conflict may also be fleeing a well-founded fear of persecution for Convention reasons. This is the case, for example, when a segment of the population is targeted by government or non-government forces due to their ethnic, religious or political affiliation. Persons fleeing or remaining outside a country for reasons pertinent to refugee status qualify as Convention refugees, regardless of whether those grounds have arisen during conflict".[8] And, while acknowledging that the 1951 Convention does not address the protection needs of persons leaving their countries to escape indiscriminate violence arising in the context of war and conflicts, UNHCR's paper "*The 1951 Convention relating to the Status of Refugees. Its Relevance in the Contemporary Context*" of 1 February 1999, stresses that "[e]ven in war or conflict situations persons may be forced to flee on account of a well-founded fear of persecution for Convention reasons", and adds that "[t]here is no doubt that actual or potential victims of persecution in the context of war or conflict should, in principle, be considered as refugees under the 1951 Convention and 1967 Protocol".

The distinction between targeted violence and indiscriminate violence has also been acknowledged by the General Assembly of the Organization of American States and by the Inter-American Commission on Human Rights. Thus, in resolution 1043 (XX-0/90), on "Consequences of Acts of Violence Perpetrated by Irregular Armed Groups on the Enjoyment of Human Rights", the General Assembly referred to "the increase in indiscriminate and selective violence perpetrated by irregular armed groups in some states of the hemisphere", and in its Annual Report for 1990-1991, the Commission stated the following:

> "In some countries of the hemisphere, violence has taken a serious turn for the worse and, by extension, has taken a toll on the people's rights. Some of the violence has political connotations, while in other cases it is the result of increased activity on the part of organizations engaged in common crime whose illicit activities have enabled them to arm themselves with everything they need to take on the State's security forces.
> There is nothing new about this brand of indiscriminate violence or politically motivated violence ... In certain situations, the scale of the conflict is that of an armed struggle in which a group of irregulars may come to control pieces of territory. In the course of the conflict, indiscriminate or selective violence may also be used. Such violence may affect persons not directly involved in the armed struggle or who have ceased to be involved in it".

(b) Filling the gap by means of regional arrangements

(i) The Organization of African Unity

The plight of the new category of internationally displaced above referred to, was dramatically brought home to the international community during the wars of liberation and decolonization that erupted in the African continent in the late 1950s and early 1960s. These events were attended by large-scale refugee movements composed not only of persons fleeing persecution for 1951 Convention reasons, but also of persons fleeing the indiscriminate effects of violence arising in that context. While persons in the latter category could be assisted by UNHCR by virtue of various resolutions of the General Assembly,[9]

8 UN Doc. A/AC.96/850 of 1 September 1995, para.11.

9 Cf. for instance resolution 1286 of 1958 and resolution 1500 of 1960, relating to refugees from Algeria in Morocco and Tunisia, and resolution 1671 of 1961 relating to Angolan refugees in the Congo. At a later stage the General Assembly authorized UNHCR not only to assist people displaced by war and conflict -the so-called them "victims of man-made disasters"- but also to extend them protection.

they were not covered by the 1951 Convention and 1967 Protocol and, hence, were in a precarious position from the protection standpoint.

This situation led the Council of Ministers of the Organisation of African Unity to establish in 1964 an ad hoc Commission on Refugees, tasked with studying the problem of refugees in Africa and making recommendations to the Council as to ways to addressing it. The Commission produced a draft refugee convention known as the "Kampala draft". That text was reviewed in 1965 by a Committee of Legal Experts nominated by the Commission. The result of this revision, which came to be known as the "Leo draft", was shared with Member States for comments and the Committee continued working in the elaboration of a draft instrument.

In 1967 the Council of Ministers, meeting at Kinshasa, adopted a resolution instructing the Committee of Legal Experts to draft a declaration on the specific aspects of the problem of African refugees. The issue was also examined in Addis Ababa in October 1967, at a Conference co-sponsored by the United Nations Economic Commission for Africa, the United Nations High Commissioner for Refugees, the Organisation of African Unity and the Dag Hammarskjöld Foundation. There was agreement at that Conference that, while the refugee definition contained in the 1951 Convention and 1967 Protocol was "for the most part adequate to cover African refugee situations", it was not wide enough and "should be supplemented by a declaration, within the context of the OAU, setting out all the specific aspects of African refugee problems".[10]

The final draft prepared by the Committee of Legal Experts was reviewed by the Council of Ministers in February 1969. The resulting text was then referred to the 6th ordinary session of the Assembly of Heads of State and Government, held in Addis Ababa in September 1969, and on the 10th of that month the Assembly adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa.

Article 1 of that Convention provides a definition of the term "refugee" which encompasses people fleeing persecution as well as fleeing war and conflict with no specific element of persecution. Indeed, while the first paragraph of that article reproduces the general definition laid down in Article 1(A)(2) of the 1951 United Nations Convention, as complemented by the 1967 Protocol, the second paragraph adds:

> "The term "refugee" shall also 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".

Article 1 of the OAU Convention also makes provision for cessation of, and exclusion from refugee status.

The cessation clauses are contained in paragraph 4, which reads:

"This Convention shall cease to apply to any refugee if:

10 Conference on the Legal, Economic and Social Aspects of African Refugee Problems, 9-18 October 1967, Final report, paras.75 ff.

(a) he has voluntarily re-availed himself of the protection of the country of his nationality, or,
(b) having lost his nationality, he has voluntarily reacquired it, or,
(c) he has acquired a new nationality, and enjoys the protection of the country of his new nationality, or,
(d) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution, or,
(e) he can no longer, because the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality, or,
(f) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or,
(g) he has seriously infringed the purposes and objectives of this Convention".

The exclusion clauses are set out in paragraph 5, which reads:

"The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that:
(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the Organization of African Unity;
(d) he has been guilty of acts contrary to the purposes and principles of the United Nations".

As can be seen, the above provisions depart in some respects from the corresponding ones of the 1951 Convention. Perhaps the most significant of those departures is the clause of the OAU Convention providing that that instrument shall cease to apply to any refugee who has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee;[11] this is not a cessation clause under the 1951 Convention.

(ii) The Latin-American response

Wars, civil conflicts, violence and political upheaval in El Salvador, Guatemala and Nicaragua in the decade of the eighties triggered an unprecedented scale of forced human displacement. UNHCR estimates that some two million people were uprooted by these events –a proportion of whom remained internally displaced, and others fled to other Central American countries, including Honduras, Mexico, Costa Rica, Belize and Panama, as well as to the USA and Canada.[12]

11 Article 1(4)(f) of the OAU Convention.
12 UNHCR. The State of The World's Refugees 2000. Fifty Years of Humanitarian Action, Oxford University Press, 2000, p.121 ff.

As had been the case in Africa in the previous decade, many of those forcibly displaced people had not left their homelands because of fear of persecution, but to escape the dangers concomitant to the armed struggle. Accordingly, they did not fall under the scope of the 1951 Convention and 1967 Protocol and lacked a defined international legal status.

To address this legal vacuum, a "Colloquium on the Right of Asylum and the International Protection of Refugees in Latin-America" was jointly organized by the Diplomatic Academy of the Mexican Ministry of Foreign Affairs (the Matias Romero Institute) and the Institute of Legal Research of the Autonomous National University of Mexico, with the auspices of UNHCR. The event was held in Mexico City in May 1981. One of the recommendations adopted by the Colloquium was that the protection accorded to refugees by universal and regional instruments should be extended to also cover persons fleeing their country "because of aggression, foreign occupation or domination, massive violation of human rights or events seriously disturbing public order in either part or the whole of their country of origin".[13]

Moreover, concern about the grave humanitarian problems posed by the large-scale refugee movement unfolding in the region was forcefully expressed by the Inter-American Commission on Human Rights in its Annual Report for 1980-1981. The Commission said that the "epidemic of violence" prevailing in several countries of the region had produced, as a secondary effect, a phenomenon of the displacement of persons which was truly alarming in its magnitude. The Commission affirmed that "[t]he Organization of American States has an obligation to contribute to the solution of problems deriving from the displacement of persons and to support the observance of international legal principles such as non-refoulement and, a derivative there from, the prohibition of rejecting people in flight at the border, which have been recognized as fundamental by several international instruments and recently reiterated by the colloquium on asylum and international protection of refugees in Latin America, held in Mexico City from the 11 through 15 of May, 1981", and recommended that the General Assembly "establish the necessary mechanisms so that the corresponding organs of the OAS, including the IACHR, define the juridical norms which are required for the assistance and protection of refugees".[14]

In its next Annual Report, the Inter-American Commission analysed the subject in greater detail and made further recommendations to the General Assembly. One of those recommendations was that the Organization should adopt a definition of the term "refugee" along the lines recommended by the 1981 Colloquium, referred to above.[15]

Although the OAS General Assembly did not deem appropriate at that time to take action on the Commission's recommendations, the perception that there was a need to broaden the scope of the refugee protection regime in the region had, by then, gained momentum. With this objective in mind, a "Colloquium on International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems" was organized jointly by UNHCR, the Law School of the Universidad de

13 ACNUR, Compilación de Instrumentos Jurídicos Internacionales: Principios y Criterios relativos a Refugiados y Derechos Humanos, 1992, vol.I, p.362 ff. (my translation).

14 Annual Report of the Inter-American Commission on Human Rights 1980-1981, OEA/Ser.L/V/II.54, Doc. 9 rev. 1 of 16 October 1981.

15 Annual Report of the Inter-American Commission on Human Rights 1981-1982, OEA/Ser.L/V/II.57, doc. 6 rev.1, 20 september 1982.

Cartagena de Indias and the Regional Center for Third World Studies (COCSET), under the auspices of the Colombian Government. The Colloquium took place in Cartagena de Indias in November 1984, with the participation of governmental and non-governmental experts from Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru and Venezuela. The outcome of the Colloquium was the "Cartagena Declaration on Refugees".

The Declaration deals with a wide range of issues, including the refugee definition; the right of asylum; accession to the 1951 Convention/1967 Protocol and their implementation at national level; promotion of refugee law and principles; minimum standards of treatment; durable solutions; military attacks on refugee camps; cooperation with UNHCR; and internally displaced persons.

The Declaration recalls the conclusions and recommendations adopted by the Colloquium held in Mexico in 1981, acknowledging that it "established important landmarks for the analysis and consideration of this matter" and, on the question of the refugee definition, it reiterates that, "in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights". The Declaration concludes that "the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who 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".

Although the Cartagena Declaration is not a legally binding instrument, it has over time attained a considerable level of recognition, and has significantly influenced both the legislation and the practice of the countries of the region. Furthermore, it has received the endorsement of important international organs and fora. It was, for instance, reflected –and further elaborated– in a document submitted to the 1989 International Conference on Central American Refugees (CIREFCA),[16] entitled "Principles and Criteria for the protection and assistance of Central American refugees, returnees and internally displaced in Latin America".[17] The Conference took note of the importance of that document for the countries of the region and affirmed that it "may constitute a source of information and orientation for all interested States"; the Conference further took note "of the contribution, for the countries of the region, of the Cartagena Declaration on refugees, which amplifies the relevant principles and criteria for the protection of and assistance to refugees in the region and serves as guidance and orientation for those States."[18] The importance of the Cartagena Declaration as an instrument of refugee protection has also been acknowledged by the General Assembly of the Organization of American States,[19] by the Executive Committee of UNHCR[20] and, in a unanimous manner, by States Parties to the 1951 Convention and its 1967 Protocol.[21]

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16 CIREFCA was convoked by the Governments of Costa Rica, El Salvador, Guatemala, Honduras, Mexico and Nicaragua, with the support of the OAS and the UNO. It was held at Guatemala City from 29 to 31 May 1989, with the participation of 52 States and the Holy See.

17 ACNUR, Compilación de Instrumentos Jurídicos Internacionales: Principios y Criterios relativos a Refugiados y Derechos Humanos, 1992, vol.I, p.373 ff.

18 International Conference on Central American Refugees, Report of the Secretary-General, UN Doc. A/44/527 of 3 October 1989 and A/44/527/Corr.2 of 31 October 1989, Annex.

19 Resolution 1273 (XXIV-O/94) of 10 June 1994.

20 Conclusion 77(XLVI) of 1995, para.5.

21 Declaration adopted at the conclusion of the Ministerial Meeting of States Parties to the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol, organized jointly by Switzerland and UNHCR on 12–13 December 2001, to commemorate the 50th anniversary of the Convention (UN Doc. AC 96/965/Add.1 of 26 June 2002).

(iii) The Asian-African Legal Consultative Organization

This international organization (formerly known as the Asian-African Legal Consultative Committee), adopted in 1966, at its 8th Session in Bankok, a set of Principles Concerning Treatment of Refugees. The definition of refugee used in that document reproduced, with only minor changes, the definition of the 1951 Convention.

A revision of that text took place at the 40th Session of the organization, held in New Delhi in the year 2001. That revised version incorporated a new paragraph to Article 1 of the Principles, according to which

> "The term "refugee" shall also 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".

2. OVERVIEW OF INTERNATIONAL INSTRUMENTS

(a) The Inter-American system

Latin-America has a long and quite remarkable tradition of asylum –both in terms of State practice and of international legal instruments– which stretches back to the end of the 19th century.[22]

Among the Inter-American instruments dealing with or containing provisions on asylum are the following:

(1) The Treaty on International Penal Law, signed in Montevideo on 23 January 1889, at the First South-American Congress on Private International Law;
(2) The Treaty for the Extradition of Criminals and for Protection Against Anarchism of 28 January 1902;
(3) The Extradition Agreement, signed in Caracas on 18 July 1911, at the Bolivarian Congress;
(4) The Convention on Asylum, signed in Havana on 20 February 1928, at the Sixth Inter-American Conference;
(5) The Convention on Political Asylum, signed at Montevideo on 26 December 1933, at the Seventh Inter-American Conference;
(6) The Convention on Private International Law signed in Havana on 20 February 1928, at the Sixth Inter-American Conference (Bustamante Code);

22 It should however be noted that the majority of those legal instruments deal with the concept asylum in the sense of international law of extradition, that is to say, as an exemption from extradition established mainly in favour of political offenders. The concept of asylum under international refugee law encompasses three elements: protection from refoulement (including through extradition); permit to remain in the territory at least on temporary basis; and treatment in conformity with international human rights standards. The typical beneficiaries of this form of protection are not the political offenders, but people fleeing either persecution or "man-made disasters".

(7) The Convention on Duties and Rights of States in the Event of Civil Strife, signed in Havana on 20 February 1928, at the Sixth Inter-American Conference;
(8) The Convention on Extradition, signed at Montevideo on 26 December 1933, at the Seventh Inter-American Conference;
(9) The Central American Extradition Convention, signed at Guatemala on 12 April 1934;
(10) The Treaty on Asylum and Political Refuge, signed in Montevideo on 8 April 1939, at the Second South-American Congress on Private International Law;
(11) The Treaty on International Penal Law, signed in Montevideo on 19 March 1940, at the Second South-American Congress on Private International Law;
(12) The American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Bogota, 1948;
(13) The Convention on Diplomatic Asylum, signed in Caracas on 28 March 1954, at the Tenth Inter-American Conference;
(14) The Convention on Territorial Asylum, signed in Caracas on 28 March 1954, at the Tenth Inter-American Conference of 28 March 1954;
(15) The American Convention on Human Rights (Pact of San Jose), signed in San Jose on 22 November 1969, at the Inter-American Specialized Conference on Human Rights; and,
(16) The Inter-American Convention on Extradition, signed in Caracas on 25 February 1981.

The protection accorded by the above regional instruments extends to the following categories of persons:

(1) Political offenders whose extradition has been requested;
(2) Persons accused of having committed common crimes if, in the circumstances, it appears that their position will be negatively affected for reasons of race, religion, nationality or political opinion;[23]
(3) People fleeing persecution for any of the relevant reasons, regardless of whether they may qualify in addition as political offenders or not. Depending on the instrument, those reasons may be exclusively of a political nature[24] or may include the five 1951 Convention grounds.[25]

While it is apparent from the preceding description that refugees under the extended Cartagena definition would not fall under the personal scope of the above-mentioned instruments, there are other elements and principles in those instruments which may prove useful or which may provide guidance to the interpretation of that definition.

As regards exclusions from refugee status it is worth mentioning that Article 3 of the 1939 Treaty on Asylum and Political Refuge provides:

23 Cf. 1940 Treaty on International Penal Law, Article 20(f); 1981 Inter-American Convention on Extradition, Article 4(5).
24 Cf. 1939 Treaty on Asylum and Political Refuge, Articles 2 and 11; 1954 Convention on Diplomatic Asylum, Article 6; 1954 Convention on Territorial Asylum, Article 2.
25 Cf. American Convention on Human Rights, Article 22(8).

> "Asylum shall not be granted to persons accused of political offenses, who shall have been indicted or condemned previously for common offenses, by the ordinary tribunals".

This formulation is interesting insofar as the standard it sets is more favourable to the person than the one found in the equivalent provision of the 1951 Convention. Indeed, while the exclusion of Article 3 of the 1939 Treaty requires that the person has been indicted or condemned by ordinary tribunals, Article 1(F)(b) of the 1951 Convention only requires "serious reasons for considering" that the person has committed a serious non-political crime.

However, from another point of view, the provision of Article 3 of the 1939 Treaty is less favourable to the applicant than that of Article 1(F)(b) of the 1951 Convention. Indeed, unlike the latter provision, Article 3 of the 1939 Treaty does not require that the offence on which the exclusion is based, be a "serious" one.

Although no proper cessation clauses are laid down in the Inter-American instruments, some of their provisions reflect the notion that asylum is temporary measure of protection, which may be terminated when the circumstances that made it necessary, change. Thus, Article 5 of the 1954 Convention on Diplomatic Asylum which provides: "Asylum may not be granted except in urgent cases and for the period of time strictly necessary ... to the end that [the asylee's] life, liberty, or personal integrity may not be endangered". An idea of the type of dangers that would justify the granting and the continuation of asylum is given in Article 6 of that Convention gives; that article states that "[u]rgent cases are understood to be those, among others, in which the individual is being sought by persons or mobs over whom the authorities have lost control, or by the authorities themselves, and is in danger of being deprived of his life or liberty because of political persecution and cannot, without risk, ensure his safety in any other way". The same issue is brought up in the 1939 Treaty on Asylum and Political Refuge; Article 11 of that instrument states that "[t]he grant of asylum does not entail for the State which makes that grant, any obligation to admit the refugees indefinitely into its territory". Moreover, Article 12 implies that subversive activities carried out by asylees against other countries, may lead to termination of asylum.[26]

Mention should finally be made of two important protection principles enshrined in the above regional instruments, namely:

(1) That the obligations that States assume as regards beneficiaries of asylum are not subject to reciprocity; and,
(2) That all persons should have access to protection, irrespective of their nationality.

26 It is worth mentioning, however, that the provision stresses the need to respect the principle of non-refoulement, even in those circumstances; in fact, the article goes on to say that "[d]iscontinuance of the benefits of asylum does not imply authorization to place a refugee in the territory of the pursuing State".

The above principles are reflected in Article 3 of the 1933 Convention on Political Asylum and in Article 20 of the 1954 Convention on Diplomatic Asylum. These articles respectively provide:

"[p]olitical asylum, as an institution of humanitarian character, is not subject to reciprocity. Any man may resort to its protection, whatever his nationality ..."; and,

"asylum shall not be subject to reciprocity. Every person is under its protection, whatever his nationality".[27]

(b) International humanitarian law instruments

Provisions on the protection of refugees are contained in the Fourth Geneva Convention of 12 August 1949, relative to the Protection of Civilian Persons in Time of War and in Protocol I to the 1949 Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts, done on 8 June 1977. Article 44 of the Fourth Geneva Convention states:

> "In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government";[28]

Article 70 of the same instrument provides:

> "[n]ationals of the occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace"; and

27 It is noted that the above provisions on reciprocity go in the same direction as Article 60(5) of the Vienna Convention on the Law of Treaties which provides that, with respect to treaties of a humanitarian character and provisions relating to the protection of the human person, Contracting States cannot terminate the treaty or suspend the operation such provisions on the ground that the treaty has been breached by another Contracting State. As regards the principle of universal access to protection, it is recalled that UNHCR raised strong objections to the Protocol to the Amsterdam Treaty which allows EU Member States to deny EU nationals access to asylum procedures.

28 This provision served as a basis for Article 8 of the 1951 Refugee Convention, which reads: "With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this Article, shall, in appropriate cases, grant exemptions in favour of such refugees".

Article 73 of Protocol I provides:

> "Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction".[29]

As the wording of these provisions indicates, they only apply to persons already enjoying the status of refugees who happen to find themselves in an area of armed conflict. They do not apply to people who have become refugees as a result of the conflict.

It is interesting however to note that a proposal to extend the protection of the Protocol I to this latter category of refugees was made by the delegation of Syria, with the strong support of UNHCR and ICRC, at the Diplomatic Conference where that instrument was adopted. That proposal was considered by a Working Group which took the view that that question should be pursued further as a separate matter and that the text of Article 64 should be adopted as it stood.[30]

At the Conference's 43rd plenary meeting, the delegate of the Syrian Arab Republic, Mr. Abdine, while expressing his regret that the protection granted by the article had not been extended to persons who were forced to flee their homes because of hostilities, noted, "with moderate satisfaction", the suggestion by Committee III "that the sponsors of this proposal may wish to continue their efforts as a matter of the law of refugees, in co-operation with the United Nations High Commissioner for Refugees, and outside the specialised field of the laws of war". Mr. Abdine considered that suggestion to constitute encouragement and authorization by the Conference to pursue the efforts in favour of refugees and to prepare the relevant conventions in collaboration with the UNHCR.[31]

Addressing the Conference on this point, the observer for UNHCR, Mr. Patrnogic, stated that the representatives of the Office of UNHCR and of the ICRC, as well as interested governmental delegations, "had endeavoured to find a satisfactory solution to the problem of extending certain forms of protection to persons obliged to leave their homes because of hostilities, but unfortunately there had not been enough time to reach general agreement". In this regard, he assured the Conference that the Office of UNHCR "was ready to co-operate with interested Governments in any effort connected with the law of refugees".[32]

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29 According to Article 4 of the Fourth Convention, "protected persons" are "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals".

30 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977), Vol.XV, Summary Records of Committee III, 57th meeting, para.9.

31 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977), Vol.VI, Summary Records of the Plenary meetings, 4th session, 43rd plenary meeting, paras.26, 27.

32 Ibid, para.29.

It is worth recalling that one of UNHCR's permanent priorities has been to ensure international protection for people displaced by war and conflict. The Office's participation in the process leading to the adoption of the Declaration of Cartagena, as well as its activities of promoting this instrument in the region, form an important part of its efforts to this end.

3. THE EXTENDED CARTAGENA DEFINITION

(a) About the interpretation of the text

Bearing in mind the particular nature of the Cartagena definition and the fact that it is meant to be a complement to the 1951 Convention definition, it is submitted that its interpretation must be conducted in a flexible and purposive manner –trying to avoid too textual or literal approaches– and should be mainly geared towards ensuring that the outcome is consistent with the principles underpinning the 1951 Convention definition, as well as with general principles of International Refugee Law.

The analysis that follows is in line with this approach.

(b) The elements of the Cartagena definition

When analysing the refugee definition of the 1951 Convention, it is customary to group its various elements into three categories: inclusion, exclusion and cessation clauses.

Although the Cartagena definition only contains inclusion elements, it must be understood that the exclusion and cessation clauses of the 1951 Convention are incorporated in it by reference. This understanding flows from the fact the Cartagena Declaration specifically states that the definition recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes the other ones mentioned above. Moreover, this understanding is consistent with generally accepted principles of international refugee law which, on the one hand affirm the inherently temporary nature of refugee status[33] and, on the other, recognize that, given the special –and somehow unique– character of the international regime for the protection of refugees, certain categories of people may justifiably be excluded from its benefits.[34]

This having been said, since the exclusion and cessation clauses of the 1951 Convention were specifically tailored to the situation of people fleeing persecution, they can only be applied by analogy, and *mutatis mutandi*, to Cartagena refugees. The applicability of each of those clauses to the situation of Cartagena refugees is examined in sections 4 and 5, below.

33 Cf. UNHCR Handbook on Determination of Refugee Status, para.111.

34 The position is different under international law of human rights and under international humanitarian law, where no exclusions from protection are found.

(c) Analysis of the elements of the definition

Three conditions must be satisfied for a person to fall under the scope of the Cartagena definition:

(1) The person must be outside his/her country;
(2) The country in question must be experiencing generalized violence, or foreign aggression, or internal conflict, or massive violations of human rights, or other circumstances which have seriously disturbed public order; and,
(3) The person's life, safety or freedom must be under threat as a result of any of those circumstances –provided, of course, that the threat in question does not constitute persecution under the 1951 Convention.

(i) The persons concerned must be outside their country

As 1951 Convention refugees, Cartagena refugees are people who are outside their countries. Internally displaced persons fall neither under the scope of the 1951 Convention nor under that of the Cartagena definition.

There is a difference, however, in the manner in which this requirement is formulated in these two instruments. While the 1951 Convention refers to persons who, owing to well-founded fear of being persecuted, are outside their country, the Cartagena definition refers to persons who have fled their country because their lives, safety or freedom have been threatened.

The form of words used in the 1951 Convention clearly encompasses both so-called "escapees", i.e. persons who left their country to escape persecution, and refugees *sur place*, i.e. persons who left their country for other reasons and became refugees as a result of later events. Conversely, the language of the Cartagena definition appears to apply only to "escapees".

Notwithstanding this difference, it is submitted that the Cartagena definition should be understood to cover the two categories of refugees referred to above. This submission is based not only the consideration that both categories have the same protection needs –hence there is no reason why they should be treated differently– but also on the fact that it is in line with UNHCR's invariable position to oppose the return of persons to territories affected by serious levels of violence.[35]

35 UNHCR has asserted this position in relation to the return of rejected asylum-seekers of certain specific origins, but it is obvious that it must, *a fortiori*, apply to refugees "*sur place*". Examples include the request UNHCR made to governments in September 1997 to refrain from deporting rejected Algerian asylum-seekers "in the midst of an upsurge of violence in Algeria" (UNHCR Press Release of 18 September 1997); the request made to European governments in March 1998 to stop sending rejected asylum-seekers coming from Kosovo back to the Federal Republic of Yugoslavia, in view of "the dramatic increase in the levels of violence" in that region (UNHCR Press Release of 9 March 1998) –a request which was reiterated in May 1998, in a letter addressed to 15 European Union governments and Switzerland (UNHCR Press Release of 4 May 1998); and the request made to governments in March 2003 to refrain sending rejected Iraqi asylum-seekers back home "in view of current tensions" there (UNHCR Press Release of 11 March 2003) –a request which was reiterated in July 2003 (UNHCR Press Release of 4 July 2003).

It is accordingly submitted that the expression "persons who have fled their country" should be understood as if the text read "persons who have fled or who remain out of their country".

Another difference between the 1951 Convention and the Cartagena definitions concerning this requirement is that the 1951 Convention definition specifies that, for persons who possess a nationality, the relevant country is that of nationality and, for stateless persons is that of habitual residence. Although this distinction is not made in the Cartagena definition, for the sake consistency it must assumed that it equally applies to Cartagena refugees.

(ii) The circumstances or events that bring about the threat

Generalized violence

The expression "generalized violence" (or the similar one "widespread violence") has been used by the Inter-American Commission on Human Rights to describe situations prevailing at certain points in time in some countries of the region.[36] A review of some of those situations may throw light on the meaning assigned to that expression. The following excerpts from some of the Commission's reports are intended to serve this purpose.

> Excerpts from the Annual Report for 1979-1980, Chapter V, section on El Salvador, sub-section 3[37]
> (b) Deaths in confrontations with security forces
> The difficulties experienced by the civilian-military regime in instituting progressive reforms and the unity achieved by the left-wing forces on April 18, 1980, intensified the armed confrontations between the security forces and the member organizations of the united left wing. (...)
> The increasingly frequent armed confrontations occurring all over the country have taken many lives of militants of opposition groups, members of the army and innocent civilians caught in the cross-fire between the two bands. To cite just one example, between March 16-25, 1979, according to one news agency, 140 fatalities were reported in confrontations between the forces mentioned.
> (c) The deaths on the Sumpul River
> On June 24, the Inter-American Commission on Human Rights was informed that an incident had occurred on May 14-15 in the border area of La Arada, where the Sumpul River forms the border separating El Salvador and Honduras. Because of the serious nature of the incident, it is being carefully investigated by the Commission.
> According to information received, approximately 600 peasants from El Salvador (other information places the figure between 300 and 1,500) may have lost their lives as they were trying to cross the border and enter Honduras, as a result of coordinated actions attributable to troops of the Salvadorian Government.

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36 See for instance Annual Report for 1979-1980, Chapter V, section D.2, OEA/Ser.L/V/II.50, Doc. 13 rev.1 of 2 October 1980; Annual Report for 1980-1981, Chapter V, section on Summary Executions, OEA/Ser.L/V/II.54, Doc.9 rev.1 of 16 October 1981; Annual Report for 1982-1983, Chapter III, section 6, OEA/Ser.L/V/II.61, Doc.22 rev.1 of 27 September 1983; Annual Report for 1984-1985, Chapter V, section IV, OEA/Ser.L/V/II.66, Doc.10 rev.1 of 1 October 1985; Annual Report for 1990-1991, Chapter V, section II.5, OEA/Ser.L/V/II.79.rev.1, Doc.12 of 22 February 1991; Annual Report for 1992-1993, Chapter V, section I, OEA/Ser./L/V/II.83, doc.14 corr.1, of 12 March 1993; and Annual Report for 2001, Chapter IV, section on Colombia, OEA/Ser./L/V/II.114, doc.5 of 16 April 2002.

37 OEA/Ser.L/V/II.50, Doc. 13 rev.1 of 2 October 1980.

(d) Homicides charged to the authorities

The Inter-American Commission on Human Rights has received many charges of assassinations attributed to the security forces and paramilitary organizations operating, according to the charges, with the concurrence of national government authorities such as the White Warrior Union, Balance and the now-dissolved ORDEN.

Legal Aid, an office under the Archbishop of El Salvador which defends human rights causes, informed the Inter-American Commission on Human Rights on March 6, 1980, that during February security agencies were responsible for the following assassinations:

(1) In Aguilares and Suchitoto, 70 peasants
(2) In Chalatenango, 50 peasants
(3) In Morazán and La Unión, 41 peasants
(...)

(e) Generalized violence in recent months

The spiral of violence has reached truly alarming levels in El Salvador in 1980. The armed confrontations mentioned earlier by the Inter-American Commission on Human Rights, terrorist assaults by armed groups of the extreme left and the extreme right, the discovery of bullet-ridden, mutilated bodies, and kidnappings of prominent figures are increasing dramatically.

Information received by the Inter-American Commission indicates that during the first nine months of 1980, some 6,000 people were probably killed as a result of the increasing violence in the country.

Excerpts from the Annual Report for 1981-1982, Chapter V, section on El Salvador[38]

2. The right to life continues to be the most breached right. The Commission continues to periodically receive lists of murdered civilians–often as a result of Government repression– who are neither combatants nor are actively involved with the subversive forces. A telling testimony of this situation are the bodies found on daily basis all around the Republic's territory and the discovery of new clandestine cemeteries –the latest of which occurred on 24 May 1982 at a place called Devil's Gate of Panchimalco, where the bodies of more than 150 people would have been buried.

Information possessed by Commission indicates that the average number of victims of political killings in El Salvador during 1982 ranged between 300 persons per month according to reports from the USA Embassy, and 500 persons per month according information compiled by the Legal Aid Office of the Catholic Church and reported by the Associated Press on 26 July 1982. According to the same Church source, 35.000 out of the 4.8 million country inhabitants would have died as a result of political violence in the last three years.

Excerpts from the Annual Report for 1982-1983, Chapter II, section on the Right to Life[39]

The Commission has serious misgivings in regard to the continued climate of violence prevailing in El Salvador, where illegal executions and disappearances of persons have continued. As it pointed out in earlier reports, most of these acts are the work of security forces who are able to act outside the law with impunity, and of paramilitary groups who, in the absence of an effective and appropriate investigation of these crimes, would seem to be acting with the Government's tacit consent.

38 OEA/Ser.L/V/II.57, doc.6 rev.1 of 20 September 1982. My translation from the Spanish text.
39 OEA/Ser.L/V/II.61, Doc.22 rev.1 of 27 September 1983.

According to information the Commission has obtained from various reliable sources, more than 2,000 Salvadorans have perished in the period covered by this report. These figures are still alarming and validate the Commission's insistent concern to have this violence ended and to see that agreements are reached to ensure lasting social peace. (...)
[I]n rural areas and in conflict zones [of Guatemala] (...) severe violations of the right to life chargeable to the Guatemalan Army continue to occur, including the destruction and sacking of villages and bloody killings of both combatants and innocent civilians, particularly among the Indian and farm communities.

Excerpts from the Annual Report for 1983-1984, Chapter IV, section on El Salvador[40]
3. Thus, with respect to the right to life, as is well known and has been detailed by the Commission, the statistics on El Salvador are alarming. It is estimated that the total number of persons who have died as a consequence of the violence reached 50,000, many of them assassinated in the most inhumane way, in acts attributable to the security forces or those that operate with their acquiescence.

Excerpts from the Annual Report for 1983-1984, Chapter IV, section on Guatemala[41]
According to information in the possession of the Commission, the number of recorded cases of disappearances of persons in Guatemala between August 8, 1983 and April 30, 1984 totals 635 cases, which is an average of almost 80 disappearances per month.

Excerpts from the Annual Report for 2001, Chapter IV, section on Colombia[42]
4. To adequately analyse the current situation in Colombia, it is necessary to take into account the dynamics of the armed conflict and the phenomenon of widespread violence, in a context in which, for various reasons, the State's presence in certain areas of the national territory is weak or even nonexistent.
(...)
6. The Commission received information and observed the situation of the civilian population that is a victim of the violence generated by the actors involved in the domestic armed conflict in Colombia. The Commission received testimony from displaced persons and communities from most departments in the country that paints a picture of deplorable acts of violence aimed at terrorizing the civilian population. Those acts, which entail massacres, executions, mutilation, kidnappings, and threats, are directed at peasant men and women, social and political leaders, trade unionists, educators, human rights defenders, and journalists and dramatically affect the most vulnerable sectors of the population, including Black communities, indigenous communities, women, and children. As a result of these actions, in several regions of the country entire populations feel abandoned, given the State's failure or inability to protect its citizens from violence.
7. The Commission observes that many acts of violence against the civilian population are attributable to armed dissident groups; such acts include massacres, indiscriminate and selective summary executions, hostage taking, kidnappings for ransom, indiscriminate use of antipersonnel mines, and recruitment of minor boys and girls. (...) The Commission deplores the serious violations

40 OEA/Ser.L/V/II.63, Doc.10 of 24 September 1984.
41 Ibid.
42 OEA/Ser./L/V/II.114, doc.5 of 16 April 2002.

of international humanitarian law perpetrated by armed dissident groups in Colombia, including kidnapping as a customary means of intimidation for economic or other purposes.
8. The Commission is very concerned about the paramilitary violence reflected in the commission of massacres, selective murders, extortion, and mass displacement for military, economic, or "social cleansing" purposes. The seriousness of the development of paramilitary activity in Colombia cannot be overstated. In fact, it has introduced an element into the conflict and into society that resorts to the extermination of its opponents as a valid way of conducting politics. In addition, the Commission has received numerous complaints regarding the link between paramilitary and criminal activities.

Excerpts from the Annual Report for 2002, Chapter IV, section on Colombia, sub-section II[43]
5. The IACHR observes that the violence derived from Colombia's internal armed conflict and the degradation in the behavior of the parties involved continues to affect compliance with the fundamental rights to life, humane treatment, movement and residence and effective judicial protection. The State acknowledged that the acts of violence perpetrated by criminal organizations, the succession of murders and kidnappings and the profusion of illegal activities are "a threat to the Nation's viability".
(...)
14. Periodically, throughout 2002, the Commission has continued to receive urgent actions, complaints and information of all kinds reporting the repeated violation of the right to life in Colombia. The excesses committed in the context of the internal armed conflict remain a source of gross violations of human rights and of international humanitarian law against the civilian population.
15. The number of casualties of political violence has continued to escalate during the year 2002. Statistics show that while the political violence claimed an average of 10 lives per day in 1988, that figure has increased steadily since; the daily death toll from the political violence in 2002 was expected to reach 20 victims/day.
16. As in years past, a significant percentage of the violations of the right to life were committed during the course of paramilitary attacks against the civilian population with a view to causing terror and forced displacement. In many cases the execution of the victims is preceded by torture and cruel, inhumane and degrading treatment.
(...)
19. The year 2002 has also seen a marked increase in violations of international humanitarian law committed by armed dissident groups, chiefly the FARC. These groups have been involved in numerous assaults, massacres, extrajudicial executions, attacks and threats against the civilian population.
20. In their attacks, the armed dissident groups have violated basic principles of international humanitarian law, such as target discrimination and proportionality, and have inflicted numerous casualties among the civilian population. The indiscriminate use of mortars and car bombs has claimed many civilian lives.
(...)

43 OEA/Ser.L/V/II.117, Doc.1 rev.1 of 7 March 2003.

> 22. The IACHR vigorously condemned the indiscriminate attacks launched against the civilian population in the municipalities of Bojayá and Vigía del Fuerte in the department of El Chocó on May 2, 2002. On that occasion the FARC launched a crude mortar into Bellavista's Catholic chapel where the civilian population had sought shelter during a confrontation between this armed dissident group and the AUC.
> 30. The Commission must indicate though that it continues to receive complaints on the negligent or acquiescent conduct of the Army and even its direct participation in human right violations committed by paramilitaries. The Commission has repeatedly pronounced upon the responsibility of the State by virtue of the ties between members of the security forces and paramilitary groups in Colombia in the commission of acts that constitute violations of human rights and international humanitarian law. Regrettably, there are no signs of the situation having improved during 2002. Paramilitary groups continue to operate with impunity throughout much of Colombia, despite the military presence. Violence is running high and still escalating, forcing the civilian population into displacement.

From the foregoing descriptions it would appear that situations that have been characterized as of "generalized violence" share some or all of the following traits:

(1) The number of violent incidents as well as the number of victims of those incidents are very high;
(2) Prevailing violence inflicts heavy suffering among civilians and manifests itself in some of its most egregious forms, such as massacres, torture, mutilation, cruel, inhuman and degrading treatments, summary executions, kidnappings for ransom, disappearances of persons, gross violations of international humanitarian law against the civilian population, wanton destruction and sacking of villages and indiscriminate use of antipersonnel mines;
(3) Innocent civilians are caught in the cross-fire between the parties to the conflict;
(4) The perpetration of acts of violence against the civilian population is often aimed at causing terror and, eventually, at creating such heavy physical and psychological pressures on individuals that they are left with no alternative but to flee the area;
(5) Where violence emanates from State agents or from private agents acting at the instigation or with the acquiescence of the State's authorities, the authors enjoy impunity;
(6) Where violence emanates from private agents who are not supported by the State, the authorities are unable effectively to control them; and,
(7) The level and extent of violence is such, that the normal functioning of society is seriously impaired.

The above enumeration is not meant to be comprehensive or exhaustive, but only illustrative of the type of situations under which a refugee claim which is based on the existence of a situation of generalized violence in the person's country of origin, may be deemed to be well-founded.

Foreign aggression

The notions of "aggression", "war of aggression" and "act of aggression" are found in numerous international conventions adopted since the end of the First World War for the purposes of outlawing and preventing acts of aggression, as well as of ensuring the prosecution and punishment of those

responsible of committing such acts.[44] Moreover, by resolution 3314 (XXIX) of 14 December 1974, the General Assembly of the United Nations approved a Definition of Aggression designed, *inter alia*, at providing guidance to the Security Council in the determination of the existence of an act of aggression. According to that resolution "aggression" means "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations"; the text goes on to provide that "[n]othing in this Definition ... could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration".

The notions of aggression embodied in the instruments referred to above may not, however, be of assistance for construing the meaning of this term in the Cartagena definition because those instruments are aimed at regulating relations between States, not at the protection of potential victims.

Furthermore, the General Assembly's definition is too narrow in scope for protection purposes, as it is exclusively concerned with situations where the use of force by a State against another is ilegitimate. Instances of use of force which have been declared legitimate by the General Assembly do not constitute aggression under the definition –yet they definitely have the potential to cause refugee flows.[45]

It is therefore submitted that the expression "foreign aggression" in the Cartagena definition should be understood to refer to any international war or conflict, irrespective of whether it would qualify or not as "aggression" or as a "war of aggression" under the relevant international instruments. This approach would ensure that people who are in need of protection are not left without it simply because the situation from which they are fleeing does not meet the specific parameters set in the instruments relating to aggression.

Internal conflicts

Protocol II to the Geneva Conventions of 12 August 1949 provides a definition of internal conflicts –or, in the words of that instrument, of an "armed conflicts not of an international character". According to Article 1 of that Protocol such conflicts are those "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which,

44 Among conventions adopted at the universal level are: the Treaty of Versailles of 28 June 1919 (Articles 10, 231, 232 and 429); the Protocol for the Pacific Settlement of International Disputes of 1 October 1924 (Preamble, Articles 2, 8, 9, 11, 13, 15); the the Locarno Pact of 16 October 1925 (Article 2); the Charter of the United Nations Organization (Articles 1, 39, 53); the Statute of the International Criminal Court of 17 July 1998 (Article 5). Examples of Inter-American conventions are: the Anti-War Treaty of Non-Aggression and Conciliation (Saavedra-Lamas Pact) of 10 October 1933 (preamble, Article 1); the Inter-American Treaty of Reciprocal Assistance of 2 September 1947, as amended in 1975 by the Protocol of San Jose (preamble, Articles 5 and 9); and the Charter of the Organization of American States, as amended by the Protocols of Cartagena de Indias in 1985 and of Washington in 1992 (Articles 2, 3, 28, 29 and 68).

45 An example of this kind of situations is found in resolution 34/93 of the UN General Assembly, of 12 December 1979, which reaffirmed "the legitimacy of the struggle of the oppressed people of South Africa ... by all available and appropriate means, including armed struggle" and appealed to all States "to provide all necessary assistance to the national liberation movement of South Africa in this crucial stage of its struggle".

under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol". The Article adds that the Protocol shall not apply to "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts".

The above definition of "internal conflict" is also too narrow in scope, as it only applies to well structured armed conflicts, with a rather high level of intensity. Therefore, for the same type of considerations made in the preceding section, it would not be appropriate to make use of it for construing the meaning of the term "internal conflicts" in the Cartagena definition. It is consequently submitted that such term should be understood to apply to any situation of armed confrontation between different factions in a given country, regardless of whether the conditions laid down in international humanitarian instruments for the purpose of their application are met or not.

Massive violation of human rights

This expression –or similar ones which convey the same meaning– appear in numerous human rights instruments. Perhaps the most well-known among those formulations, is that found in Economic and Social Council (ECOSOC) resolutions 1235 (XLII) of 6 June 1967 and 1503 (XLVIII) of 27 May 1970. Under ECOSOC resolution 1235 (XLII), the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities may examine information relevant to "gross violations of human rights and fundamental freedoms", and the Commission may, in appropriate cases, make a thorough study of "situations which reveal a consistent pattern of violations of human rights". Under ECOSOC resolution 1503 (XLVIII), the Sub-Commission on Prevention of Discrimination and Protection of Minorities is tasked with considering all communications concerning human rights violations received by the Secretary-General, and with referring to the Commission on Human Rights those which appear to reveal "a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms".[46]

The notion of "gross violations of human rights and fundamental freedoms" has been considered in the context of the works within the United Nations towards the elaboration of basic principles and guidelines on restitution, compensation and rehabilitation for victims of such violations. Those works were started in 1989 with the appointment by the Sub-Commission on Prevention of Discrimination and Protection of Minorities of Mr. Theo van Boven as Special Rapporteur to prepare a study on this subject and propose a set of draft principles and guidelines. The Special Rapporteur submitted his final study in July 1993 and a revised version of the draft basic principles and guidelines was referred to the Human Rights Commission in 1996; this draft was widely circulated among States, NGOs and agencies for comments. In 1998 the Commission appointed a new Special Rapporteur, Mr. M. Cherif Bassiouni, to revise the draft basic principles and guidelines, in the light of the comments received by the secretariat. The independent expert held a series of consultations in 1998 and 1999, and submitted

46 Other expressions used in international instruments include: "constant and flagrant violations of basic human rights and fundamental freedoms", "gross and cruel violations of human rights", "gross and massive violation of the rights", "gross and systematic violations of human rights", "horrifying violations of human rights", "massive and extremely grave violations of human rights", "massive, gross and systematic human rights violations", "serious and numerous violations of human rights", "widespread and flagrant violations of human rights".

the revised text in the year 2000. Two consultative meetings were thereafter organized by the Office of the High Commissioner for Human Rights (OHCHR), one in 2002 and the other in 2003. On the basis of the report of the second meeting, the Commission requested the Chairperson-Rapporteur of the consultative meetings to prepare, in consultation with Mr. Theo van Boven and Mr. Cherif Bassiouni, a revised version of the basic principles and guidelines, and further requested the OHCHR to convene a third consultative meeting with a view to adopting the basic principles and guidelines (resolution 2004/34 of 19 April 2004). Work on this subject is in progress.

An examination of the above works shows the difficulties of delimiting with some degree of precision the scope of the expression "gross violations of human rights and fundamental freedoms". In his Final Report, Special Rapporteur Theo van Boven pointed out that, while no agreed definition of that expression exists, it appears that the word "gross" not only indicates the serious character of the violations but it also relates to the type of human right that is being violated. Mr. van Boven submitted that the expression in question would include at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender.[47] For his part, Special Rapporteur Cherif Bassiouni pointed out in his Final Report that a number of Governments and organizations had felt that the term "gross violations of human rights" was insufficiently precise, and as a result he had opted to drop the term "gross" from the text and refer instead to certain types of violations as "crimes under international law".[48] During the first consultative meeting views in support of keeping that term were expressed,[49] and at the second consultative meeting the term was re-introduced in the text, subject to further consideration.[50]

Judging from the type of situations in which, according to the relevant international supervisory bodies, "massive violation of human rights" (expressed in this manner or in an equivalent form of words) have been committed, it would appear that that expression has been applied with reference to situations in which:

(1) There is a very large number of violations of human rights; and,
(2) Such violations are of a particularly serious nature.

Examples of those type of situations include: South Africa and Namibia under the apartheid regime;[51] the occupied Arab territories of Palestine;[52] Chile during the military dictatorship that took power in the early seventies;[53] Afghanistan during the internationalized conflict that broke up in the late seventies;[54]

47 UN Doc. E/CN.4/Sub.2/1993/8, para.13.
48 UN Doc. E/CN.4/2000/62, para.8.
49 See UN Doc. E/CN.4/2003/63, para.21.
50 See UN Doc. E/CN.4/2004/57, Appendix I.
51 See resolutions 4 (XXXIV) of 1978, 5 (XXXIV) of 1978, 1982/16, 1983/4, 1983/9, 1985/6, 1985/8, 1985/9, 1985/10, 1986/3, 1986/4, 1986/5, 1986/7, 1986/24, 1987/7, 1987/8, 1987/9, 1987/11, 1987/14, 1988/9, 1988/10, 1988/13, 1988/14, 1989/3, 1989/5, 1989/7, 1989/8, 1990/12, 1990/26, 1991/10 and 1993/10 of the UN Commission on Human Rights.
52 See resolutions 1989/2, 1990/6, 1991/6 and 1992/4 of the UN Commission on Human Rights.
53 See resolutions 8(XXXI) of 1975, 3(XXXII) of 1976, 9(XXXIII) of 1977, 12(XXXIV) of 1978, 11(XXXV) of 1979, 9 (XXXVII) of 1981, 1985/47, 1986/63, 1987/60, 1988/78 and 1989/62 of the UN Commission on Human Rights.
54 See resolutions 1985/38, 1986/40, 1987/58 and 1988/67 of the UN Commission on Human Rights.

El Salvador and Guatemala during the protracted internal conflicts that those countries underwent in the seventies and eighties;[55] Iran after the 1979 revolution;[56] Iraq during repression perpetrated in the nineties against the Kurds in the North and against the Assyrian, Shiites and Turkmen in the southern marsh areas;[57] Cambodia under the regime of the Khmer Rouge in the late seventies and eighties;[58] Rwanda during the ethnic conflict and genocide befalling the country since the late nineties;[59] the Balkan countries subsequent to the dismembering of the Federal Republic of Yugoslavia in the nineties;[60] Burundi during the bloody ethnic conflicts between Tutsis and Hutus of the early nineties;[61] Chechnya during the civil war which followed the country's self-proclaimed independence in the mid nineties;[62] Sierra Leone during the civil war that followed the military coup staged in the late nineties by supporters of the Revolutionary United Front;[63] Sudan during the civil war which, since the nineties, has been confronting the government of the National Islamic Front, supported mainly by the Arab population from the North, with the Sudan's People's Liberation Army supported mainly by the Christian black African population from the South;[64] and Myanmar under the military dictatorship headed by the State, Peace and Development Council which took power in 1988.[65]

The above conclusion about the quantitative and qualitative elements encompassed in the notion of "gross violations of human rights" seems to be consistent with the connotation that flows from one passage of the Declaration and Programme of Action adopted by the World Conference on Human Rights held in Vienna in 1993. In that document, the World Conference expressed its dismay at "massive violations of human rights especially in the form of genocide, 'ethnic cleansing' and systematic rape of women in war situations, creating mass exodus of refugees and displaced persons".[66] All the situations which, by way of example, are mentioned in the Declaration, clearly fulfil the two conditions suggested above.[67]

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55 See resolutions 1983/29, 1987/51, 1988/65 and 1990/77 of the UN Commission on Human Rights, relating to the situation of human rights in El Salvador, and resolutions 1983/37 and 1985/36 of the UN Commission on Human Rights relating to the situation of human rights in Guatemala.

56 See resolutions 1985/39, 1986/41 and 1987/55 of the UN Commission on Human Rights.

57 See resolutions 1992/71, 1993/74, 1994/74, 1995/76, 1996/72 and 1997/60 of the UN Commission on Human Rights.

58 See resolutions 29 (XXXVI) of 1980, 11 (XXXVII) of 1981, 1982/13, 1983/5, 1984/12, 1985/12, 1986/25, 1987/6, 1988/6, 1989/20 and 1990/9 of the UN Commission on Human Rights.

59 See resolutions 1998/69, 1999/20 and 2000/21 of the UN Commission on Human Rights.

60 See resolutions 1992/S-1/1, 1993/7, 1994/72, 1994/75, 1995/89, 1996/71 and 1999/18 of the UN Commission on Human Rights. See also decision 2(47) on the situation in Bosnia and Herzegovina, adopted by the UN Committee on the Elimination of Racial Discrimination on 17 August 1995 (Report of the Committee on the Elimination of Racial Discrimination for 1995, UN Doc. A/50/18 of 22 September 1995, para.26(2)); also Concluding observations on the situation in Bosnia and Herzegovina adopted by the above Committee on 16 March 1995 (Ibid. para.219).

61 See resolution 1995/90 of the UN Commission on Human Rights.

62 See resolutions 2000/58 and 2001/24 of the UN Commission on Human Rights. Also, Concluding Observations on the situation in the Russian Federation adopted by the UN Committee on the Elimination of Racial Discrimination on 12 March 1996 (Report for 1995, UN Doc. A/51/18 of 30 September 1996, para.153).

63 See resolution 1999/1 of the UN Commission on Human Rights.

64 See resolutions 1999/15, 2000/27 and 2001/18 of the UN Commission on Human Rights.

65 See resolutions 2000/23, 2001/15, 2002/67 and 2003/12 of the UN Commission on Human Rights.

66 UN Doc. A/CONF.157/23 of 12 July 1993, para.28.

67 Attention is, however, drawn to the fact that most of the above examples relate to situations in which the victims of the massive violations of human rights were targeted on account of their ethnic background, religious beliefs or political opinions. Persons fleeing their country for those reasons would not fall under the scope of the extended refugee definition, but would qualify under the 1951 Convention definition.

It should finally be underlined that almost all massive violations of human rights are perpetrated for 1951 Convention reasons. The victims of such violations should, accordingly, be entitled to recognition as refugees under that instrument. Only in cases where the violations of human rights are not linked to any of the grounds of the Convention, would the possible relevance of the Cartagena definition to the case arise.

Other circumstances which have seriously disturbed public order

The notion of "public order" relates to the peace and security of society. Public order may be seriously disturbed if the mechanisms that society has for the prevention, investigation and punishment of crimes become so ineffective that individuals are left defenceless. A situation like this may arise in the context of strife, riots or internal upheavals that the authorities are unable to control. The effect of this clause would, therefore, be to expand the protection net, by covering people who are fleeing situations in which the level and/or extent of violence are below the threshold that would be required to be categorized as of "generalized violence".

(iii) The reasons why the persons concerned are outside their country

The fact that the country of origin of a person is experiencing generalized violence, or foreign aggression, or internal conflicts, or massive violation of human rights or other circumstances which have seriously disturbed public order is not, in and of itself, sufficient to recognize that person as a refugee under the Cartagena definition. To qualify as refugees under the Cartagena definition, the persons concerned must establish that they are outside their country "because their lives, safety or freedom have been threatened" as a result of those events. This implies that there must be a direct and objective link between the events in question and the potential harm to the person. Such link would not exist, for instance, if the war, conflict or violence in a country is circumscribed to a part of the territory other than that where the applicant for refugee status comes from.

The various components of this requirement are examined below.

The expression "have been threatened"

The notion of "threat" connotes the possibility of harm being inflicted on a person; it does not imply that the harm has actually materialized. Accordingly, a person who has not been directly exposed to any concrete harmful events may qualify as a refugee under the Cartagena definition if, in the circumstances, there is a real possibility that this will happen. In this sense, the approaches of the Cartagena definition and of the 1951 Convention definition are similar, as the latter does not require that the person has actually suffered persecution, but merely requires that he/she has well-founded fear of being persecuted. Moreover, for the reasons stated above regarding the applicability of the Cartagena definition to refugees "*sur place*", it is submitted that the expression "have been threatened" should not be understood literally –i.e. referring only to threats that have arisen in the past– but should be understood as if the text read "have been or may be threatened".

The threat to the person's life

Since the characterization and scope of the right to life is clear (at least for the narrow purposes of the question in hand) the reference in the Cartagena definition to threats to the person's life seems to raise no particular problems of interpretation.

The threat to the person's safety

The right to the security of the person[68] is recognized in all major international human rights instruments.[69]

The preparatory works of the Universal Declaration of Human Rights, in whose Article 3 this right was firstly formulated, appear to show that, for the drafters of that instrument, the right to "security of person" referred firstly and foremost to the physical security or physical integrity of the person.[70] It is legitimate to assume that this notion has the same meaning in Article 9 of the International Covenant on Civil and Political Rights and in Article I of the American Convention on Human Rights, because those provisions were modelled after Article 3 of the Universal Declaration.[71]

Moreover, the above interpretation seems to be confirmed by the views expressed by the parties –as well as by the Inter-American Commission on Human Rights– in the case *The Haitian Centre for Human Rights et al. v. United States*,[72] regarding the meaning of the term of "security" in Article I of the American Declaration of the Rights and Duties of Man.

The above-mentioned case was submitted to the Commission in October 1990 by a group of NGOs and individuals alleging that the "interception-and-return" policy being implemented by the U.S. Administration with regard to Haitian nationals, was in violation of the U.S. Government's international obligations under international refugee law as well as under the international law of human rights. According to that policy, Haitian nationals trying to get to the United States in small boats or rafts in order to seek asylum (the so-called "boat people"), were intercepted in international waters by the U.S. Coast Guard, and returned to Haiti without a proper hearing. The petitioners alleged that many of the repatriated interdictees were arrested upon their arrival, were subjected to severe ill-treatment and torture, and some were later been found shot to death. Among the legal arguments raised by the petitioners was that the policy in question violated Article I of the American Declaration.

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68 The term "safety" used in the Cartagena definition is interchangeable with the term "security" found in international human rights instruments. The reason is that the Spanish version of the Cartagena definition (which is the original one) uses the term "*seguridad*", which can be equally translated "safety" or "security"; this is evidenced by the fact that the term "*seguridad*" in the Spanish versions of the American Declaration of the Rights and Duties of Man, of the American Convention on Human Rights, of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights, corresponds to "security" in the English texts.

69 Cf. Article 3 of the Universal Declaration of Human Rights; Article 9(1) of the International Covenant on Civil and Political Rights; Article I of the American Declaration of the Rights and Duties of Man; Article 7(1) of the American Convention on Human Rights; Article 6 of the African Charter on Human and Peoples' Rights; and Article 5 of the European Convention on Human Rights.

70 Cf. Nehemiah Robinson, The Universal Declaration of Human Rights. Its Origin, Significance, Application, and Interpretation, Institute of Jewish Affairs, World Jewish Congress, New York, 1958, p.106.

71 Regarding the International Covenant, Cf. Manfred Nowak, U.N. Covenant on Civil and Political Rights. CCPR Commentary, N. P. Engel, Publisher (Kehl-Strasbourg-Arlington), 1993, p.162. It was expressly put on record at the 1969 Conference which adopted the American Convention, that Article 7 was inspired in Article 3 of the Universal Declaration -Cf. Conferencia Especializada Interamericana sobre Derechos Humanos, San José, Costa Rica, 7-22 de noviembre de 1969, Actas y Documentos. OEA/Ser.K/XVI/1.2, p.297.

72 Report No. 51/96, Decision of the Commission as to the Merits of Case 10.675, approved by the Commission during its 93rd Session on October 17, 1996. Revised and adopted as a final Report at its 95th Session on March 13, 1997.

In September 1994, the Commission requested the parties to submit legal arguments with regard to the application of the alleged Articles of the American Declaration as it related to the facts of the case. In relation to Article I, the Commission requested the parties to elaborate on "the meaning of 'security' in the context of the American Declaration, and its application to the factual situation relied on by each party in support of its case".

Replying to that request, the United States Government reaffirmed its commitment to the protection of life, liberty and security of the person, but pointed out that "the right to security of the person as understood in the American Declaration simply is not relevant to the factual situation of the Haitian Interdiction program". In the opinion of that Government, "[t]he right to security of the person does not create an obligation on states to provide admission to persons fleeing their country by sea or preclude their repatriation, even in the case of a bona fide refugee. Nor does it require that safe haven be provided. As discussed in our May 4 submission, the United States has no evidence to indicate that repatriated Haitians were subjected to abuse or harassment as a result of their status as repatriated interdictees. In its monitoring of repatriates, the United States found no evidence of systemic persecution of returned boat people. The physical integrity of interdicted Haitians simply is not negatively affected by United States actions".

In their reply to the Commission's request, the petitioners stated that "the right to 'security' appears to mean the right to be free from arbitrary arrest and danger or risk of personal harm or injury".

The Commission took the view that petitioners' evidence was compelling and established that some of Haitians who were repatriated to Haiti against their will were arrested, detained, imprisoned and suffered violence at the hands of the Haitian military upon their return to Haiti. Based on that evidence, the Commission found that "the United States Government's act of interdicting Haitians on the high seas, placing them in vessels under their jurisdiction, returning them to Haiti, and leaving them exposed to acts of brutality by the Haitian military and its supporters constitutes a breach of the right to security of the Haitian refugees".

The threat to the person's freedom

In a study prepared for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities by Special Rapporteur Erica-Irene A. Daes, "personal freedom" is defined as "the freedom of every law-abiding individual to think what he will, say what he will and go where he will on his lawful occasions without let or hindrance from any other persons".[73] This generic and rather broad notion, encompasses a number of specific rights.

According to the now classical analysis by Berlin of the concept freedom, a distinction must be drawn between "positive freedom" –which is the freedom to do things– and "negative freedom" –which is the

73 "Freedom of the Individual under the Law. A Study of the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights", para.213. United Nations Publication: Sales No. E.89.XIV.5.

freedom from interference of others.[74] This distinction is reflected in the manner in which the different human rights are formulated in international instruments. Among the human rights which aim at the realization of "positive freedoms" are the right to freedom of thought, conscience and religion,[75] the right to freedom of opinion and expression,[76] the right to freedom of peaceful assembly and association,[77] and the right to freedom of movement;[78] among the rights aiming at the realization of "negative freedoms" are the right to freedom from slavery,[79] and the right to freedom from ex post facto laws.[80]

One reflection that immediately comes to mind in connection with the above-mentioned freedoms is that, owing to the very nature of some those freedoms, the threats that may arise against them will, in most cases, constitute persecution under the 1951 Convention. It is indeed difficult to imagine situations where the person's right to freedom of religion, or to freedom of opinion may be threatened or violated by events which do not involve a discriminatory element: after all, it is not by chance that these rights are specifically referred to in the 1951 Convention definition. Similarly, most threats that may arise against the person's right to freedom of peaceful assembly and association, right to freedom of movement and right to freedom from slavery are more likely to constitute persecution than not.

Be this as it may, the gist of this part of the Cartagena definition is that there may be situations in which the person's freedoms may be threatened under circumstances not involving persecution and, if that were the case, the person concerned should be entitled to protection as a refugee.

4. EXCLUSION FROM REFUGEE STATUS

The exclusion clauses of the 1951 Convention definition are contained in Sections D, E and F of Article 1 of that instrument. The applicability of these provisions to Cartagena refugees is considered below.

74 Isaiah Berlin, Two Concepts of Liberty, Inaugural Lecture as Chichele Professor of Social and Political Theory, Clarendon Press (Oxford) 1958.

75 Cf. Article 18 of the Universal Declaration of Human Rights; Article 18 of the International Covenant on Civil and Political Rights; Articles 12 and 13 of the American Convention on Human Rights; Article 8 of the African Charter on Human and Peoples' Rights; Article 9 of the European Convention for Protection of Human Rights and Fundamental Freedoms; and, Article 10 of the Charter of Fundamental Rights of the European Union.

76 Cf. Article 19 of the International Covenant on Civil and Political Rights; Article 19 of the Universal Declaration of Human Rights; Article IV of the American Declaration of the Rights and Duties of Man; Article 13 of the American Convention on Human Rights; Article 9 of the African Charter on Human and Peoples' Rights; Article 10 of the European Convention for Protection of Human Rights and Fundamental Freedoms; and, Article 11 of the Charter of Fundamental Rights of the European Union.

77 Cf. Article 22 of the International Covenant on Civil and Political Rights; Article 20 of the Universal Declaration of Human Rights; Article 16 of the American Convention on Human Rights; Articles 10 and 11 of the African Charter on Human and Peoples' Rights; Article 11 of the European Convention for Protection of Human Rights and Fundamental Freedoms; and, Article 12 of the Charter of Fundamental Rights of the European Union.

78 Cf. Article 13 of the Universal Declaration of Human Rights; Article 22 of the American Convention on Human Rights; Article 12 of the African Charter on Human and Peoples' Rights; Article 2(1) of Protocol No.4 to the European Convention for Protection of Human Rights and Fundamental Freedoms; and, Article 45 of the Charter of Fundamental Rights of the European Union.

79 Cf. Article 6 of the American Convention on Human Rights.

80 Cf. Article 9 of the American Convention on Human Rights.

(a) Article 1, Section D

According to this provision, the Convention shall not apply "to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance"; the text further provides that "[w]hen such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention".

The only group to which this exclusion clause currently applies is that of Palestinian refugees who are receiving protection or assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).[81] Since that Agency operates and provides assistance only in certain countries in the Near East, UNHCR considers that UNRWA's assistance has ceased with regard to Palestinian refugees who are outside UNRWA's area of operation and who are unable to return there for instance because they are not in possession of the necessary documents or permits, or who are unwilling to return because of threats to their life, safety or freedom. Since persons in these situations are automatically entitled to the benefits of the 1951 Convention, the question of the possible application of the Cartagena definition to such cases does not arise.

(b) Article 1, Section E

According to this provision, the Convention "shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country".

Although the drafting history of Section E shows that the exclusion was meant to apply only to one specific group,[82] the language of the clause is broad enough to permit its application to other groups of persons who may satisfy the stipulated conditions.

Accordingly, persons who satisfy the inclusion conditions of the Cartagena definition may be excluded from refugee status if they take residence in a country which recognizes them as having the rights and obligations attached to the possession of the nationality of that country.

(c) Article 1, Section F

According to this provision, the Convention "shall not apply to any person with respect to whom there are serious reasons for considering that:

81 For the working purposes of UNRWA, Palestine refugees are those persons whose normal place of residence was Palestine for a minimum of two years preceding the conflict in 1948 and who, as a result of that conflict, lost their home and means of livelihood, and took refugee in neighbouring countries; by virtue of General Assembly resolutions, UNRWA also assists Palestinians forcibly displaced by the 1967 conflict. Guidance on the interpretation of this exclusion clause is found in UNHCR's *Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian refugeess*, of October 2002.

82 The group in question was that of persons of German ethnic origin or members of a German minority living outside Germany or Austria ("Volksdeutsche"), who had taken up residence in Germany during or after World War II.

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations".

These are the exclusions clauses *par excellence*, not only because they are the most applied in practice but, principally, because the notions that they embody appear to have become, by now, part of the general body of principles of refugee and asylum law. As such, they apply to Cartagena refugees in the same manner as they apply to 1951 Convention refugees.[83]

5. CESSATION OF REFUGEE STATUS

The cessation clauses of the 1951 Convention are embodied in Section C of Article 1. That Section provides that the Convention shall cease to apply to any person falling under the terms of Section A of Article 1 (the general inclusion clauses) if any of the six situations specified therein comes to materialize. The applicability of those provisions to Cartagena refugees is examined below.

(a) Article 1, Section C, paragraph (1)

According to this provision, refugee status ceases if the refugee "has voluntarily re-availed himself of the protection of the country of his nationality".

To properly understand the meaning this clause it is necessary to bear in mind that the protection to which it refers is the diplomatic protection of that country.[84]

This clause rightly assumes that a person who fears persecution from the authorities of his/her country of nationality has severed his ties with those authorities and no longer feels under a duty of allegiance to that country. The rationale of the clause is that there is an inconsistency between the person's claim to fear persecution from the authorities of his/her country of nationality, and the fact that he/she avails him/herself of the protection of that country.[85]

Such inconsistency does not arise in the case of Cartagena refugees for the simple reason that they are not fleeing persecution from their country's authorities –they are fleeing the indiscriminate effects of war, conflict or violence. Accordingly, there is nothing wrong, or inconsistent, in that they maintain normal contacts with the diplomatic or consular authorities of their country.[86]

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83 Guidance to the interpretation of this exclusion clause is found in UNHCR's *Guidelines on Internaional Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees (HCR/GIP/03/05* of 4 September 2003) and the *Background Note* attached thereto.

84 See UNHCR, The Cessation Clauses: Guidelines on their Application, Geneva, April 1999, para.6.

85 Cf. UNHCR Handbook on Determination of Refugee Status, para.100.

86 The same applies, of course, to refugees fleeing persecution by non-State agents. There is no reason why these refugees should be prevented from maintaining normal contacts with the diplomatic or consular authorities of their country of nationality.

It follows from the foregoing that the fact that a refugee under the Cartagena definition has sought and has obtained the diplomatic protection of his/her country of nationality (for instance by getting or renewing a national passport) does not constitute a valid ground to bring his/her refugee status to an end.

(b) Article 1, section C, paragraph (2)

According to this provision, refugee status ceases if, "[h]aving lost his nationality, he [the refugee] has voluntarily re-acquired it".

There are good reasons to believe that this clause applies specifically to cases where the loss of nationality was the result of a persecutory measure.[87] Should that be the case, the clause would evidently not apply to the situation of Cartagena refugees.

But even if the loss of nationality did not result from persecution, its re-acquisition by the Cartagena refugee should not lead to cessation of his/her status because, as said before, refugee status under the Cartagena definition is independent from the relations that the refugees may have with the authorities of their country.

(c) Article 1, Section C, paragraph (3)

According to this provision, refugee status ceases if the refugee "has acquired a new nationality, and enjoys the protection of the country of his new nationality".

The situation foreseen by this clause differs from those of the two previous paragraphs of Section C, in that the person who has acquired a new nationality is entitled not only to the diplomatic protection of the country of his/her new nationality (which, as pointed out before, is irrelevant for the purpose of assessing a claim under the Cartagena definition), but is also entitled to enter and reside in that country.[88] For this reason, the maintenance of refugee status would not be justified with regard to a refugee who has acquired a new nationality.

(d) Article 1, Section C, paragraph (4)

According to this provision, refugee status ceases if the refugee "has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution".

This clause evidently applies to 1951 Convention and Cartagena refugees alike, as it is of the essence of refugee status that the person be outside his/her country of origin. However, for obvious reasons, the words "the country which he left or outside which he remained owing to fear of persecution" must be understood in relation to Cartagena refugees as if they read: "the country which he left or outside

87 Denationalization on racial and political grounds was a major problem facing the international community in the period between the two World Wars -literally affecting millions of people, principally Russians living abroad after the Bolshevik Revolution and Germans of Jewish origin after the accession to power of the National-Socialist regime.

88 See Article 13(2) of the Universal Declaration of Human Rights; Article 12(4) of the International Covenant on Civil and Political Rights; and Article 22(5) of the American Convention on Human Rights.

which he remained because his life, safety or freedom were threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order".

(e) Article 1, Section C, paragraphs (5) and (6)

These two paragraphs deal with change of circumstances in the country of origin of the refugee. Paragraph (5) relates to refugees who possess a nationality and paragraph (6) with those who are stateless.

Paragraph (5) provides that the Convention shall cease to apply to any refugee who "can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality", and goes on to say: "[p]rovided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article[89] who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality".

Paragraph (6) provides that the Convention shall cease to apply to any stateless refugee who, "because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, is able to return to the country of his former habitual residence", and goes on to say: "[p]rovided that this paragraph shall not apply to a refugee falling under section A(1) of this Article[90] who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence".

There can be no doubt that a person's refugee status under the Cartagena definition must come to an end when the circumstances in connection with which it was recognized have ceased to exist. The position of Cartagena refugees is, in this regard, the same as that of 1951 Convention refugees. Where differences appear, however, is regarding the process of evaluation of the change of circumstances.

The task of evaluating whether the risk of persecution in a given country no longer exists, is not an easy one. The reason for this is that persecution is often an insidious phenomenon, something that cannot no be detected at first sight. As the UNHCR Handbook explains, persecution may be the cumulative result of successive instances of discrimination –not in themselves amounting to persecution– the evaluation of which requires an examination of all the circumstances, including the particular geographical, historical and ethnological context.[91] Even measures that may appear on their face to be aimed at achieving legitimate and commendable objectives (for instance certain economic measures) may, in reality, be directed against a particular group for Convention reasons and, thus, constitute persecution.[92] Moreover, because of the subjective component of the refugee definition, interpretations of what amounts to persecution are bound to vary: what constitutes persecution for one person may not constitute persecution for another.[93]

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89 This refers to the so-called "statutory refugees", that is to say, those recognized under the provisions of the international instruments which preceded the 1951 Convention (Cf. UNHCR Handbook on Determination of Refugee Status, para.32).

90 Ibid.

91 UNHCR Handbook, Paragraph 53.

92 UNHCR Handbook, Paragraph 63.

93 UNHCR Handbook, Paragraphs 40 and 52.

It follows from the foregoing that the determination of whether Convention refugee status can be deemed to have ceased as a result of a change of circumstances in the refugee's country of origin requires a thorough examination not only of the conditions prevailing in the country of origin –in order to assess the depth and potential durability of the changes– but also of the individual circumstances of the refugee.

The application of the "change of circumstances" clause is much more straightforward with regard to Cartagena refugees. While persecution may exist in hidden forms, the events that may lead to the creation of Cartagena refugees are always manifest. It is indeed perfectly possible that a person visiting a country which is living under a dictatorial regime may not personally come across any situation which may indicate or suggest that there is persecution in that country; conversely, such situations as war, civil conflict, generalized violence and the like cannot go unnoticed to anybody who may be present in the territory or part of the territory where they take place. To evaluate a change of circumstances in connection with Cartagena refugees is, accordingly, much easier than to evaluate it in connection with refugees fleeing persecution.

This having been said, to lead to cessation of refugee status under the Cartagena definition, the change of circumstances in the country of origin of the refugee must, like in the case of 1951 Convention refugees, be fundamental and durable. A mere truce or temporary cessation of hostilities would not be sufficient ground to end the refugee status of persons fleeing war or conflict.

As regards the exception to cessation of refugee status which the 1951 Convention establishes in favour of "statutory refugees", it is submitted that, as a matter of policy, UNHCR should promote that refugees under the Cartagena who for compelling reasons arising out of previous traumatic experiences are unwilling to return to their country of origin, should be accorded an appropriate status in their country of asylum preserving their previously acquired rights, as recommended by EXCOM Conclusion No. 69 (XLIII) of 1992.

6. OTHER RELEVANT ISSUES

(a) Internal flight alternative

> This concept is dealt with in Paragraph 91 of the UNHCR Handbook, which states:
>
> "The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so".

The above description –with appropriate changes of language– is also relevant to the situation of Cartagena refugees.[94]

94 For instance, if the words "the fear of being persecuted" are replaced by the words "the threats to the persons' lives, safety or freedom", and the words "persecution of a specific ethnic or national group" are replaced by the words "such threats".

It must be emphasized that the conditions for the application of the "internal flight alternative" concept in the determination of refugee status under the 1951 Convention and 1967 Protocol, also fully apply to determination of refugee status under the Cartagena definition.[95]

(b) Cancellation of refugee status

Paragraph 117 of the UNHCR Handbook states that refugee status may be cancelled if circumstances come to light "that indicate that a person should never have been recognized as a refugee in the first place; e.g. if it subsequently appears that refugee status was obtained by a misrepresentation of material facts, or that the person concerned possesses another nationality, or that one of the exclusion clauses would have applied to him had all the relevant facts been known".

Evidently, this position must also apply to persons who have been recognized as refugees under the Cartagena definition. Accordingly, refugee status should be cancelled if, for instance, it is subsequently discovered that the person concerned comes in reality from a country other than that in relation to which the recognition was made, or if it is discovered that, prior to being recognized as a refugee, the person had committed an excludable crime.

(c) Status of family members

The principle of family unity is a fundamental principle of refugee protection.[96] On the basis of this principle, UNHCR recommends that, if the head of a family meets the criteria of the refugee definition, his/her dependants should also be recognized as refugees, unless such recognition would prove incompatible with those dependants' personal legal status. On the same basis UNHCR promotes the reunification of refugee families that have been separated.[97]

These recommendations are fully applicable to refugees under the Cartagena definition, as EXCOM has affirmed that the principle of family unity must be respected in relation to asylum-seekers in situations of large-scale influx,[98] and has specifically included within this category, refugees "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".[99]

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95 Guidance to the interpretation of this concept is found in UNHCR's *Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1(A)2 of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, of 23 July 2003.

96 See EXCOM Conclusions No. 1 (XXVI) of 1975, para.(f), No.9 (XXVIII) of 1977, No. 15 (XXX) of 1979, para.(e); No.24 (XXXII) of 1981; No. 47 (XXXVIII) of 1987, para.(d); No. 84 (XLVIII) of 1997; No. 85 (XLIX) of 1998; and No. 88 (XLX) of 1999. Also see UNHCR Agenda for Protection. Programme of Action, Section 2 (UN Doc. A/Ac.96/965/Add.1 of 26 June 2002).

97 See UNHCR Handbook, paras.184 and 185; also see UNHCR Note on Family Protection Issues, submitted to the 1999 session of EXCOM (EC/49/SC/CRP.14 of 4 June 1999); and UNHCR Note on Family Reunification, submitted to the 1981 session of EXCOM (E/SCP/17 of 13 August 1981).

98 Conclusion No. 22 (XXXII) of 1981, Section II(B), para.2(h).

99 Ibid, Section I, para.1.

(d) Determination procedures

Wars, armed conflicts, generalized violence, massive violation of human rights and other circumstances seriously disturbing public order normally trigger large-scale movements of refugees which, as has been pointed out before, may be composed both of people who fulfil the requirements of the 1951 Convention/Protocol and/or of people who fall under the scope of the extended refugee definition.[100]

In those circumstances, asylum procedures may be overwhelmed by the number of applicants and individual determination of refugee claims may not be possible or practical. Because of this, it is generally accepted that recourse be had to so-called "group determination" or "prima facie determination" of refugee status. This means that, in the absence of evidence to the contrary, each member of the group is regarded as a refugee.[101]

It should be underlined that Cartagena refugees do not, by necessity, have to form part of a large-scale influx in the country where they are applying for asylum. It is perfectly possible that a group of people who have crossed a border to escape war or violence may not constitute a "large-scale influx" in the country they have entered, as this is an assessment which depends not only on the size of the influx but also on the resources of the country of arrival. It is also perfectly possible that some of the individuals who have entered a country forming part of a large-scale influx, move subsequently to another country where they submit individual asylum applications. It is noted in this connection that there is nothing preventing recognition of Cartagena refugee status to applicants coming from outside the Latin-American region; the scope of the Cartagena definition is in this respect as universal as that of the 1951 Convention and 1967 Protocol.

Finally, some considerations regarding the procedure itself.

The first one is that, taking into account that the 1951 Convention and its 1967 Protocol constitute the foundation of the international refugee regime, and that the Cartagena extended definition has been conceived as a complement to those instruments, it stands to reason that the determination process should begin with the examination of the application under the Convention and Protocol and, if it is found that the applicant does not qualify as a refugee under those instruments, the process should continue with the examination of the claim under the extended Cartagena definition.

The second one is that the examination of the claim under the extended Cartagena definition should be carried out in a manner consistent with the procedural standards laid down by the Executive Committee of UNHCR. In particular, rejected applicants should be given a reasonable time to appeal or seek a reconsideration of the decision, and that recourse must have suspensive effect.[102]

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100 See above Section I(1).

101 Cf. para.44 of the UNHCR Handbook.

102 EXCOM Conclusions dealing with procedural standards include No. 8 (XXVIII) of 1977, paragraph (iii); No. 15 (XXX) of 1979, paragraph (j); No. 30 (XXXIV) of 1983, paragraph (e) (i); No. 33 (XXXV) of 1984, paragraph (h); No. 44 (XXXVII) of 1986, paragraph (g); No. 47 (XXXVIII) of 1987, paragraph (h); No. 64 (XLI) of 1990, paragraph (a)(iii); No. 73 (XLIV) of 1993, paragraph (g); No. 79 (XLVII) of 1996, paragraph (p); No. 82 (XLVIII) of 1997, paragraph (d)(iv); and No.88 (XLX) of 1999, paragraph (b)(iii).

The third and last one is that, as UNHCR has consistently recommended, refugee claims should be handled in a single, consolidated procedure where all the possible grounds for recognition of refugee status –meaning those laid down in the 1951 Convention as well as those laid down in the extended refugee definition– are examined.[103]

This recommendation is based not only on the obvious reason that such a procedure is more resource-efficient but, more fundamentally, on the consideration that refugee claims are a composite of many elements, both objective and subjective, and that the person's decision to flee or to remain outside his/her country is usually due to a combination of different reasons –some of which may constitute grounds under the 1951 Convention and others under the extended refugee definition. The examination of the refugee claim in a holistic manner is, therefore, indispensable to properly assess the protection needs of the person –and it is evident that this objective can better be ensured in the context of a single determination procedure.

103 Cf. UNHCR Background Note on Asylum Processes (Fair and Efficient Asylum Procedures) for the Global Consultations on International Protection (EC/GC/01/12 of 31 May 2001); Agenda for Protection. Programme of Action, Goal 1(3). UN Doc. A/Ac.96/965/Add.1 of 26 June 2002.

THE CARTAGENA DECLARATION
LEGAL NATURE AND HISTORICAL IMPORTANCE

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At the time of celebrating the 20th Anniversary of the Cartagena Declaration it is important to reflect once more upon its historical importance, as well as its legal reach and the impact it has had, and possibly will have, over the course of history.

We speak of reflecting "once more" because it should not be forgotten that in 1994 an International Colloquium in Commemoration of the "Tenth Anniversary of the Cartagena Declaration on Refugees," was held in San Jose, Costa Rica.

One of the speakers at this 1994 Commemoration, Kofi Asomani, noted that the Cartagena Declaration "marks a milestone that ten years later we evoke, not in praise, but rather to seek inspiration for the path we have ahead."[1] He noted later that "this is the continent which has generated the most norms on asylum, since the end of the last century till the fifties, and which has shown the most dynamism throughout the last two decades in adopting the doctrine, practice and even the law towards the evolution of the problem of the forced displacement of persons seeking protection."[2]

In referring to new challenges, Kofi Asomani pointed out that "the present international context is full of grand expectations but also risks that cannot be minimized. Since the end of the Cold War, there exists newfound hope for increased international cooperation, free of ideological barriers. At the same time, it seems that our world faces serious challenges in reaching consensus and commitments capable of crystallizing this cooperation. An undeniable reality, nevertheless, is that the path of isolation leads to a dead end representing an obsolete world vision, in which it is patent that developments taking place in one region undeniably affect the rest of the world."[3]

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1 International Colloquium in Commemoration of the "Tenth Anniversary of the Cartagena Declaration on Refugees", San Jose, Costa Rica, 5-7 December 1994, IIHR–UNHCR, 1995, p. 186.

2 *Ibid*.

3 *Op cit*., pp. 189-190.

From 1994 to 2004 relations between States changed drastically, but the aforementioned commentary nevertheless remains true. More than ever it is evident that, much like relations between individuals, among States there are only two paths: that of egotistical isolation in which only the interests of the State are considered, or the other option, contemplating one's own interests alongside those of the international community, opening the possibility of a solidarity that takes shape in agreements of cooperation and joint action.

Since the beginning of the new millennium we know that these aforementioned modes of relating are not merely ideas. They are realities molding the world in which we live and which will be passed on to new generations. This becomes evident in addressing the phenomenon of migration and refugees, which represents one of the most important and challenging of our epoch.

The Cartagena Declaration is one of the interpretive keys of priceless importance in resolving this challenge. Therefore, it is important to retrace the steps leading to its adoption, the impact that its resolutions have had and see in what way this Latin American instrument can help map out roads towards cooperation and solidarity in the phenomenon of forced migrations and in particular in that of refugees.

The present study attempts to mark some of the antecedents leading to the meeting of Cartagena de Indias in 1984. It seeks to highlight the structure and reach of the Declaration adopted there, and to understand the meaning and obligatory nature of the "broad definition" [of refugee] adopted in this Declaration. It will conclude by touching upon the reception and practical application of the Declaration in Latin American countries.

ANTECEDENTS OF THE CARTAGENA OF INDIAS MEETING (1984)
THE MEXICO COLLOQUIUM OF 1981

In May 1981 the Matías Romero Institute of Diplomatic Studies of Mexico's Ministry of Foreign Affairs organized, with the cooperation of the Institute of Legal Investigations of the National Autonomous University of Mexico (UNAM), and under the auspices of the UNHCR, a Colloquium "to examine the most delicate and immediate problems of asylum and of refugees, (...) the shortcomings and gaps in the international legal order and of domestic refugee law."[4]

In this Colloquium, which constitutes the most important antecedent of the meeting that would take place three years later in Cartagena,[5] the most pressing needs perceived in Latin America in the area of asylum and refugees were laid out.

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4 The Acts of this Colloquium appear in the volume "Asilo y protección internacional de refugiados en América Latina," UNAM, Mexico, 1982.

5 One should nevertheless not forget that at the beginning of the eighties, at the International Institute of Humanitarian Law, in San Remo, Italy, a series of round table discussions were held. The most important outcomes of these meetings have been published by the Institution. These round tables were the following:

- Round Table on the Problems Arising from Large Numbers of Asylum-Seekers, June 22-25, 1981. The document from this study was elaborated by G. J. L. Coles. 'Problems Arising from large numbers of Asylum-Seekers: a Study of Protection Aspects';
- Round Table on Protection of Refugees in Armed Conflicts and International Disturbances, September 8-11, 1982;
- Round Table on the Problem of Mass Expulsion, April 16-18, 1983.

The Colloquium facilitated the meeting of prestigious jurists from Latin America, Mexico and Europe, such as Professor Tom Farer, president of the Inter-American Commission on Human Rights; Doctor Tatiana Maerkelt, sub-secretary for Legal Matters of the OAS; Professor Carlos Dunshee de Abranches of Brazil and member of the ICHR; Doctor Rodolfo Piza Escalante of Costa Rica, judge of the Inter-American Court of Human Rights; Doctor Jorge Salvador Lara of Ecuador, president of the Ecumenical Council for Refugees; Professor José Joaquín Caicedo Perdomo of Colombia; Doctor Antonio Martínez Baez of Mexico; Doctor Máximo Cisneros of Peru, judge of the Inter-American Court; Doctor Edmundo Vargas Carreño, executive secretary of the ICHR, Doctor Jorge Carpizo, director of the Institute of Legal Investigations of the UNAM; Doctor Héctor Gros Espiell, secretary-general of the Agency for the Prohibition of Nuclear Arms in Latin America (OPANAL); Gabino Fraga of the Mexican Intersecretarial Commission for Refugee Aid. Also included were officers from the UNHCR, amongst them Paul Hartling, United Nations High Commissioner for Refugees; Michael Moussalli, director of Protection; Franz Krenz, head of the General Legal Section; George Koulischer, executive secretary; as well as the regional representatives for Latin America, Mohammed Benamer, Guillermo da Cuhna and Philip Sargisson and many others.

In his Opening Speech, Paul Hartling referred to the more than 10 million refugees and displaced persons with whom the UNHCR was working at that moment. He pointed out that "asylum, a concept that is not easy to comprehend, originally applied to individuals,"[6] but it has slowly given way to the new phenomenon of "mass exodus," which "has become—unfortunately—a preoccupation of the United Nations General Assembly and of the Human Rights Commission. And more generally, the difficulties that the States run up against, in finding themselves confronted by a large scale flow of refugees, has been in recent years an object of great concern. Greater importance has also been attributed to the principles of burden sharing and international solidarity."[7]

The evolution of the right to asylum, noted the High Commissioner, has been in great measure driven by the efforts made in Latin America. Within this, territorial asylum has come to have global dimensions, while diplomatic asylum, which is not limited to the Latin American region, has only been institutionalized in this part of the world.

In referring to different points in the history of refugee protection in Latin America, UNHCR's Director of International Protection, Michael Moussalli, referred to three principal eras. First, the period before and after World War II until 1972, in which hundreds of thousands of refugees from Europe arrived. A second moment marked by the events in Bolivia in 1972, and those of Chile and Uruguay in 1973, when the UNHCR provided assistance to approximately 25,000 refugees. The third moment begins after 1978, when the refugee problem moved from South America to Central America, beginning with Nicaraguan refugees, followed by those from El Salvador and Guatemala, not to mention the recent refugee movements from Cuba and Haiti. Recent events equally explain massive refugee movements from Bolivia.

The Mexico Colloquium had, after these presentations of high ranking officials who organized the Colloquium and the UNHCR, as a point of departure the working paper prepared by Dr. Héctor Gros Espiell relative to "International American Law on Territorial Asylum and Extradition in Their Relations with the 1951 Convention and Its 1967 Protocol Relating to the Status of Refugees."[8]

6 *Op. cit.,* p. 23.
7 *Ibid.*
8 *Op. cit.,* pp. 33-81.

This document fully describes the relations between the system elaborated in the American territory on asylum and the universal system of the UN on this material—and shaped in the 1951 Convention and its 1967 Protocol relating to the Status of Refugees—which constitute fundamental references when dealing with precisely defining the nature of asylum, this "concept that is not easy to comprehend."

In Latin America there is a long history of conventional protection offered to persecuted persons, mostly due to their political opinions. This history of conventional instruments has its origin in the "1889 Treaty of International Criminal Law" of Montevideo and finds its legacy in various other instruments: the "1928 Convention on Asylum" adopted in Havana, the "1933 Convention on Political Asylum" of Montevideo, the "1939 Treaty on Asylum and Political Refuge" of Montevideo and in the conventions adopted in Caracas in 1954, namely, the "Convention on Diplomatic Asylum" and the "Convention on Territorial Asylum."

The clear distinction between "diplomatic asylum" and "territorial asylum" appears first in the Montevideo treaty of 1939. The first ten articles are dedicated to "political or diplomatic asylum," while Articles 12-15 deal with "territorial asylum" (denominated simply as "asylum") or refuge given in foreign territory.

Based on what has been described up to this point one can observe that: 1) the tradition of protection given to persecuted persons has a long history of conventional instruments adopted in Latin America; 2) in this long history the terminology is often imprecise and has suffered various misinterpretations; 3) only in 1954 was institutional clarity reached thanks to the two conventions in Caracas on territorial asylum and refuge.

This progress culminated in Article 22 of the American Convention on Human Rights or the 1969 Pact of San Jose. However, by this time two important instruments were already adopted at a universal level: the 1951 Convention and its 1967 Protocol relating to the Status of Refugees.

With a characteristic meticulousness, Dr. Gros Espiell analyzes the unfortunate evolution suffered by "asylum"—diplomatic and territorial—in Latin America, both in the instruments mentioned and in other attempts that were made—at a regional and universal level—to codify this material.

The conclusions derived from this analysis permits one to conclude: 1) that "institutes of territorial asylum and refuge in the ambit of the United Nations—concepts that do not absolutely coincide or are synonymous, although are similar—in as much as the grounds that can rule out their granting, do not completely agree with that established in the different applicable texts of American international law";[9] 2) that "in Latin America, according to these Conventions territorial asylum and refuge are absolutely synonymous, but Latin American territorial asylum (or refuge) is not a concept identical to that of refugees according to the 1951 Convention and its 1967 Protocol."[10]

9 *Op. cit.,* p. 43.
10 *Ibid.*

The grounds considered in the universal milieu and Latin American system are diverse: with respect to refugees—according to the United Nations system—they have the right to be considered as such if "a well-founded fear" of political persecution exists. This is not mentioned in the case of territorial asylum for the American system, although the basic idea upon which it is founded is the same, that is to say, that those politically persecuted should benefit from it but not those persecuted for common crimes. However, the United Nations system expressly excludes other crimes—in Article 1(F) of the 1951 Convention—such as crimes against peace, war crimes and crimes against humanity, as well as acts committed against the goals and principles of the United Nations, something which obviously does not appear in the American conventions.

To further increase difficulties, Dr. Gros Espiell observes that the parties in the different American instruments are varied. On the contrary, almost all of the Latin American countries have ratified the 1951 Convention and/or the 1967 Protocol.

What is said about Latin American "asylum" automatically raises the question of a possible regional American custom in the matter of asylum. This is a highly debated issue to which the working paper of the Mexico Colloquium makes important clarifications, especially relevant in the wake of Víctor Raúl Haya de la Torre's trial before the International Court of Justice.

Above all it should be emphasized that the existence and validity of regional custom has been accepted by doctrine and international jurisprudence. The International Court of Justice accepts in principle the possible existence of regional custom.

These are considerations having enormous importance for "asylum" as a regional "custom," the formal source of international legal norms, as well as for the considerations concerning the "Cartagena Declaration."

Let us return for a moment to the precision of the International Court of Justice in the case of Haya de la Torre. In this case the Court affirmed the possibility of a regional custom in Latin America but denied that this was true in the case in question. This negative stance has been severely criticized in the dissident opinions of the Latin American judges Alvarez, Azevedo and Caicedo Castilla, as well as by doctrine. "The correct and just decision would be, in contrast to that sustained by the Court, to investigate whether or not this custom has been recognized as the consequence of a regional practice, generally accepted with the conviction of what is legally obligatory."[11] It is also important to keep in mind the unacceptability of a State unable to apply a custom, universal or regional, due to the fact that it remained outside of the process of its formation. For example a state maintaining a position differing from that taken by a State repeatedly expressing that it does not accept the repetition of actions in contravention to law and considered legal obligation.

Dr. Gros Espiell's position is clear: "territorial asylum in itself undoubtedly constitutes a traditional institution in Latin America and its acceptance is the necessary result of the existence of a regional custom."[12] He asserts the same in relation to diplomatic asylum, though the latter position is not universally accepted.

11 *Op. cit.,* p. 52.
12 *Op. cit.,* p. 53.

In any case, given that Latin American territorial asylum (or refuge) is a concept not identical to that of refugee according to the 1951 Convention and its 1967 Protocol, one can conclude that a person accepted for territorial asylum is not automatically a refugee under the 1951 Convention and its 1967 Protocol, although such a fact is of great importance for authorities having to verify political refuge. The opposite is also true: the fact that a person is considered as a refugee in accordance with the United Nations system does not mean that they should be considered for territorial asylum.

This diversity of concepts —which causes problems "of difficult resolution"— due to the deterioration of territorial asylum has not had grave consequences since "the big questions of refugees in Latin America are confronted and resolved by the application of the United Nations system of political refugees and by action of the High Commissioner."[13]

The system of protection that the 1951 Convention and its 1967 Protocol offers is "far more modern, progressive and current than American International Law" and has the enormous possibility of being able to open itself to new hypotheses.

These new paths are marked by necessities nonexistent in the past but which, in 1981, became pressing. The most evident, as was said in the report presented a the 1978 Round Table in San Remo, is the fact that "currently the problem lies in that, as result of the political movements occurring in the majority of American countries and the lack of democratic stability in some of them, large numbers of people, the majority of them without possessions of any kind, have moved to the territories of other American republics due to the persecutions of which they were the object."[14]

Research by Jorge Salvador Lara, Ex-Minister of Foreign Affairs for Ecuador, is in full agreement with these notions. He presented a study at the Mexico Colloquium titled "The Concept of Territorial Asylum According to Latin American Agreements and the Notion of Refugee According to the International Instruments of the United Nations."[15] [This paper] has the advantage of recalling in one of its conclusions that, with the aim of responding to new historical challenges, one should take into account the contribution that Africa provided in the "OAU Convention governing the Specific Aspects of Refugee Problems in Africa," endorsed in Addis-Abeba in September 1969 which incorporated a substantial contribution to the refugee concept. In Article 1 this Convention established that "the term 'refugee' shall also 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."

This African contribution, already observed in Mexico Colloquium of 1981, permits a response to the new challenge of massive refugee flows.

The complimentary nature of the United Nations system and the Inter-American system was emphasized by Rodolfo Piza Escalante and Máximo Cisneros Sánchez.[16]

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13 *Op. cit.,* p. 64.

14 *Op. cit.,* p. 73

15 *Op. cit.,* pp. 89-102.

16 Cf. Their study on "Algunas ideas sobre la incorporación del Derecho de asilo y de refugio al Sistema Interamericano de Derechos Humanos," *op. cit*., pp. 103-111.

Edmundo Vargas Carreño[17] addressed the contribution of the Inter-American Legal Committee in matters of asylum and refugees. The Committee, he noted, drew up the blueprints for the conventions on diplomatic and territorial asylum, adopted by the Latin American Conference held in Caracas in 1954, along with other important convention plans in the region relative to the prevention and prohibition of terrorist acts as well as extradition. It is interesting to point out that in 1966 the Committee worked on a proposal for an Inter-American Convention on Refugees. The draft of this Convention, whose main objective was to resolve the problem of how to supply Cuban refugees with a travel document,[18] provided the following definition of refugee: "For the purposes of this Convention, refugee is understood as any person who upon entering a territory of one of the contracting parties for reasons of persecution not motivated by common crimes, they shall be recognized in this quality by the Territorial State."[19]

In this project the Rio Committee reproduced Article 2 of the 1951 Geneva Convention relative to the obligations of refugees and obliged the States Parties to issue a travel document in the terms of the recommendation of the XXI Resolution of the Second Extra-Ordinary Inter-American Conference. That is to say, taking as a model that which was established in Article 28 of the 1951 Geneva Convention. In the case that this is not possible, the draft established that the OAS would be able to authorize such a travel document in accordance with the State in question.

The draft also established an authority of the OAS charged with giving assistance and protection to refugees.

This project has never been considered again. For this the Executive Secretary of the Inter-American Commission of Human Rights has reiterated the statement made by Dr. Gros Espiell, according to which "it is not possible to think seriously of the possibility of elaborating a text which, with visions of success and a rapid process with regard to signatures and ratifications, updates, modernizes and gives new operative ability to the institution of territorial asylum in America."[20] Hence "the only realistic path is to work upon the basis of the international texts in force, but coordinating their application, as much as possible, with the United Nations system."[21] In order to achieve this, Edmundo Vargas Carreño proposed a Cooperation Agreement between the UNHCR Office and the OAS Secretary-General. He did not lose sight of the possibility of difficulties that could arise due to the interpretation of regional instruments or in regard to their simultaneous application with the instruments of the United Nations: The Inter-American Legal Committee or the Inter-American Court of Human Rights itself, through an advisory opinion, could pass judgment in this regard.

"Another initiative in which the Inter-American Legal Committee could participate refers to the elaboration of legal norms with respect to the coordination of the assistance and protection of refugees in the Americas."[22] All of this is in keeping with the perspective of a coordinated use of two different legal systems.

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17 Cf. His study "El Comité Jurídico Interamericano y el desarrollo del asilo y la protección de los refugiados, op. cit., pp. 113-132.

18 In conformity with that established by Resolution XXI of the Second Extra-ordinary International Conference held in Río de Janeiro in 1965.

19 *In op*. cit., p. 127.

20 In *op. cit*., p. 135.

21 In *op. cit*., p. 135-136.

22 *Op. cit.,* p. 136.

Similar ideas are also explored in the research of Tatiana B. de Maekelt, of the Sub secretary of Legal Matters of the OAS, in her study on the "Regional Instruments in Matters of Asylum, Territorial Asylum and Extradition. The Refugee Question in the Face of the Possibilities of a New Inter-American Codification,"[23] reiterates the necessity of a regional authority within the framework of the OAS responsible for refugees and which should coordinate its activities with UNHCR. This appears necessary especially since the adoption, at a universal level, of the 1967 Protocol relating to the Status of Refugees and the approval and vigorous implementation, at a regional level, of the American Convention on Human Rights.

In this way, the 1981 Mexico Colloquium ended with a series of conclusions and recommendations, among which it noted the necessity of making an effort "to combine the most favorable aspects of the tradition of the Inter-American System with elements contributing to the universal system for the protection of refugees and asylum-seekers" (3), as well as the necessity of "extending the protection in Latin America that the universal instruments and Inter-American bodies grant to refugees and asylum-seekers—to all such persons fleeing their country due to aggression, foreign occupation or domination, massive human rights violations or situations seriously disturbing public order, in all or part of the territory of the country of origin" (4).

Among other conclusions, these mentioned have a special importance to our study. They refer to the necessity to intensify collaboration between the regional American system and the universal system of the United Nations on refugee issues, along with the usefulness of having a broader refugee concept capable of responding to the new phenomenon of massive refugee flows.

THE 1984 CARTAGENA COLLOQUIUM (COLOMBIA)

From November 19-22, 1984, a Colloquium was held in the city of Cartagena (Colombia) under the auspices of the Colombian government and with the joint cooperation of the UNHCR, the University of Cartagena and the Centro Regional Estudios del Tercer Mundo (CRESET), on "The International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems"—a colloquium resulting in the adoption of the "Cartagena Declaration." The participating delegates came from Belize, Costa Rica, Colombia, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela along with various experts from other South American countries such as Peru, Uruguay and Chile, including the Holy See. The meeting was also attended by UNHCR officers from Geneva and various other delegations and a UNDP officer. Also present were Mr. Paul Hartling, United Nations High Commissioner for Refugees; Dr. Michael Moussalli, Director of International Protection; Dr. Augusto Ramírez Ocampo, Minister of Foreign Affairs for Colombia and other important figures.

It is important to point out that this Colloquium was held after the elaboration of a Document of Objectives by the Contadora Group that was approved in September 1983 and permitted the adoption of the Contadora Act on Peace and Cooperation in Central America. Both instruments contain provisions

23 In *op. cit.*, p. 139-171.

on refugees. The importance of the universal instruments of the United Nations are emphasized to such an extent that it was decided "to adopt the terminology established in the Convention (of Geneva, 1951) and the Protocol (of 1967) with a view towards distinguishing refugees from other categories of migrants" (no. 59). It equally supports "the work performed by the UNHCR in Central America" and proposes "to establish direct co-ordination machinery to facilite the fulfillment of its mandate" (no. 62). In order to facilitate voluntary repatriation of refugees it established "tripartite commissions composed of representatives of the State of origin, of the receiving State and of UNHCR" (no. 64).

The Document of Objectives of the Contadora Group, the points referring to refugees in the Contadora Act, and numerous resolutions of the UN General Assembly and its Economic and Social Council (ECOSOC) relating to the solutions applicable to the situation of massive refugee flows are addressed by the Working Paper—elaborated by Jorge Santistevan, UNHCR Senior Legal Adviser for Latin America. This Working Paper emphasizes that "the mass flow of persons in search of asylum has in the present century acquired proportions unknown in the history of mankind."[24] In addition to reviewing the system of international protection for refugees within the ambit of the United Nations and that of the Inter-American scope, it specifies the "necessity of making both international systems of protection complimentary,"[25] above all in moments when the challenge of large-scale influxes of refugees are posed.

Jorge Santistevan specified the need to guarantee the protection of persons find themselves forced to leave their country of origin as a consequence of armed conflicts within a framework of generalized violence and massive and indiscriminate human rights violations, always respecting the general principle of the pacific and humanitarian character of asylum, along with respect for the principle of *non-refoulement*.

Minimum standards of treatment in cases of large-scale refugee flows have antecedents that were mentioned,[26] as well as minimum norms to be respected.[27] Physical security in such situations implies the responsibility of the host country[28] and this must always take into consideration the most frequent threats in this regard, usually leading to recommending the removal of refugees at a reasonable distance from the borders of the country of origin.[29]

The Working Paper deals with the durable solutions of the refugee problem, in particular, voluntary repatriation,[30] which in the case of repatriation *en masse*, should be carried out in the framework of tripartite commissions with concrete objectives.[31] It also addresses the integration of refugees in the country of asylum,[32] with the reunification of families that integration implies, and the possibilities of resettlement in a third country.

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24 La Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios; Universidad Nacional de Bogotá, Colombia, 1986, p. 41, no. 6.
25 Op. cit., p. 49.
26 Cf. Op. cit., no. 63 and following.
27 Cf. Op. cit., no. 70 and following.
28 Op. cit., no. 74.
29 Op. cit. no. 81 and following.
30 Op. cit., no. 92 and following.
31 Op. cit., no. 104.
32 Op. cit., no. 105 and following.

Various presentations were given at the Cartagena Colloquium, made by government representatives describing the refugee situation in Belize, Costa Rica, El Salvador, Honduras and Mexico.

The representative from Costa Rica, Hilda Porras, Director for the National Commission for Refugee Assistance (CONAPARE), stated "that the situation of refugees entering a determined country in massive numbers is characterized above all by its strictly humanitarian character" and, in these situations it "is necessary to guarantee, as the primary goal, the protection of the refugees, respecting the principle of *non-refoulement*."[33]

The representative from El Salvador, Carlos Adrián Velasco Novoa, Director of the Section of International Bodies and Treaties of the Foreign Affairs Ministry, referred to the efforts being made by his country—a refugee generating country—to better the situation of human rights in El Salvador—with the ratification of the American Convention on Human Rights and the recognition of the competence of the Inter-American Court of Human Rights—to that end mention was made in the revised version of the Contadora Act on Peace and Cooperation in Central America.

On the other hand, the General Coordinator of the National Commission for Refugees (CONARE) of Honduras, Abraham García Turcios, observed that despite the fact that his country still had not accepted the 1951 Convention nor its 1967 Protocol, it had always given refuge to persons in need of protection. He stated that, confronted with thousands of recently arriving refugees in Honduras, the country made an effort to share this responsibility so that diverse groups of refugees could be accepted by other countries.

Mexico (represented by Ambassador Oscar González, Coordinator of the Mexican Commission for Refugee Aid (COMAR); Jorge Montaño, Director of Multilateral Affairs in the Ministry of Foreign Affairs and Ambassador Calzada Urquiza, Ambassador of Mexico to Bogotá) had not accepted the 1951 Convention nor its 1967 Protocol, despite the fact that it provided refuge to thousands of refugees in recent years, above all to those from Guatemala. In order to safeguard the physical security of refugees, Mexico found itself obligated to relocate them.

Nicaragua, represented by Alejandro Bendaña, Secretary General of the Ministry of Exterior, also highlighted the importance of the Contadora Act, which recognizes the central role of the UNHCR in protecting refugees and recommending the formation of tri-party commissions to facilitate this task, above all when carrying out programs of voluntary repatriation.

Aside from the governmental representatives mentioned, there were various experts who referred to matters of interest. Sergio Aguayo of Mexico noted the political aspects of the Central American exodus[34] manifested by numerous refugees and displaced persons in the interior of the countries. He finished on a pessimistic note stating: "The panorama is desolate, the forces of the conflict are, it would seem, uncontrollable in the short term. Because of this, one should expect a greater number of refugees and displaced persons scattering out over most of the region."[35]

33 Op. cit., pp. 95-96.
34 Op. cit., pp. 117-129.
35 Op. cit., pp. 127-128.

Yolanda Frías, professor at the *Universidad Nacional Autónoma de México* (UNAM), who discussed the international instruments of refugee protection and the legal regime in force in Mexico,[36] referred to the meaning and importance of the 1951 Convention and its 1967 Protocol, as well as the Contadora Act, which attributes a fundamental role to the UNHCR in protecting refugees and in the search for solutions to the situation. She also spoke of regional instruments related to asylum emphasizing that "the 1954 Caracas Convention on Territorial Asylum and the 1969 Pact of San Jose constitute the legal base from which the norms and principles that have nurtured the Inter-American system in matters of asylum and refugee protection are derived."[37] She also noted in her conclusions "that it would prove opportune for the Mexican Government to revise its migratory legislation in order to define, in the clearest way possible, important legal aspects that have been raised by the massive reception of Guatemalan refugees,"[38] aside from emphasizing the importance of Mexico's adherence to the international instruments relating to refugees.

Dr. Reinaldo Galindo Pohl, a professor from El Salvador, discussed refuge and asylum in theory and in legal and political practice.[39] His presentation referred widely to the importance of the African provisions and practices in the matter of the reception of massive refugee flows. On the American continent, where diverse systems of refugee protection exist, what is required is "an effort of coordination, codification and progressive development...inasmuch as it would introduce clarity, precision and uniformity into the applicable legal structure or would incorporate new situations within the protection system. Latin American countries could provide their own contributions to advancement in this area, such contributions having been absent for several decades."[40] Dr. Galindo's excellent observation illuminates the paths that Latin American countries must take in the future. Thus Dr. Galindo concluded: "If peace is reached in Central America, the refugee problem would be quickly resolved through means of voluntary repatriation, and the causes generating refugees and displaced persons would cease to exist." This opinion was fulfilled only a few years later, and in its realization contributed in an important way to the treatment given to refugees after the Colloquium of 1984.

The issue referring to the protection of persons seeking asylum in situations of large-scale flows was addressed by Carlos García Bauer, ex-representative of Guatemala in the United Nations and in the Organization of American States,[41] while Diego García Sayán of Peru, Executive Secretary of the Andean Commission of Jurists, spoke of Humanitarian Law and International Protection of Refugees.[42] The latter observed that "the deepest connection between International Humanitarian Law and the system of refugee protection can be found in the causal relationship existing between humanitarian law violations in situations of internal armed conflict, and the generation of a civil population seeking refuge and protection in another country."[43] Either way, the most interesting point is the link between massive human rights violations and/or generalized violence and the production of massive flows of persons arriving in another country seeking protection. This was precisely the situation prevailing in the Central American region.

36 Op. cit., pp. 133-144.
37 Op. cit., p. 139.
38 Op. cit., p. 144.
39 Op. cit., pp. 145-171.
40 Op. cit., p. 159.
41 Op. cit., p. 167.
42 Op. cit., pp. 173-190.
43 Op. cit., pp. 191-203.

Dr. Héctor Gros Espiell of Uruguay spoke of refugee repatriation,[44] which should be clearly distinguished from the return of refugees. The essential difference lies in the voluntary nature of the return. The keystone of refugee protection resides in the principle of *non-refoulement*, "which exists and asserts itself in an imperative manner in virtue of its *jus cogens* character, with all the consequences that derive from this in accordance with the Vienna Convention on the Law of Treaties."[45]

In Central America it was necessary to begin to prepare the organization and, when appropriate, the promotion of various massive repatriations within the framework of the tripartite commissions designated in the Contadora Act. He ended on a positive note: "I finish by expressing my confidence, and more than my confidence, my hope, that the evolution towards democracy, peace and the co-habitation in freedom of all the political ideologies, brings to Latin America in the coming years—in South America, Central America and the Caribbean—the attention of the office of the High Commissioner towards the problem of voluntary repatriation and not that of refuge in itself, and mobilizes the humanitarian and social action of the United Nations."[46]

Dr. Odilón Méndez Ramírez, of Costa Rica, spoke on the national security[47] doctrine and reiterated the importance of the UNHCR attending to refugees who were victims of oppression and civil war: "It deals with a type of refugee different from the traditional... this type of refugee moves in mass from one country to another in search of protection."[48]

Marco Gerardo Monroy Cabra, of the Inter-American Commission on Human Rights, addressed the "Inter-American System and the Protection of Refugees."[49] He repeated that in America the institution of territorial asylum does not fully coincide with the status of refugees according to the 1951 Convention and, moreover, on this continent the circumstances generating refugees occurred after 1951. Attempts at regional solutions appear, for example, in the 1966 draft of the Inter-American Convention on Refugees, which was never approved. Nevertheless, the issue itself has been the object of various pronouncements on the part of different bodies of the OAS. In this way, in its report to the General Assembly for the period 1981-1982, the Inter-American Commission recommended, among other matters relative to refugees, "that the definition of refugee in the region recognize persons who fled from their countries because their lives had been threatened by violence, aggression, foreign occupation, massive violations of human rights and other circumstances that destroyed the normal public order and for which there existed no internal resources."[50] This was in conformity with the recommendation of the 1981 Mexican Colloquium, which underlined the importance of strengthening the collaboration with UNHCR.

44 Op. cit., pp. 205-223.
45 Op. cit., p. 208.
46 Op. cit., p. 221.
47 Op. cit., pp. 225-237.
48 Op. Cit., p. 230.
49 Op. cit., pp. 239-258.
50 Op. cit., p. 249.

On the other hand, Michel Najlis, of Nicaragua, referred to the treatment of refugees in her country.[51] Nicaragua, which in 1980 had adhered to the 1951 Convention and its 1967 Protocol, received numerous Salvadorian refugees and participated very actively in the voluntary repatriation of indigenous Miskitos and Sumos who found themselves as refugees in Honduras. Michel Najlis likewise recommended "to broaden the concept of refugee in terms similar to those established by the OAU Convention, being sure to always maintain the definition of the Geneva Convention."[52]

The President of the Inter-American Commission on Human Rights, César Sepúlveda, spoke of the ties between International Humanitarian Law, human rights and international protection of refugees.[53] The objective of his presentation was to underline the importance of the interaction between these different systems of International Law in situations like that of the refugees in Central America. He also discussed the contributions of the Inter-American Commission in relation to refugees.

Another member of the Inter-American Commission on Human Rights, Edmundo Vargas Carreño, dealt with territorial asylum and the new concepts that have emerged from the Central American situation.[54] The Executive Secretary of the Commission noted the necessity of including "no rejection at the border" as an integral part of the fundamental principle of "*non-refoulement"*. He observed that "the most important problem presented by this issue consists in the quantitative and qualitative change experienced by the asylum seekers. While the instruments relative to asylum, at least those of the Inter-American system, were conceived to protect individually considered political leaders and whose asylum did not cause problems for the host country, the massive displacement of thousands of Central Americans, the majority lacking economic resources, is causing various difficulties for the countries of refuge. This is a new and unavoidable reality."

"It is evident," continued Vargas Carreño, "that the regional conventions, such as that of Caracas in 1954, have turned out to be completely inadequate for resolving these types of problems, which had never been posed before. Even the 1951 United Nations Convention and its 1967 Protocol do not contain provisions that resolve the problem of permanence and subsistence of the refugee within the territory of a State."[55]

Leo Valladores, of Honduras, referred to voluntary repatriation as a possible solution for the refugees found in his country.[56] The legal, theoretical and material aspects of this ideal solution for refugees were elaborated.

The final contribution at the Cartagena Colloquium was that of Monsignor Pedro Rubián Sáenz, coadjutant Bishop of Cali, who expounded on the characteristics of the Catholic Church's presence in the service of refugees.[57] Basing his exposition on the evangelical teachings, Monsignor Rubiano also detailed the teachings of the councils and of the various synods held in Latin America.

The Cartagena Colloquium concluded with the adoption of the document titled "The Cartagena Declaration on Refugees," which will be analyzed next.

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51 Op. cit., pp. 259-288.
52 Op. cit., p. 272.
53 Op cit., pp. 289-302.
54 Op. cit., pp. 303-309. Op. cit., p. 308.
55 Op. cit., p. 308.
56 Op. cit., pp. 310-328.
57 Op. cit., pp. 329-331.

THE STRUCTURE AND CONTENT OF THE 1984 CARTAGENA DECLARATION

The Cartagena Declaration is frequently reduced to the "broad" refugee definition that it adopted: such a reduction, aside from being improper, completely loses sight of the richness of the instrument and the importance it holds for all of Latin America.

In fact, as we have seen, one of the characteristics that Latin America has in the refugee domain is its long tradition in the protection of persecuted persons—excluding those who are persecuted for having committed a common crime—its rich production of regional instruments on the material and, because of this, an abundant body of doctrinal work relative to this important theme. The Cartagena Declaration is situated within this dynamic and is the inheritor of a regional custom tied to the dynamism of an international movement of universal character made visible in the mandate received by UNHCR and solidified in the 1951 Geneva Convention and in its 1967 Protocol relating to the Status of Refugees. The Cartagena Declaration, on the other hand, has a catalyzing function in naming a series of principles that structure the Law of refugees and possess a universal validity, going beyond those countries that were involved in the elaboration of the Declaration and that have applied the Declaration from the moment of its adoption.

The Cartagena Declaration is composed of four different parts. The first echoes the conclusions and recommendations adopted by the Colloquium held in Mexico in 1981 on International Asylum and Protection of Refugees in Latin America, which established important criteria for the analysis and consideration of the matter. The second part reproduces the obligations relative to refugees included in the Contadora Act on Peace and Cooperation in Central America, whose criteria are accepted in full and transcribed. The third part reproduces a series of conclusions that are the result of the Colloquium held in Cartagena in 1984 on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems. The third of these conclusions contains the "broad definition" that was adopted in the region. The fourth and final part establishes a series of recommendations whose objective is to highlight the necessity to scrupulously observe the obligations in matters of refugees present in the Contadora Act, as well as the conclusions achieved thanks to the Cartagena Colloquium. It also recommends that the Cartagena Declaration, the working paper, the papers and reports, as well as the conclusions, the recommendations of the Colloquium and other pertinent documents be duly published and distributed. The UNHCR was put in charge of officially transmitting the content of the Cartagena Declaration to the heads of State of the Central American countries, Belize and the member countries of the Contadora Group.

In this vein it is necessary to remember the most distinct points of the Cartagena Declaration. The most adequate would be to examine each of the four parts.

The first, as we already said, recalls the conclusions and recommendations of the 1981 Mexico Colloquium, which laid out "important criteria for the analysis and consideration of this material." It is as follows:

- it recognizes that the refugee phenomenon had taken on new dimensions in the region to the point at which it deserved special consideration;

- it appreciates the generosity, notwithstanding the great difficulties they have had to face, of the countries receiving Central American refugees;

- it emphasizes the "admirable humanitarian and non-political task" carried out by the UNHCR which benefits all states, whether or not party to the 1951 Convention and/or its 1967 Protocol;

- it likewise recalls the important work of the Inter-American Commission on Human Rights on this matter;

- it definitively supports the efforts of the Contadora Group to find an effective and lasting solution to the problem of Central American refugees;

- it expresses its conviction that "many of the legal and humanitarian problems relating to refugees which have arisen in the Central American region, Mexico and Panama can only be tackled in the light of the necessary co-ordination and harmonization of universal and regional systems and national efforts."

The second part reproduces the agreements in refugee matters contained in the Contadora Act on Peace and Co-operation in Central America. These refer to the need to:

- adhere, on the part of the States that have not yet done so, to the 1951 Convention and its 1967 Protocol;

- adopt the terminology established in the 1951 Convention and its 1967 Protocol;

- produce the domestic legislation necessary to implement the provisions of such instruments;

- establish mechanisms of national consultation to address the refugee problem;

- support and facilitate the work performed by the UNHCR;

- ensure the voluntary character of refugee repatriation;

- establish tripartite commissions to facilitate repatriation;

- strengthen the programs of protection and assistance for refugees;

- establish programs and projects facilitating the integration of refugees;

- train public officials dealing with refugees;

- request immediate assistance from the international community on behalf of Central American refugees;

- identify other possible countries which might receive Central American refugees;

- eradicate the causes of the refugee problem;

- permit the visits of authorities from the country of origin to the refugee camps in order to facilitate voluntary repatriations;

- facilitate exit procedures for refugees for the purpose of voluntary repatriation;

- prevent the participation of refugees in activities directed against the country of origin.

The third part establishes seventeen conclusions which represent the most original and important contribution of the Cartagena Declaration on Refugees. These conclusions include:

- To promote within the countries of the region the adoption of national laws and regulations facilitating the application of the 1951 Convention and its 1967 Protocol;

- to promote the adherence to or ratification of said instruments on the part of the States that have not yet done so;

- the adoption of a 'broader' refugee definition. The third conclusion literally says: "To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in light of the situation prevailingin the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who 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 the public order."

  It is thus that the 'broad' definition, with roots in the region (the doctrine used in the Reports of the Inter-American Commission on Human Rights), as well as roots outside the region (the 1969 OAU Convention which regulated specific aspects of the refugee problem in Africa), attempts to respond to the grave problem represented by massive refugee flows.

  The 'broad' definition maintains and exceeds the characteristic elements of the concept of refugee, such as the fact that the person should find themselves outside their country of origin. It goes beyond 'well-founded fear of persecution' and includes an 'objective' situation consistent with the fact that life, safety or freedom are threatened by 'generalized violence, foreign aggression, internal conflicts, the massive violation of human rights or other circumstances which have seriously disturbed public order.'

  The reasons mentioned, which justify the status of refugee in accordance with the Cartagena Declaration, allow one to understand that, if the document is extrapolated from the aforementioned definition adopted by the 1969 OAU Convention, such extrapolation does not signify a literal transcription of the provisions but rather a deep reflection upon it, thanks to which one can regulate 'the particular aspects of the refugee problem in Latin America.' In fact, if Article 1, no. 1 of the OAU Convention reproduces the definition that appears in the 1951 Geneva Convention, the same Article 1, in no. 2 establishes that "the term 'refugee' shall also 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."

As can be seen, the Cartagena Declaration is original in mentioning generalized violence, internal conflicts and massive violations of human rights alongside the reasons referred to in the 1969 OAU Convention. With this, the Cartagena Declaration appears endowed with enduring relevance—and a universal potential—since such reasons for refugee status appear cyclically not only in Latin America, but in all corners of the world.

If the 1951 Geneva Convention has been accused—though without a real foundation—of responding precisely to a European situation shaped by the moments during and immediately after the Second World War, the Cartagena Declaration allows for the inclusion of situations going beyond European borders and crossing, unfortunately, every latitude and every epoch. Meanwhile, the European countries, which refuse to evolve in the meaning marked by the definition established in the Cartagena Declaration, are finding themselves obligated to invent 'subsidiary forms of protection,' known under different denominations such as 'Statute B,' 'Temporary Protection,' 'Humanitarian Statute,' and 'Tolerated Stay,' etc. This impedes the repatriation of persons to the countries of origin where—should they be returned—their lives, freedom or safety is in clear danger. This creates then a difficult situation for these human beings that, although they are not returned to their countries of origin on the grounds of the evident circumstances of danger that prevail, are not recognized as refugees either. Under these circumstances, the UNHCR does everything possible so that, at the very least, they are recognized as having certain fundamental rights. In cases where this is not observed, the same States creating these 'subsidiary forms of protection' then become the cause of the irregular movement of persons.

This situation becomes more ironic when it is understood that these reactions have been caused not only by the arrival of persons from countries and continents where the situation of generalized violence and massive human rights violations is known and well documented, but they are also caused by events happening on the European continent. The Balkans and the current situation in Chechnya, where thousands of people have been compelled to seek protection in various European countries, suffice as examples.

The Cartagena Declaration is the Latin American instrument knowing the broadest application and serving to recognize refugee status of those persons in need of protection. It is interesting to note that the fecundity of the broad refugee definition contained in the Cartagena Declaration is evident not only in the fact that it allowed the protection of thousands of Central and South American refugees, but it also was a precious instrument used in Brazil to resolve the situation of several hundred Angolans who arrived seeking protection in the nineties. Thanks to that challenge Brazil reached enviable levels of 'modernization' in the domain of refugee law, adopting domestic legislation on the matter that has even served as an inspiration to other national regulations.

- The fourth conclusion of the third part has, as we previously noted, special importance.

It confirms "the peaceful, non-political and exclusively humanitarian nature of granting asylum or recognizing refugee status," which is fundamental for reminding countries that such a concession or recognition should never be interpreted as an unfriendly act towards the country of origin of the protected persons.

In this respect the President of the Inter-American Court of Human Rights, judge Antonio A. Cançado Trindade, has written in the Concurring Opinion of the famous Advisory Opinion no. 18 of September 2003, relating to the "Legal Condition and Rights of Undocumented Migrants," that "it ought to be kept in mind that the institute of asylum is much wider than the meaning attributed to asylum within the ambit of Refugee Law (i.e., amounting to refuge). Furthermore, the institution of asylum (the general kind to which territorial asylum belongs) precedes historically by many years the *corpus juris* itself of Refugee Law. *Aggiornamento* and a more integral comprehension of territorial asylum—which could be extracted from Article 22 of the American Convention on Human Rights—could come to the aid of undocumented migrant workers...To that end, [asylum] would have to be acknowledged (or again, to become) recognized precisely as a subjective individual right, and not as a discretionary faculty of the State."[58] The Inter-American Court judge completes his idea by adding: "Likewise, as to refugees, one 'recognizes', rather than 'grants', their status; it is not a simple 'concession' on the part of the States. Nevertheless, the terminology nowadays commonly employed is a reflection of a regression that we regrettably witness. For example, there are terms, like 'temporary protection', which seem to imply a relativization of the full protection granted in the past."[59]

In any case, this fourth conclusion also emphasizes, as we have said, "the internationally accepted principle by which nothing should be interpreted as an unfriendly act towards the country of origin of refugees." Thus the Cartagena Declaration is elevated, after stating a more realistic definition of the concept of refugee, to the level of a principle of International Refugee Law.

It is important to remember that it was the same Inter-American Court President who recalled the importance of the General Principles of the Law, in noting that these are "the first causes, sources or origins of the norms and rules, confer cohesion, coherence and legitimacy upon the legal norms and the legal system as a whole."[60] These General Principles give the legal order "its ineluctable axiological dimension; they reveal the values inspiring the whole legal order and ultimately provide its foundation."[61]

The Principles show the goals to achieve: the common good, justice, the primacy of the law over force, the realization of peace. "Without principles, the 'legal order' simply is not accomplished, and ceases to exist as such."[62]

The General Principles of the Law inspire the interpretation and application of the legal norms and reflect the *opinio juris*, which is found at the base of the Law's very formation. In this way the General Principles of Law demonstrate the values and ultimate goals of the international legal norms and possess a universal reach: they do not emanate from the will of the States but do require their universal observance.

58 Concurring Opinion, no. 40.
59 Concurring Opinion, no. 40.
60 Concurring Opinion, no. 44I
61 Idem.
62 Concurring Opinion, no. 46.

In International Human Rights Law certain general principles exist—such as the principle of the inherent dignity of the human being, the inalienability of human rights, the principle of equality and non-discrimination—the same as International Refugee Law. Thus the Cartagena Declaration mentions one of the primary principles of International Refugee Law, a principle requiring as a given universal acceptance and observation.

- The fifth conclusion has special importance not only in mentioning the principle which constitutes 'the cornerstone' of Refugee Law, the principle of non-return (*non-refoulement*), which states explicitly its enormous richness: it is a principle of an imperative nature, which asserts itself as an obligation for all the States, does not accept agreements to the contrary, and forms part of the international *jus cogens*.

This fifth conclusion reiterates the importance and significance of "the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative with respect to refugees and in the current state of international law should be acknowledged and observed as a rule of *jus cogens*."

The principle of *non-refoulement*, as stated in the provisional measures adopted in the face of the massive deportation of Haitian migrants that were in the Dominican Republic, "can be invoked in contexts different [to that of refugees], such as that of the collective expulsion of illegal migrants or other groups."[63]

Such a principle, which includes the prohibition of rejection at the border, allows the importance of *jus cogens* to be derived from imperative law. In fact, *jus cogens*, enshrined in the Vienna Convention on the Law of Treaties Between States and International Organizations (1969 and 1986), applies in the domain of treaties but extends to general International Law. It is, moreover, an 'open category,' that defines itself and grows more every day as the 'universal legal conscience' awakens. To such a category as *jus cogens* belongs, for example, the irrevocable human rights, amongst which are the absolute prohibition of the practice of torture, the forced disappearance of persons and illegal and extralegal executions.

Jus cogens is important to adequately understand State responsibility. State violations of *jus cogens* represent an objective illegality that establishes objective State responsibility. "The emergence and assertion of *jus cogens* evoke the notions of international public order and of a hierarchy of legal norms, as well as the prevalence of the *jus necessarium* over the *jus voluntarium*; *jus cogens* presents itself as the juridical expression of the international community as a whole, which takes conscience of itself, and of the fundamental principles and values guiding it."[64]

63 Resolution of the Inter-American Court of Human Rights (December 18, 2000), San José, Costa Rica, Provisional Measures of Protection in the Case of the Haitians and Dominicans of Haitian Origin in the Dominican Republic: Concurring Opinion of Judge Antonio A. Cancado Trindade, no. 5.

64 Concurring Opinion of Judge Antonio A. Cancado Trindade, no. 73. Advisory Opinion OC-18/03. Op. cit.

Jus cogens creates *erga omnes* obligations binding all states "and generate[ing] effects with regard to third parties, including individuals."[65] This is a point upon which the Inter-American Court of Human Rights has shed abundant light in Latin America with Advisory Opinion no. 18, where following its adoption the UNHCR intervened—for the first time ever—in the capacity of *amicus curiae*.

All of this is included *in noce* in the fifth conclusion of the Cartagena Declaration.

- Other principles of International Refugee Law mentioned in the Cartagena Declaration are those of the voluntary and individual character of the repatriation of refugees (a principle that is a natural corollary of the principle of *non-refoulement*, such as Dr. Gros Espiell explained it in his paper presented in 1984 at the Cartagena Colloquium) which is mentioned in conclusion 12, specifying, moreover, that such repatriations should be undertaken in conditions of complete security and dignity, "preferably at the place of residence of the refugee in his or her country of origin."

  Another principle "fundamental in the matter of refugees" is that of family reunification (conclusion 13), which unfortunately is not observed in the case of those States using 'other subsidiary forms of international protection' different from that which is particular to refugees. Such arbitrariness has been impeded by the Cartagena Declaration which, as can be seen, goes far beyond the 'broad definition of refugee.'

- Other conclusions advise locating refugee camps and resettlements at a "reasonable distance" from the borders for the purpose of assuring adequate protection on the part of the host country, as well as for preserving the fundamental human rights of the refugees and facilitating their self-sufficiency and integration. The concern becomes apparent in the face of military attacks suffered by refugee camps and resettlements (conclusion 7) and makes it necessary to put into practice the Conclusions in matters of protection adopted by the UNHCR Executive Committee.

- The Cartagena Declaration also refers to persons internally displaced within countries due to violence (conclusion 9), and their need to receive due protection and assistance.

- The 1969 American Convention on Human Rights is a regional instrument that should be applied in the region by the States Parties (conclusion 10).

- The Latin American countries experiencing a large refugee presence should study "the possibilities of integrating them into the economic life of the country" (conclusion 11).

- The importance of coordinating regional institutions with UNHCR is emphasized. Such organizations include the OAS, specifically its Program of Co-operation (conclusion 16), and the Inter-American Commission on Human Rights (conclusion 15).

65 OC-18/03, par. 110 and resolution no. 5.

It is interesting to highlight, in this sense, the importance the Inter-American Commission has had in the protection of refugees, on par with, as we have superficially noted, the Inter-American Court of Human Rights. The recommendations and resolutions of the Commission, as well as the important work of the Court—expressing itself through sentencing, advisory opinions and decreed provisional measures—have been extremely valuable for the protection of refugees in the region.

- The need for all these efforts to be duly promoted and known makes up the content of conclusion 17, which specifies that it is "especially important that such a dissemination be undertaken with the valuable co-operation of appropriate universities and centers of higher education."

HISTORICAL IMPORTANCE OF THE CARTAGENA DECLARATION

The Cartagena Declaration has had an undeniable importance which can be seen in two different dimensions: above all in a 'temporal' dimension, in the sense that it constituted an extremely valuable instrument helping to resolve the crisis of the Central American refugees in the eighties and nineties. However, its importance at the time went beyond this precise chapter in Latin American life since the meaning of the Declaration, especially the 'broad' refugee definition, was taken up by different Latin American internal normatives at later dates and by the jurisprudence of different countries of this region. This is a phenomenon extending even to very recent history.[66] Its importance equally possesses a 'spatial' dimension, in the sense that the Declaration has not only been accepted by the countries represented at the adoption of the Declaration, gathered together in Cartagena in 1984,[67] and by the countries forming the Contadora group,[68] but its effects have also reverberated throughout Latin America.[69]

The definition adopted by the Declaration has been used to determine the condition of refugee for thousands of Central Americans as well as for other Latin American persons from various South American countries. It has also benefited refugees from outside the continent.[70]

The definition established by the Declaration has been used to resolve the phenomena of large-scale refugee flows and has also been applied to individual cases meeting the requirements described in the Declaration. Naturally, one should not confuse '*prima facie* refugees' with 'refugees in accordance with the Cartagena Declaration,' even though 'refugees in accordance with the Cartagena Declaration' can exist that are *prima facie*. The position of the UNHCR has always been that the host country should proceed as rapidly as possible to make an 'individual determination'.

The Cartagena Declaration goes well beyond the definition that it contains, and it is a part of a dynamic Latin American tradition in favor of persons who are victims of a situation depriving them of due protection. Nevertheless, one should not believe that the Cartagena Declaration responds to all of the causes of today's forced migratory movements.[71] The Declaration undoubtedly contains a progressive

66 Remember, for example, the case of the Law for the determination of the Condition of Persons Taking Refuge in El Salvador, of August 2002 and the Migration Law of Honduras, of December 2003.
67 Guatemala, Belize, Honduras, El Salvador, Nicaragua and Costa Rica.
68 Mexico, Panama, Colombia and Venezuela.
69 It should be remembered that the United States of North America and Canada, in all the regional meetings which touched upon the theme of refugees, declared that they did not accept the definition proposed by the Cartagena Declaration.
70 As we have already noted, such was the case with the Angolan refugees recognized by Brazil.
71 In this regard one can take a look at my two small essays: The Problem of Forced Migration in Our Time, IMDOSOC, Mexico, 2003 and Forced Migrations, IMDOSOC, Mexico, 2004.

character in referring, in the broad definition, to causes uncovering a 'new dimension of the necessities of protection of the human being' which have been very present during the last decades.

The Cartagena Declaration is situated within the framework of conventional regional and subregional asylum Law,[72] and in the conventional universal Law represented by the 1951 Convention and its 1967 Protocol relating to the Status of Refugees. For this reason, the Cartagena Declaration attempts to protect persons that have 'well-founded fears of persecution' for those grounds specified in the 1951 Convention and its 1967 Protocol, as well as those whose lives, security or liberty are in danger due to reasons pointed out in the 'broad' refugee definition. In the case of the Convention and its Protocol, the psychological element of the 'fear of individual persecution' is emphasized, while in the definition of the Declaration the 'objective' realities that put the life, safety or freedom of persons in danger are accentuated. Do they deal with completely different situations? Authorities such as I. Jackson think not, that better yet the 'broad' definition adopted by Latin America is only a more explicit form of the 1951 Convention and its 1967 Protocol. The 'broadening' is in reality merely a more 'explicit form' [of the definition], possible thanks to a generous interpretation of the universal definition which appears in the 1951 Convention and its 1967 Protocol. I personally think that this is the correct position and that the 'broad definition' only makes manifest this 'new dimension of the necessities of the protection of the human being at the beginning of the 21st century.'[73]

The Cartagena Declaration is also of great import due to the fact that, being an instrument that in no way is reduced merely to the 'broad' definition, it emphasizes a series of General Principles of International Refugee Law. The war declared against Iraq by the United States of North America, in addition to having committed this absolutely internationally illegal act in which the Law was violated by force and the paths of reason were negated by violence— questioned International Law itself. Not simply International Law, but rather Law itself. The sophist arguments of Callias have tried once again to prevail over the wisdom of Socrates. Under these circumstances, more than ever, it is necessary to remember the fundamental Principles upon which the Law rests, International Law, International Refugee Law—those general principles 'recognized by civilized nations.' Truly, what has been put into question has not been the validity of such general principles so much as the 'civilized' character of certain nations...

As has been recalled,[74] these principles give the juridical order "its ineluctable axiological dimension; they have revealed the values which inspire the whole legal order and which, ultimately, provide its foundations themselves."

72 Which includes the treaty of Montevideo in 1889 until the American Convention on Human Rights or the 1969 Pact of San Jose.

73 Such is precisely the title of the piece written in collaboration with Antonio A. Cancado Trindade, UNHCR, San Jose, Costa Rica, 3rd ed., 2004, which emphasizes the profound relation existing between International Human Rights Law and International Refugee Law. In a previous work, in which Gérard Peyrinet also collaborated, titled the "Three Branches of International Protection of the Rights of the Human Person," this relation was also studied in relation to International Humanitarian Law. This last work is also available in a Portuguese edition (CICR-IIDH-ACNUR, San Jose, Costa Rica/Brasilia, 1996) and Spanish edition (Porrúa, Mexico, 2003).

74 O-C 18, no. 41.

The Cartagena Declaration makes explicit some of these principles of refugee law such as consideration of the pacific, non-political and exclusively humanitarian nature of conceding asylum or recognition of the condition of refugee; the consideration of the principle of non-return (*non-refoulement*) as a case of *jus cogens*; the voluntary and individual character of the repatriation of refugees; and the reunification of the family. The Cartagena Declaration has reminded us that certain of these principles—the true expression of the universal legal conscience, which manifests the 'material' values of the Law—possess the nature of *jus imperativum* or *necessarium* to which is granted *erga omnes* obligations. These obligations impose their authority on States and their violation is cause for objective State responsibility.

In this way the Cartagena Declaration possesses—in reference to these principles—a force going beyond its application in Latin America and the American continent and universally asserts itself on all States and under all circumstances.

It is thus that one can comprehend that the Cartagena Declaration exists today as a juridical fact, its validity is recognized and is applied as if this validity existed.

Twenty years have passed since the adoption of the Cartagena Declaration: the foundation of its force, of its binding nature, can be found in this unilateral act for which, by means of their various representatives present at the 1984 Colloquium, the States accepted this Declaration as binding, and likewise for having incorporated its criteria into various domestic legislations. In this sense, it is important to remember the doctrine of judicial '*estoppel*', which is founded on the good faith principle. Thanks to this, according to the doctrine, a State is obliged by its own acts, having taken into account the general obligation to act in good faith and the corresponding right of other States to rely on the conduct of the first. In this way, a State that has in a unilateral manner recognized, or acted in the sense of having recognized, the binding nature of the Cartagena Declaration cannot then afterwards renege on its attitude and deny the binding nature of such Declaration.

Different resolutions adopted by the OAS General Assembly, which represents an expression of the political will demonstrating the acceptance of the Declaration's principles on the part of the Latin American and Caribbean countries, helps to reveal the foundation of the Declaration's binding nature. It was precisely on such occasions that the United States of America and Canada expressed their rejection of such a position. However, Latin American and Caribbean countries were unanimous in their acceptance.

For all these reasons I believe that the Cartagena Declaration should be thought of and considered an example of regional custom. Together with one of the best studies on this material,[75] one should consider that, after twenty years during which the Declaration has been applied with the consciousness that it possesses a binding nature (founded in national legislations and reports from the OAS General Assembly), and that it has been applied repeatedly to situations foreseen in the OAS, the Cartagena Declaration is part of a regional custom.

75 See the considerations that Héctor Gros Espiell makes in this regard in his study "The Cartagena Declaration as a Source of International Refugee Law in Latin America," in the Volume dedicated to the International Colloquium in Commemoration of the "Tenth Anniversary of the Cartagena Declaration on Refugees," San José, 5-7 December 1994, Op. cit., pp. 453-469.

Custom, which in accordance with the International Court of Justice, can be universal, regional and even bilateral, requires two elements: general practice (*usus* or *diuturnitas*) and the conviction that such a practice reflects or possesses the force of law (*opinio juris*). As Antonio Cassese[76] noted, "in order for a principle to serve as the source of international matters it is sufficient that the majority of the States get involved by a constant practice and in conformity to such a principle, and that they are conscience of its obligatory necessity."

Ten years after the adoption of the Cartagena Declaration, Gros Espiell maintained that it was an example of a custom denominated 'savage,' different from that called 'sage,' which comes from progressively solidified 'tendencies.'Within another ten years following the instrument's acceptance, and of its application with the consciousness of its obligatory character, the nature of regional custom is clearer still. It has a 'general' practice that has no reason to be unanimous—this would be unattainable and unrealistic—and that is regional and not universal.

Moreover, as the situations that confront the Cartagena Declaration are far from being exclusive to Latin America, other countries are forced to resolve these 'new dimensions in the necessities of protection of the human being' in a totally inappropriate manner.

Latin America has shown itself progressive in the just and humanitarian manner it has responded to these new individual protection needs. Nevertheless, we firmly hope that this instrument will not need to be newly applied to situations originating on the continent itself.

76 International Law, Oxford University Press, New York, 2001, p. 123.

THE TREATMENT OF ASYLUM-SEEKERS AND REFUGEES IN LIGHT OF THE CARTAGENA DECLARATION ON REFUGEES AND INTERNATIONAL HUMAN RIGHTS LAW

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1. Introduction

The purpose of this presentation is to analyze how International Human Rights Law supplements the norms of International Refugee Law. This paper will examine how the Cartagena Declaration on Refugees[1] became a pioneering instrument twenty years ago on this matter by emphasizing the need for a comprehensive vision of all sources of individual protection.

The Convention relating to Refugee Status[2] (hereafter the 1951 Convention), supplemented by the Protocol relating to Refugee Status[3] (hereafter the 1967 Protocol), has been interpreted over the years so as to grant greater protection to asylum-seekers and refugees. These norms by themselves, however, do not grant effective and due protection to the individuals in need.

The complementariness and convergence of international norms relating to the protection of the individual, promoted by the Cartagena Declaration, is of great relevance and is in full effect, particularly from the perspective of the dynamic evolution which has reinforced and extended significantly the protection granted to asylum-seekers and refugees under International Refugee Law.

Considering the dynamic character of International Human Rights Law, this paper will analyze the protection granted to individuals by International Refugee Law and the existing limitations in the protection granted by it. An analysis is then made of concrete examples demonstrating how human rights norms grant converging and complementary individual protection.[4]

2. The Cartagena Declaration and human rights

The preamble of the 1951 Convention reflects "the intention of the drafters to incorporate human rights values into the identification and treatment of refugees, which serves as a useful guide to interpret the provisions contained in the 1951 Convention".[5] In addition, the convergence and complementariness of both branches of Law on the matter of protection of the individual has been underlined throughout the years in various conclusions of the UNHCR's Executive Committee.[6] However, we must not lose sight

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1 Adopted at the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena 19-22, November 1984. Hereafter called the *Cartagena Declaration* or simply *Declaration*.

2 Adopted in Geneva, Switzerland on July 28, 1951 by the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (United Nations) called by the General Assembly in resolution 429 (V) of December 14, 1950. It entered into effect on April 22, 1954 pursuant to Article 43.

3 The Economic and Social Council and the General Assembly took note of the Protocol and approved it in Resolution 1186 (XLI) of November 18, 1966 and resolution 2198 (XXI) of December 16, 1966 respectively. In the same resolution, the General Assembly asked the Secretary General to communicate to the States the text of the Protocol mentioned in Article V so that they could access the Protocol signed in New York on January 31, 1967. The Protocol entered into effect on October 4, 1967, pursuant to Article VIII.

4 This paper will not analyze the protection granted by International Humanitarian Law. For an analysis of International Humanitarian Law, see Cançado-Trindade, Antonio A.: Derecho internacional de los derechos humanos, derecho internacional de los refugiados y derecho internacional humanitario: Aproximaciones y convergencias *(International Human Rights Law, International Refugee Law and International Humanitarian Law: Approaches and Concergences)*. In: Report of the International Colloquium: 10 years of the Declaration of Cartagena on Refugees, 1994 The San Jose Declaration on Refugees and Displaced Persons. IIHR-UNHCR, 1995, pp. 77-168.

5 UNHCR: Interpreting of Article 1 of the 1951 Convention relating to the Status of Refugees, 2001, paragraph 4.

6 See, for example, Conclusions on the International Protection of Refugees No. 50 (XXXIX), 1988; No. 56 (XL), 1989 on durable solutions and protection of refugees; No. 80 (XLVII), 1996 on global and regional approaches within a protection framework, No. 85 (XLIX) 1998 on International Protection. 1999 (50th meeting period of the Executive Committee), No. 87 (L) General Conclusion on International Protection.

of the fact that, following the tradition of asylum in the region and the work done by the Inter-American Commission on Human Rights, the Cartagena Declaration has a visionary character. Since 1984 it foresaw the need to integrate and supplement the standards of International Refugee Law, the juridical protection frameworks established in International Human Rights Law and International Humanitarian Law.

The Cartagena Declaration integrates human rights on several fronts. First, as is well known, the Cartagena Declaration incorporates massive human rights violations as one of the causes for the refugee definition as stated in the broader refugee definition as contained in the third conclusion.[7]

Second, the Declaration urges States to establish a minimum refugee treatment regime based on the precepts of the 1951 Convention and the 1967 Protocol and in the regional Inter-American norms on human rights, represented by the American Convention on Human Rights (Part III, Conclusion VIII).[8]

The Declaration also urges States party to the American Convention on Human Rights to apply this instrument in their conduct toward asylees and refugees present in their territory (Part II, conclusion X). This is of paramount importance because, as we will see later, the norms of the American Convention provide complementary protection and in some cases greater protection than International Refugee Law.

Furthermore, the Declaration deems it necessary to promote the use of competent bodies of the Inter-American system for the protection of human rights (the Inter-American Commission and the Court of Human Rights) (Part III, conclusion XV). This is also transcendental if we consider that the universal regime of refugee protection does not contain judicial or quasi-judicial supervisory bodies, something which does exist in the realm of International Human Rights Law.[9]

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7 To analyze this issue in detail, see the papers relative to the broader definition of refugee contained in other chapters of this publication.

8 The innovative character of the Cartagena Declaration may have been inspired, among other sources, in Conclusion No. XXII of the Executive Committee of UNHCR adopted in 1981 on the "protection of asylum-seekers in large-scale influx situations", which is expressly mentioned in the eighth conclusion of the Declaration. This conclusion of the Executive Committee carefully examines the minimum basic norms such as enjoying fundamental civil rights, receiving the necessary assistance and meeting their "vital needs, including the provision of food, housing, and basic health and hygiene services, non-discrimination, access to courts and to other competent administrative authorities, family unit and special protection to minors." As it can be observed, these are all norms embodied in human rights law. However, it also deals with specific issues which emerge from the particular circumstances of refugees such as the need to locate asylum- seekers, based on their security and well being, at a reasonable distance from the border. It also states that the best help possible must be provided to settle their relatives; to allow material assistance from friends and relatives; to provide adequate measures to record births, deaths and marriages; and to facilitate voluntary repatriation. The fact that this aspect of the Cartagena Declaration may have been inspired in this conclusion of the Executive Committee does not undermine whatsoever the importance of the Declaration itself, which goes beyond the conclusion by expressly stating the importance of international human rights law in general, including the cases of individual eligibility and not only cases of mass influxes, in addition to making clear reference to the American Convention on Human Rights, a binding instrument for the States. It also recommends the use of mechanisms to protect human rights, particularly those of the Inter-American system in order to ensure a more effective protection of refugees (fifteenth conclusion). In addition, as it has already been mentioned, based on the experience gained from the cases of mass influxes of refugees in Central America, the Cartagena Declaration was consolidated as the first Latin American document that establishes guidelines for the States facing large-scale inluxes of refugees. (See: Arboleda, Eduardo: The Cartagena Declaration of 1984 and its Similarities to the 1969 OAU Convention—A Comparative Perspective, *International Journal of Refugee Law*, (1995), page 93).

9 See text attached to note No. 28.

Another contribution of the Declaration is its emphasis on the need to promote the dissemination at all levels of international and domestic norms relative not only to the protection of refugees but also those relative to human rights. At the same time the Declaration emphasizes the key role that universities and institutions of higher education play in advocacy.

The need to integrate the norms of human rights and refugee law is also emphasized by subsequent instruments emerging from the Cartagena Declaration.[10] For instance, we find that the subsequent documents reiterate that human rights violations are one of the main causes of massive refugee exoduses and serious humanitarian crises. It also states that the safeguarding of human rights is an integral element to ensure due protection of refugees as well as in achieving durable solutions.[11]

In short, the Cartagena Declaration and the subsequent documents relate human rights with refugee issues in three main areas: *causes, protection and durable solutions*. From these three areas of convergence, this analysis will focus on *protection*, namely, the integration of both regulatory systems as a means of strengthening the protection of asylum-seekers and refugees in the country of asylum.

3. The rights of asylum-seekers and refugees according to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol

3.1 Legal rights contained in the 1951 Convention

One must not overlook the fact that the 1951 Convention establishes certain legal rights to refugees which include, among others, the following:

1. *Prohibition of discrimination* with respect to *race, religion or country of origin* (Article 3)

2. *Some rights of a civil and political nature such as:*

   Religious freedom (Article 4)
   Right of association (Article 15)
   Access to courts (Article 16)
   Freedom of movement (Article 26)

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10 We refer for instance to the San Jose Declaration on Refugees and Displaced Persons adopted by the International Colloquium: 10 Years of the Cartagena Declaration on Refugees, celebrated in San Jose, Costa Rica from December 5-7 of 1994 (hereafter referred to as *the San Jose Declaration*); the Declaration and Action Plan agreed upon in favor of the Central American refugees, returnees and displaced persons., CIREFCA 1989 (CIREFCA 89/13/Rev. 1, May 30, 1989); Principles and criteria for the protection and assistance to refugees, returnees and displaced persons in Latin America. Document prepared by the Expert Group for the International Conference on Central American Refugees, 1989 (CIREFCA 89/9, April 1989).

11 See the San Jose Declaration, part I and the CIREFCA document, paragraphs 72 and 73. The refugee status is not permanent. The person is expected to return voluntarily (repatriation) to his country of origin or, whenever this is not possible, to integrate to the hosting society or to a third country. It is in this sense that the respect for human rights is also essential in the search for durable solutions. Voluntary repatriation is very difficult when the causes of violations of human rights that forced the person to leave still persist. Nor can we talk about voluntary repatriation if the refugee must return to his country of origin and the causes of persecution that forced him to flee still persist, or when there is no respect for human rights, especially those of an economic, social and cultural nature.

3. Some rights of an economic, social and cultural nature such as

Intellectual and industrial property rights (Article 14)
Wage-earning employment (Article 17)
Self-employment (Article 18)
Liberal professions (Article 19)
Housing (Article 21)
Public education (Article 22)
Public assistance (Article 23)
Labor rights and social security (Article 24)

4. The prohibition of expulsion or return to the territory where his life, freedom or security are threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (Articles 32 and 33).

3.2 Limitations

Nevertheless, the way these rights are embodied in the 1951 Convention poses some limitations:

1. The first limitation is that the Convention refers to "refugees". However, it could be argued that it is not possible to know whether the person is a refugee until the status determination procedure has concluded. For this reason, the person would not be protected by the 1951 Convention. Nevertheless, this position would be erroneous as the determination of refugee status has a merely "declarative" value. We must then assure that asylum-seekers also enjoy the rights established in the Convention.[12]

2. The second limitation is found in the language used in each of the Articles containing legal rights where, in certain situations, the enjoyment of such rights does not depend on the fact that the individual is located in the territory of the State of asylum, but on the satisfaction of an additional criterion, which is, for example, that the individual must "reside legally in the territory".[13]

3. The level of standards of enjoying such rights also varies in each case. In some cases, it is required that States accord as favorable treatment as possible to refugees and, in any event, not less favorable than that accorded to aliens in similar circumstances"[14]; "the most favorable treatment accorded to nationals of a foreign country in the same circumstances"[15], "the same treatment as a national in the State in which he has his habitual residence"[16] and in exceptional cases, refugees are granted "the

12 As stated in paragraph 28 of the "Manual of Procedures and Criteria to Determine the Refugee Status" in virtue of the 1951 Convention and the 1967 Protocol on the Refugee Status (hereafter referred to as *the UNHCR Manual*): "A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

13 This requirement is necessary, for example, to enjoy the rights embodied in Article 17 (wage-earning employment); Article 18 (self-employment); Article 19 (liberal professions); Article 21 (housing) and Article 24 (labor rights and social security).

14 See, for example, Articles 13 and 18. Article 6 defines what must be understood by the expression "in the same circumstances".

15 See, for example, Articles 15 and 17.

16 See, for example, Article 16.

same treatment as is accorded to *nationals*". This last standard of protection, which is the highest of all, is established only in the case of rights relating to religious freedom, including the freedom to religious instruction and elementary education.[17]

We therefore find that the 1951 Convention embodies only a limited number of human rights. Moreover, the enjoyment of those rights is subject to a series of limitations, and in most cases, the standard of protection is that which would be granted to an "*alien*" in the same circumstances.

In view of these limitations, it is important to examine the complementariness of human rights norms relating to the international protection of asylum-seekers and refugees. It is also important to bear in mind that, according to the obligations assumed by the State party to the 1951 Convention and human rights treaties, when the countries are party to several international instruments establishing different levels of protection for certain rights the States must grant the most favorable protection to the individual. This principle is embodied in the regulations contained in international instruments such as Article 5 of the 1951 Convention, Article 29 of the American Convention on Human Rights, "The Pact of San Jose" (the American Convention)[18]; Article 5 of the International Covenant on Civil and Political Rights (ICCPR)[19]; and Article 5 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[20]

When two legal norms with different scopes in individual protection coexist, or when there is doubt as to the interpretation of a norm, the norm or interpretation that is most favorable to human rights protection must be given priority. In our case, given the coexistence of obligations emerging from the 1951 Convention and from other human rights treaties, the application of the *pro homine* principle obliges that the obligations established by the Convention be integrated with those of a wider scope contained in the other human rights treaties.

4. The protection of asylum-seekers and refugees according to international human rights instruments

As mentioned before, the protection contained in the human rights treaties is accorded to "each and every person" subject to the jurisdiction of the State and not only to the nationals of the respective State. Therefore, non-nationals are to benefit from all the rights guaranteed by the international human rights instruments to the same extent as nationals, with some exceptions such as in the exercise of political rights.[21]

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17 See Articles 22 (1) and 4.

18 Signed at the Inter-American Specialized Conference on Human Rights in San Jose, Costa Rica, November 7-22, 1969.

19 Adopted and opened for signature, ratification and accession by the United Nations General Assembly in resolution 2200 A (XXI) of December 16, 1966. It entered into force on March 23, 1976 pursuant to Article 49.

20 Adopted and open for signature, ratification and accession by the United Nations General Assembly in its resolution 2200 A (XXI) of December 16, 1966. It entered into force on January 3, 1976 pursuant to Article 27.

21 Some limited exceptions to this rule are found for example in the European Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 5 and 16) and in the European Social Charter. Although Article 1(2) of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) apparently establishes a limitation to the enjoyment of rights by non-nationals, the Committee for the Elimination of Racial Discrimination itself has indicated through Recommendation XI that non-nationals are protected by the Convention.

In this sense, asylum-seekers and refugees have all the fundamental rights and freedoms established in the international instruments on human rights. Their protection must therefore be considered within the wider context of human rights protection without losing sight of the fact that, on certain occasions, the protection granted by International Refugee Law regulates more specifically the special circumstances affecting asylum-seekers and refugees.

4.1 How do human rights norms reinforce or supplement International Refugee Law?

If we compare the protection granted by the instruments of International Refugee Law (1951 Convention and the 1967 Protocol) to the human rights instruments, we find that:

1. Human rights instruments generally have a ***wider territorial application*** as they have generally been ratified by a larger number of countries than the 1951 Convention and its Protocol. For example, while the 1951 Convention and the 1967 Protocol have been ratified by 142 States, the ICCPR has been ratified by 154 States, and the United Nations Convention on the Rights of the Child[22] (CRC) by 192 States.[23]

2. The human rights instruments of a universal nature such as the ICCPR, ICESCR, CRC, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)[24]; and the regional instruments such as the American Convention and the Additional Protocol to the American Convention on Economic, Social and Cultural Rights: the "San Salvador Protocol"[25] ***cover a wider range of rights*** than the 1951 Convention. In other words, human rights treaties establish a greater number of rights than those established by refugee law. When the same rights are embodied in both systems, the rights contained in human rights instruments have a broader scope of application in most cases. The exception to this would be the right to property embodied in Article 13 of the 1951 Convention, which is not covered by ICCPR or ICESCR, although it is embodied in the American Convention (Article 21) at the regional level. It is also important to point out that some of the rights of the 1951 Convention are more specific to the circumstances of persons having crossed a border, and for this reason, they offer more specialized protection such as the recognition of academic degrees, something provisioned in the 1951 Convention but not specified in human rights instruments.

   A key right of asylum-seekers and refugees is the right to work, which is contained both in the 1951 Convention (Article 17) and in human rights treaties (such as in Articles 6 and 7 of the San Salvador Protocol and Article 6 of c). However, this right is established in a more general form in human rights norms and their Articles have less reservations than the Convention's Article.

3. According to the human rights instruments, all foreigners in general, including asylum-seekers and refugees, are entitled to enjoy ***the same level of protection accorded to nationals.***[26]

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22 Adopted by the General Assembly in resolution 44/25 on November 20, 1989 and entered into force on September 2, 1990.
23 Information effective as to December 10, 2004.
24 Adopted by the General Assembly in its resolution 34/180 on December 18, 1979 and entered into force on September 3 of 1981 pursuant to Article 27.
25 Adopted in San Salvador, El Salvador on November 17 of 1988 during the eighteenth meeting period of the OAS General Assembly and entered into force on November 16 of 1999.
26 See note No. 21.

4. With regard to **suspension in case of a state of emergency**, Article 9 of the 1951 Convention enables States to adopt the provisional measures they deem necessary to ensure national security "in times of war or in other serious and exceptional circumstances".[27] Although some human rights instruments also allow States to derogate or suspend the exercise of certain rights in cases of emergency, as in the case of Article 4 of ICCPR or Article 27 of the American Convention, these restrictions are exceptional and are subject to a series of limitations, guarantees and requirements which are easier to comply with than those established by Article 9 of the 1951 Convention. Furthermore, it is important to underscore that some human rights instruments such as the Convention on the Rights of the Child (CRC) do not allow any derogations, not even in case of war or state of emergency.

5. Another important difference is that the human rights instruments have several ***international supervisory mechanisms.*** The most common of these systems are the *periodical reports* that States must submit to be considered by the respective expert committees, usually with the presence of the government authorities of the country under analysis. Another supervisory system is the *system of complaints or individual petitions* which empowers those individuals who believe that their rights have been violated to resort (after having exhausted all domestic remedies) to an international committee of experts (such as the Human Rights Committee and the Committee against Torture) to decide upon the case. In the case of rights contained in the American Convention, the European Convention and the African Charter, individuals may resort to an *international judicial body* (such as the European Court, the Inter-American Court and the African Court of Human Rights) to have their case adjudicated upon, resulting in decisions that are binding for the States.[28]

   It is well known that the 1951 Convention does not establish any kind of judicial or quasi-judicial body to supervise compliance. The only supervisory system contained in it is that of the United Nations High Commissioner for Refugees (UNHCR) based on the Convention, the Protocol and its Statute, and the commitment assumed by the States to cooperate with UNHCR (Article 35 of the 1951 Convention).[29]

   In spite of this limited control and weak supervisory mechanism established in the 1951 Convention, the truth is that, with the passage of time, the supervisory bodies of human rights treaties have increasingly extended their protection to asylum-seekers and refugees. In this sense, it is common to find that the human rights monitoring bodies such as the Human Rights Committee; the Committee on Economic, Social and Cultural Rights; the Committee against Torture make reference to refugee protection when they examine States reports or when they hear individual complaints, in which case they force the country's authorities to take necessary measures to ensure greater protection.

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27 Another important exception in the enjoyment of the rights established in the Convention is found in Article 33, paragraph 2. See attached text No. 51 and 52.

28 It is important to mention that in the case of the American Convention, the contracting States need to have accepted the contentious jurisdiction of the Court pursuant to Article 62 of the American Convention.

29 Article 35 – Cooperation of the national authorities with the United Nations.

This interest in issues relative to refugees and asylum-seekers can also be found at the regional Inter-American level in the work done by the Inter-American Commission on Human Rights--and to a lesser extent, although no less important--by the Inter-American Court, particularly through its provisional measures.[30]

4.1 The human rights regulatory framework for interpreting rights established in the 1951 Convention on the Status of Refugees

Since International Refugee Law and Human Rights Law are two fields of the international juridical system sharing a common objective (the protection of the fundamental rights of the person), there must be a hermeneutic confluence between them.[31] This means that, in order to determine the meaning and scope of the norms contained in the 1951 Convention, it is necessary to resort to human rights norms regulating similar matters in greater detail.

The need for this hermeneutic integration between Refugee and Human Rights Law becomes evident if we consider that some provisions of the 1951 Convention, which embody legal rights, do so only at the procedural level in specifying that refugees be granted the same level of protection that is accorded, in the same circumstances, to the nationals of foreign countries. However, such provisions do not determine the specific content of the right itself. It is for this reason that the meaning and scope of some rights established in the 1951 Convention must be construed while accounting for the obligations assumed by the States in human rights issues.

What follows are some concrete examples showing how the norms contained in the 1951 Convention are to be read in light of the specific norms embodied in human rights treaties. We make particular reference to specific aspects already included in the Cartagena Declaration as well as in its subsequent documents.

1. The right to education

The Cartagena Declaration emphasizes the need to strengthen refugee protection and assistance programs especially in aspects related to rights of an economic, social and cultural character and it specifies health, education, work and security issues (part II).

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30 See for instance the provisional measures in the case "Haitians and Dominicans of Haitian origin in the Dominican Republic". Although these measures do not refer directly to the refugee issue but to migration and the existence of discriminatory practices, nothing can prohibit the application by analogy of this Court decision to refugee issues. This decision of the Inter-American Court refers to the practice of expulsions and deportations; to allowing the immediate return to the Dominican Republic; and to the protection of family reunification. See also the provisional measures in *Comunidad de Paz de San José de Apartado* and in the Communities of Jiguamiando and Curbando where the Court refers to the right to stay in the place of residence. In both cases, the Court ordered the corresponding State to adopt the necessary measures to guarantee the return and the stay of groups of persons who had been internally displaced as a result of the violence practiced by various agents.

31 The Inter-American Court of Human Rights has reiterated on numerous occasions that to interpret a treaty, it is necessary to take into account not only the agreements and the formally related instruments (Article 31.2 of the 1969 Vienna Convention on the Law of Treaties) but also the system within which it is framed (Article 31.3) while making a hermeneutic integration of all the norms. See for instance *El Derecho a la Información sobre la Asistencia Consular en el marco de las Garantías del Debido Proceso Legal (The right to information on Consular Assistance within the framework of due process guarantees)*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, paragraph 113, judgment of the Inter-American Court of Human Rights in the Villagrán-Morales case and others (case of "Street Children"), sentencing of November 19, 1999, paragraph 192.

With respect to the right to education, we find that this right is embodied in Article 22 of the 1951 Convention.[32] This norm provides, in general terms, that States must accord refugees the same treatment as that of nationals with respect to primary education. With respect to education other than primary they must be granted a treatment no less favorable than that accorded to foreigners in the same general circumstances.

However, this Article does not comment on the content of the education and does not specify, for example, the right to be accorded to nationals (and foreigners) with respect to elementary education or the level of protection that States will grant to foreigners regarding other levels of education. The content of this right and level of protection that States are obliged to provide are determined by human rights norms. Thus, for example, we find that the right to education is embodied in the Inter-American system in Articles 13 and 16 of the San Salvador Protocol, and in Article 13 of ICESCR in the universal system (and in General Observation No. 11 of the Committee on Economic, Social and Cultural Rights).

These human rights norms, for example, set forth that States must provide compulsory and free primary education (which would benefit equally all asylum-seekers and refugees). Guidelines are also established with respect to the quality of education to be provided indicating, for instance, that education in primary and high schools have four basic characteristics: "availability, accessibility, acceptability and adaptability".[33]

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32 *Article 22. – Public education*

1. The Contracting States shall accord to refugees *the same treatment as is accorded to nationals with respect to elementary education*.
2. The Contracting States shall accord to refugees treatment as favorable as possible, and, in any event, not less favorable than that accorded to aliens generally in the same circumstances, with respect to *education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships*.(italics added).

33 According to the Committee on Economic, Social and Cultural Rights: "…education in all its forms and at all levels must have the following four interrelated characteristic: a) Availability. There must be enough teaching institutions and programs within the Contracting State. The conditions for their operation depend on numerous factors such as the development context in which they work; for example, the institutions and programs probably need buildings or other protection against elements, sanitary facilities for both sexes, drinking water, qualified educators with competitive salaries, teaching materials, etc.; some will also need libraries, computer services, information technology, etc.

b) Accessibility. The teaching institutions and programs must be accessible to every person without discrimination within the Contracting State. Accessibility consists of three dimensions which coincide partially.
   i) Non-discrimination. Education must be accessible to everyone, especially to the groups that are most vulnerable by fact and by Law without discrimination for any of the prohibited reasons (see paragraphs 31 through 37 on non-discrimination);
   ii) Material accessibility. Education must be materially accessible by providing a reasonable geographical location (a neighborhood school, for example) or through modern technology (through the access to distance education programs);
   iii) Economic accessibility. Education must be accessible to everyone. This dimension of accessibility is conditioned by the editing differences in paragraph 2 of Article 13 with respect to elementary, secondary and higher education. While elementary education must be free for everyone, the Contracting States are asked to implement secondary and higher education gradually.

c) Acceptability. The form and content of education, including the academic programs and the pedagogical methods, must be acceptable (pertinent, culturally adequate and of good quality) for the students and, whenever necessary, for the parents. This point is subject to the objectives of education mentioned in paragraph 1 of Article 13 and to the minimum teaching standards set by the State (see paragraphs 3 and 4 of Article 13).

d) Adaptability. Education must be flexible enough to adapt to the needs of societies and communities in transformation and to respond to student needs within varied cultural and social contexts. (Committee on Economic, Social and Cultural Rights, General Observation No. 13 on the right to education, paragraph 7).

States are also obliged to respect the principle of non-discrimination between nationals, asylum-seekers and refugees with regard to the enjoyment of the right to education. In this respect, we must mention that--after analyzing Canada's report--the Committee on Economic, Social and Cultural Rights expressed its concern that "educational loan programs for postsecondary education are only available for Canadian citizens and permanent residents, and that recognized refugees who do not have permanent resident status as well as asylum-seekers do not have access to those educational loan programs".[34]

In sum, according to international human rights standards, we may affirm that:

(1) States may not deny access to the existing educational centers on a discriminatory basis;[35]

(2) States must eliminate legal and *de facto* barriers hindering the enjoyment of the right to education; and

(3) States must provide free primary education.[36]

Asylum-seekers and refugees must therefore have access to existing educational centers without being subject to any kind of discrimination. States have the responsibility to eliminate potential barriers they might face. Additionally, asylum-seeking children and refugees must enjoy free primary education.

2. The right to housing

Article 21 of the 1951 Convention establishes State obligations vis-à-vis refugees regarding the right to housing.[37] However, it is imprecise as to the content of that right. For this reason, in order to determine what is understood by the right to adequate housing, it is necessary to resort to interpretative norms and guidelines already established in the human rights system.

34 Committee on Economic, Social and Cultural Rights: Concluding Observations Canada E/1999/22, paragraph 414.

35 See Coomans, F.: Clarifying the core elements of the right to education. In: The right to complaint about economic, social and cultural rights. Coomans, F. y van Hoof, F. (editors). The Netherlands Institute of Human Rights, Sim Special Issue No.18, Utrecht, 1995, page 17. See also, Case "Relating to certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (Belgian Linguistics case), No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, judgment of the European Court of Human Rights, July 23 of 1968.

36 It is important to underline that the right to primary education within the context of asylum-seekers should be analyzed in conjunction with the access to the teaching of a foreign language. In fact, linguistic barriers may seriously hinder the enjoyment of the children's right to education of asylum-seeking children.

37 *Article 21 – Housing*
As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favorable as possible and, in any event, no less favorable than that accorded to aliens generally in the same circumstances.

As for human rights, Article 11.1 of ICESCR established the right to housing which has in turn been developed through two General Observations of the Committee on Economic, Social and Cultural Rights (General Observations No. 4 and 7), which specify in detail the content and scope of this right. For example, they determine that housing must comply with the requirements of inhabitability, accessibility and cultural adaptation.[38]

Regarding the enjoyment of the right to adequate housing of asylum-seekers and refugees, the Committee on Economic, Social and Cultural Rights has urged the Government of Croatia to guarantee the full protection of refugees and asylum-seekers against any acts or laws that somehow constitute discriminatory treatment in terms of housing.[39]

3. The rights of the child

Asylum-seekers and refugees are, in and of themselves, vulnerable groups. However, within these groups there are other groups, such as children,[40] who are even more vulnerable. In spite of the fact that over time the UNHCR's Executive Committee has articulated a series of protection guidelines for children

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38 Among the elements specified by General Observation No. 4 it is important to point out the following: "Juridical security of possession. Possession adopts a variety of forms such as leasing (public and private), cooperative housing, rent, occupation by the owner, emergency housing and informal settlements, including the occupation of land or property. Regardless of the type of possession, all persons must enjoy a certain degree of security of possession so as to guarantee legal protection against eviction, harassment or other threats. Consequently, the Contracting States must immediately adopt measures to grant legal security of possession to the persons and the households that currently lack such protection through a thorough consultation with the affected persons and groups.

b) Availability of services, materials, facilities and infrastructure. Adequate housing must provide certain services essential to ensure health, security, comfort and nutrition. All the beneficiaries of the right to adequate housing should have permanent access to natural and common resources, to drinking water, cooking energy, heat and electricity, sanitary and cleaning facilities, food storage, waste management, sewage facilities and emergency services.

c) Bearable expenses: The personal or household expenses should not compromise or hinder the satisfaction of basic needs. The Contracting Parties should adopt measures to guarantee that the percentage of housing expenses are commensurate with the income levels. The Contracting States should create housing subsidies for those who cannot afford a house as well as financing ways and levels adequate for housing needs. According to the principle of the capacity to pay for housing expenses, adequate measures should be taken to protect tenants against disproportionate rent increase or levels. In societies where natural materials are the main sources for housing construction, the Contracting Parties should adopt measures to guarantee the availability of those materials.

d) Inhabitability. Adequate housing should be inhabitable. It should offer adequate space to its occupants and it should protect them from cold weather, humidity, heat, rain, wind or from other threats to health, structural risk and disease vectors. It should also guarantee the physical safety of occupants. […].

e) Accessibility. Adequate housing must be accessible to those who are entitled to it. Disadvantaged groups must be granted full and sustainable access to adequate resources to obtain a house. Some priority should be given to unprivileged groups such as senior citizens, children, persons with disabilities, persons with terminal diseases, VIH-positive individuals, persons with persistent medical and mental problems, victims of natural disasters and other groups. Provisions as well as housing policies must fully account for the special needs of these groups. […].

f) Place. Adequate housing must be located in a place with access to employment opportunities, health care services, assistance to children, schools and other social services. This is particularly important in large cities and rural areas where the temporary and financial costs traveling to and from the working place can add excessive burden to the budget of poor families. Similarly, housing must not be built in polluted places or in the immediate proximity of sources of pollution that threaten the right to health of the inhabitants.

g) Cultural adaptation. Hosing construction, materials and policies must allow the expression of cultural identity and housing diversity. The activities linked to housing development or modernization must see to it that cultural aspects and modern technological services are not sacrificed (paragraph 8).

39 Committee on Economic, Social and Cultural Rights: Final Comments, Croatia, E/C.12/1/Add.73, 11/30/2001.

40 On refugee children and adolescents, see, for example, Conclusions No. 84 (XLVIII), 1997; No. 47 (XXXVIII) 1987; and No. 59 (XL) 1989.

clarifying their special protection needs, the fact that States have assumed State obligations through various international instruments cannot be overlooked. States are required to observe international obligations in good will.[41] These complementary norms must be accounted for in the interpretation of the protection of refugee children under the 1951 Convention.

As to the rights of refugee children, it is important to mention that the San Jose Declaration itself, which built on the content of the Cartagena Declaration on the occasion of its tenth anniversary, addresses the need to account for the Convention on the Rights of Children (CRC).[42] It is also important to remember that Article 22 of the CRC establishes States' duty to adopt measures with a view towards granting asylum-seeking children the required protection and assistance to ensure their enjoyment of all human rights.

The need for hermeneutic integration is especially relevant at the Inter-American level and is in accordance with the decisions of the Inter-American Court of Human Rights, whose case-law and advisory opinions, which have reiterated the need to interpret the standards of the American Convention regarding the protection of children in light of the United Nations Convention on the Rights of the Child. In fact, the Inter-American Court provides that in order to determine the content and scope of Article 19 of the American Convention, which embodies States' obligation to grant the necessary protection to children, the United Nations Convention on the Rights of the Child must be accounted for since both treaties are part of the international *corpus juris* of protection to children.[43] This is particularly relevant if we consider that the United Nations Convention refers expressly to the rights of refugee children and articulates a series of rights that they are entitled to, not only of a civil and political nature but also economic, social and cultural rights.

4.3 The human rights regulatory framework to reinforce or supplement the rights established in the 1951 Convention on the Status of Refugees

The convergence and complementarities between refugee law and International Human Rights Law does not end with a hermeneutic approach. The complementary nature encompasses protection granted by both regulatory systems. The dynamic evolution of human rights treaties has led these instruments to grant protection in areas that may not have been considered by those who drafted them but the scope of which has necessarily been extended over time and in contain of current conditions.[44]

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41 It is important to emphasize again that the Convention on the Rights of the Child (CRC) is the human rights treaty with a wider scope since it has been ratified by all the Member States of the United Nations with the exception of Somalia and the United States of America.

42 See the San Jose Declaration, Conclusion XI.

43 See judgment of the Inter-American Court of Human Rights in the case of Villagrán-Morales and others (Street Children), sentence of November 19, 1999, paragraphs 194 and 196.

44 The evolutionary interpretation of International Human Rights Law has been developed by the European Court of Human Rights (see, for example Loizidou v. Turkey, No. 15318/89 sentence of December 8, 1994, paragraphs 71-72*;* Tyrer v. United Kingdom, No. 5856/72 paragraph 15, judgment of April 25, 1978; Marckx v. Belgium, No.6833/74 judgment of June 13, 1979 paragraph 41; Airey v. Ireland, No. 6289/73, judgment of October 9,1979 paragraph 26*)*, as well as by the Inter-American Court of Human Rights (see *El Derecho a la Información sobre la Asistencia Consular en el marco de las Garantías del Debido Proceso Legal [The right to information on consular assistance within the framework of due process guarantees]*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, paragraph 114; *Interpretación de la Declaración Americana de los Derechos y Deberes del Hombre en el marco del artículo 64 de la Convención Americana sobre Derechos Humanos [Interpretation of the American Declaration on the Rights and Duties of Man within the framework of Article 64 of the American Convention on Human Rights]*. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10 paragraph 37; Paniagua-Morales and others v. Guatemala, preliminary objections, judgment of January 25, 1996, Series C. No. 23 paragraphs 40-42 and Villagrán-Morales and others (Street Children), sentence of November 19, 1999, paragraph 193.

In this sense, we have witnessed how, thanks to this evolution, International Human Rights Law has increasingly, although not sufficiently, granted asylum-seekers and refugees complementary protection established in the 1951 Convention. This means that those States party to international human rights agreements are obliged to grant greater individual protection. As we have already mentioned, States may not overlook the rights of asylum-seekers and refugees enshrined in Human Rights Law with the pretext that the 1951 Convention does not consider such a right.

We will now analyze some rights embodied in human rights instruments and how they have been applied to reinforce and supplement the protection of asylum-seekers and refugees.

4.3.1 The right to seek and be granted asylum

A doctrinal debate exists as to whether Human Rights Law recognizes the right to seek and be granted asylum. To understand this issue, we must consider the following:

Article 14 of the Universal Declaration of Human Rights:[45] "Everyone has the right to *seek and enjoy in other countries asylum* from persecution". (emphasis added).

Article XXVII. American Declaration on the Rights and Duties of Man: "Every person has the right, in case of pursuit not resulting from ordinary crimes, to *seek and receive asylum* in foreign territory, in accordance with the laws of each country and international agreements". (emphasis added).

Article 22(7) American Convention on Human Rights: "Every person has the right to *seek and be granted asylum* in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes".[46] (emphasis added).

The foregoing Articles show that there are specific norms in the Inter-American system protecting this right. The right to seek and be granted asylum as a human right will not be examined in this essay as it has been carefully analyzed by other authors.[47] However, we would like to emphasize that, whether accepted or not, the existence of the human right to asylum is protected by a series of specific rights and duties significantly limiting the margin of discretion for States regarding the treatment to be given to asylum-seekers and refugees. These rights are not a subject of contention and must be respected by the States if they wish to avoid violating international human rights obligations.

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45 Approved by the General Assembly in resolution 217 A (III) on December 10, 1948.

46 See also first conclusion of the declaration on political asylum and situation of refugees, Seminar held in La Paz, Bolivia, April 19-22, 1983 and Article 18 of the Fundamental Rights Charter of the European Union (2000).

47 See Franco, Leonardo (Editor-in-chief) El Asilo y la protección internacional de los refugiados en América latina *(Asylum and international protection of refugees in Latin America)*. Siglo veintiuno editores, 2003. See in particular: Manly, Mark: La consagración del asilo como un derecho humano: Análisis comparativo de la Declaración Universal, la Declaración Americana y la Convención Americana sobre Derechos Humanos *(The embodiment of asylum as a human right: comparative análisis of the Universal Declaration, the American Declaration and the American Convention on Human Rights)*, pp. 122-156.

4.3.2 Principle of non-discrimination

Article 3 of the 1951 Convention establishes the principle of non-discrimination; however, the scope of this principle is wider in the human rights instruments. While the 1951 Convention limits the prohibition of discrimination to only three causes, namely, "reasons of race, religion or country of origin" (Article 3), human rights instruments prohibit discrimination for reasons of "*race, sex, language, religion, political opinion or any other kind, national or social origin, economic status, birth or any other status"*. This list not being exhaustive itself, it is open to "any other condition" (see for example Articles 2 and 26 of ICCPR and Article 2 of ICESCR; Articles 1(1) and 24 of the American Convention; and Article 2 of CEDAW).

It is also important to use International Human Rights Law as a guide in determining those cases when there is discrimination. Pursuant to the general principles of International Human Rights Law, not every difference in treatment implies discrimination.[48] The principle of equality does not imply identical treatment in all cases.[49] However, any difference in treatment must be reasonable, objective and proportional[50] and must have a legitimate objective.[51]

Non-discriminatory treatment requires that those persons in analogous situations be treated equally. In this sense, if the State grants certain benefits to its nationals, it must also grant those benefits to asylum-seekers and refugees in the same circumstances.

For example, the Committee on Economic, Social and Cultural Rights, after examining the third periodic report submitted by Italy, regretfully observed that asylum-seekers in Italy could only access subsidized health care in cases of emergency but not in other cases where access was granted to nationals. The Committee stated that such policy was not in line with the provisions of the Covenant and urged Italy to extend the subsidized health care system so as to include asylum-seekers without discrimination.[52]

It is not surprising that the Committee on Economic, Social and Cultural Rights recommended that contracting States examine their legislation in order to ensure that it does not contain any negative impact on asylum-seekers and refugees.[53] At the same time it urged States to remedy the situation if such discrimination exists.[54]

A serious problem facing many asylum-seekers and refugees, as a particularly vulnerable group of non-nationals, is the xenophobic or racist aggression against them. Various human rights standards oblige

48 See Bayefsky, Anne: The principle of equality or non-discrimination in International Law. In: Human Rights Law Journal, vol. 11, Nos. 1-2 (1990), pp. 1-34; Vierdag, E.W: The concept of discrimination in international law: with specific reference to human rights, Nijhoff, (1973).

49 Committee on Human Rights: General Comment No. 18 "non-discrimination" (37th meeting period, 1989) paragraph 8.

50 This implies a proportional relation between the means used and the objective to be achieved. At the Inter-American level, see the Advisory Opinion of the Inter-American Court, OC-4/84 on January 19, 1984, paragraphs 56 and 57. At the European level, see the case "relating to certain aspects of the laws on the use of languages in education in Belgium" (merits), judgment of July 23, 1968, paragraph 32.

51 See general comment No. 18 of the on Human Rights Committee, paragraph 13.

52 Concluding Observations: Italy E/2001/22 paragraphs 123 and 138.

53 Concluding Observations: Denmark E/C. 12/Add. 34, paragraphs 16-26 05/14/99.

54 Ibid.

States to combat any kind of racial or xenophobic discrimination against asylum-seekers and refugees.[55] To this end, States are recommended to develop plans of action to fight discrimination and maintain and develop statistical data.[56] For instance, according to Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD),[57] States are obliged to prohibit or punish any act of racial discrimination even when it is committed by private persons (not only by State agents).

4.3.3 Prohibition of expulsion and *refoulement*

Article 33 of the 1951 Convention establishes the principle of *non-refoulement*[58] which has been also interpreted as the prohibition of rejection at the border.[59] The Cartagena Declaration stresses the importance of the *non-refoulement* principle and the prohibition of rejection at borders. It goes further stating that the *non-refoulement* principle is a *jus cogens* norm,[60] meaning that it applies equally to all States, even to those not party to any international treaty and no derogation to the contrary is permitted.[61]

Even though the principle of *non-refoulement* is the cornerstone of refugee protection, nevertheless, within the framework of International Refugee Law this principle does have exceptions. In fact, paragraph 2 of Article 33 of the 1951 Convention states:

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

As we have discussed, the exception to the second paragraph of Article 33 must be interpreted in a restrictive manner while respecting the norms of due process. As we will see, when there is reasonable cause to think a person may have been a victim of torture, the prohibition of *refoulement* is absolute.[62]

The principle of *non-refoulement* has also been supplemented through the activities undertaken by the UN monitoring treaty bodies which have extended the scope of the protection embodied in the 1951 Convention.

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55 Concluding Observations: Spain E/C. 12/Add.2, paragraph 10.

56 See, for example, Concluding Observations: Norway E/C. 12/1995/10, paragraph 8.

57 Approved and open for signature and ratification by resolution 2106 A (XX) of the General Assembly of December 21, 1965. Entry into force: January 4, 1969 pursuant to Article 19.

58 Article 33. -- Prohibition of expulsion and return (refoulement)
1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

59 See Conclusion XXII of the Executive Committee (1981).

60 The Fifth Conclusion of the Declaration states: "to reiterate the importance and significance of the principle of *non-refoulement* (including the prohibition of rejection at the borders) as the cornerstone of international protection of refugees.

61 See Article 53 of the 1969 Vienna Convention on the Law of Treaties. For a more in-depth analysis, see Brownlie, Ian: Principles of Public International Law, fifth edition, Oxford University Press, 1999, from page 511 on.

62 See Global Consultations on International Protection. Round table of experts held in Cambridge on July 9-10 of 2001, organized by the United Nations High Commissioner for Refugees (UNHCR) and the Lauterpacht Center for Research on International Law. Summary of conclusions – The principle of *non-refoulement*, paragraph 7.

There are in fact various international human rights treaties that have been ratified by the States of the region. These treaties establish the *non-refoulement* principle in a wider sense than that of Article 33 of the 1951 Convention, much like Article 22(8) of the American Convention, Article 3 of the Convention against Torture, and Article 13(4) of the Inter-American Convention to Prevent and Punish Torture.

Although the provision contained in Article 22(8) of the American Convention[63] is almost identical to the prohibition established in Article 33 of the 1951 Convention, it has a wider scope for it also applies to "foreigners" and not only to "refugees" as in the 1951 Convention. In addition, this prohibition is formulated in absolute terms as it allows for no exceptions whatsoever. This also contrasts with the 1951 Convention which establishes exceptions to the principle of *non-refoulement* in the second paragraph of Article 33.

We must point out that it is the American Convention itself which makes a more precise formulation and could therefore have a wider scope of application. The truth is that even the regional supervisory bodies have not been able to apply this norm in a contentious case. Furthermore, we find that the Committee against Torture (supervisory body of CAT) and the Human Rights Committee (supervisory body of ICCPR) have developed extensive jurisprudence on these principles through periodical reports as well as decisions of individual cases.[64]

Article 3 of the Convention against Torture[65] also reinforces the principle of *non-refoulement* in absolute terms. Therefore, whenever there are "substantial grounds" for believing that the person would be threatened to be subject to torture after "expulsion, return or extradition" to another State, the State party to that convention is obliged not to return the person to that State. For example, in the Tapia-Páez case concerning a Peruvian citizen who was allegedly linked to activities of the Shining Path[66] and who requested asylum in Sweden, the Committee against Torture stated the following:

"14.5 The Committee considers the text of Article 3 to be absolute. Provided that there are substantial grounds for believing that a person would be threatened to be subject to torture after being expelled to another State, the State Party is obliged not to return the person to that State. The nature of the activities in which the person may have been involved may not be deemed as material evidence in making a decision based on Article 3 of the Convention".

63 Article 22(8): "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."

64 With regard to individual communications, the Committee Against Torture has drafted a General Comment through which it has specified the elements of Article 3. See Committee against Torture, General Comment No. 1: Application of Article 3 relative to Article 22 of the Convention (A/53/44, annex IX).

65 *Article 3,* Convention against Torture
1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

66 Communication No. 39/1996, decision of April 28, 1996 (CAT/C/18/D/39/1996).

In this way, the Committee confirms that the Convention against Torture (CAT) differs from the 1951 Convention, which states that some categories of persons may not be considered refugees on the basis of activities in which they might have been involved, and are therefore excluded from protection granted by the Convention. In contrast to this, the Convention against Torture imposes the absolute obligation on the States not to expel persons when there are substantial grounds for believing that the person will be a victim of torture.

In the same manner, the Committee against Torture stated in the Korban v. Sweden case[67], that the State must go beyond not expelling, returning or extraditing the person to a country where he might be subject to torture. Moreover, it has established the prohibition to expel a person from a State where he may subsequently be expelled, returned or extradited. In this particular case, the Committee stated that the petitioner could not be expelled to Jordan because he faced the risk of being deported later to Iraq, where he could be in danger of being tortured.

It is important to emphasize that the risk of torture, according to the Committee against Torture, must be founded on reasons going beyond mere theory or suspicion. However, it is not necessary to show that the risk is highly probable.[68] In determining the agent that may inflict torture, the Committee against Torture has expressed that although torture is usually inflicted by the authorities of the a country, it may also be inflicted by certain sectors of the population whose acts may be equivalent to torture if they are deliberately tolerated by the authorities or if the authorities refuse to provide effective protection, or are incapable of doing so.[69]

The prohibition of expulsion of a person to a country where he may be victim of torture imposes other implicit duties on the States. Such duties are necessary to guarantee due respect for the absolute character of the prohibition of *refoulement*. For example, since States must assess whether there are substantial grounds for believing believe that the person would be in danger of being subject to torture, they must there at least abstain from implementing procedures that may lead to the automatic expulsion of certain categories of persons. The UN treaty bodies have emphasized such implicit duties on several occasions. Thus for example, the Committee against Torture analyzed the Finland report and criticized the authorities for using a safe third country list in order to automatically reject asylum-seekers from those countries. The Committee emphasized that, before rejecting an asylum seeker, it is necessary to examine the situation under Article 3 of the Convention against Torture. As to the report of Bolivia, the Committee requested the State to adopt necessary measures to ensure that every person facing the possibility of being expelled, returned or extradited to the territory of another State for whom there are substantial grounds for believing they would be in danger of being subject to torture, could make their reasons effective by means of an adversarial and impartial procedure, the conclusion of which would be subject to revision by a higher authority.[70]

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67 Korban v. Sweden (88/1997), CAT, A/54/44 (November 16, 1998), paragraph 7.

68 See General Comment No. 1 of the Committee against Torture: Application of Article 3 in relation to Article 22 of the Convention (paragraph 6) (A/53/44, annex IX). The Committee has maintained this same principle in deciding on individual cases. See for example In E.A. v. Switzerland (CAT, A/53/44, November 10, 1997, paragraph 11.3). It is also important to underline that according to the Committee's jurisprudence, it is usual to find inconsistencies and contradictions in the accounts of asylum-seekers in the case of those persons who have been victims of torture and, if they do exist, they should not affect the possibility of identifying a violation of Article 3 (see for instance Tala v. Sweden (43/1996), CAT A/52/44 (November 15, 1996), paragraph 10.3; Haydin v. Sweden (101/1997), CAT A/54/44 (November 20, 1998), paragraph 6.7; Pauline Muzonzo v. Sweden (41/1996), CAT/C/16/D/41/1996 (May 8, 1996), paragraph 9.3 and Alan v. Switzerland (21/1995), CAT A/51/44 (May 8, 1996), paragraph 11.3).

69 See for example Elmi v. Australia, Communication No. 120/1998, and decision of November 17, 1998.

70 Concluding observations of the Committee against Torture: Bolivia. 05/10/2001, A/56/44, paragraph 97.

It must be pointed out that the protection provided by Article 3 of the Convention against Torture is applicable not only to those who have been recognized as refugees under the 1951 Convention but also to a wider category of persons such as asylum-seekers who have been rejected.

We must also keep in mind that the prohibition of *refoulement* would not only require that States implement adequate mechanisms to determine whether a risk of torture exists for the person but also requires the establishment of procedures to ensure effective protection in the case of a person who cannot be expelled. An example of this situation is the decision of the Committee against Torture in the Aemei v. Switzerland case.[71] The Committee concluded that a violation of Article 3 of the Convention against Torture does not affect in any way the decision of the competent authorities with regard to granting or denying asylum. Although the State is not obliged to modify its decision on asylum, it must seek solutions in accordance to Article 3. According to the Committee, these solutions could be not only juridical (for example, the decision to grant temporary admission to the asylum seeker) but also political (for example the search for a third State willing to host the asylum seeker in its territory with the commitment of not returning or expelling him).[72]

This is a significant issue because, among the international obligations assumed by the States relating to the Convention against Torture, States must abstain from expelling, returning or extraditing a person to another State when there are substantial grounds for believing that the person would be in danger of being subject to torture. However, they have also assumed positive obligations such as (a) searching for a solution so that the person who may not be extradited under Article 3 can live a dignifying life under "legal" status and (b) adopting the national measures necessary to comply with Article 3. After hearing the report of Namibia, the Committee against Torture recommended that authorities incorporate adequate procedures to comply with Article 3 of the Convention and enable refugees to request residence in those cases where there are substantial grounds for believing that they would be in danger of being subject to torture if they are expelled, returned or extradited to another country.[73]

Finally, we must point out that, although the ICCPR does not expressly establish the *non-refoulement* principle,[74] the Human Rights Committee has interpreted Article 7 (prohibition of torture) in such a way as to include the principle of *non-refoulement*. Its jurisprudence has also clarified the incorporation of the protection that is to be granted in this case.

4.3.4 The right to personal liberty and security

The right to personal liberty and security is established in many human rights agreements such as Article 9.1 of the International Covenant on Civil and Political Rights (ICCPR); Article 37 (b), the United Nations Convention on the Rights of the Child (CRC); Article 51 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); Article 7 (2) of the 1969 American Convention on Human Rights and Article 5 of the African Charter on Human Rights and the Rights of Peoples (African Charter).

71 Communication No. 34/1995, decision adopted on July 29, 1997 (CAT/C/18/D/34/1995).
72 Aemei v. Switzerland, Communication No. 34/1995, decision of May 9, 1997, paragraph 11.
73 Committee against Torture: Concluding Observations: Namibia. 06/05/97, A/52/44, paragraphs 227-252.
74 See Human Rights Committee, General Comment No. 20, paragraph 6.

International Refugee Law also establishes various norms that regulate such a right. Of particular relevance is Article 31 (1) of the 1951 Convention which prohibits States from imposing penalties, on account of their illegal entry or presence, on refugees coming directly from a territory where their life or freedom was threatened.[75] The Executive Committee itself has adopted a series of conclusions relative to the personal security of refugees,[76] and the UNHCR has developed this right through its guidelines by informing States that the detention of asylum-seekers is "inherently undesirable", particularly in the case of vulnerable groups such as women, children, and persons in need of medical assistance. The UNHCR has also called attention to the importance of the principle of "necessity" to proceed with such detentions and the conditions regulating them.[77]

We also find that the UN treaty bodies have examined the content and scope of this right and developed significant jurisprudence especially relative to asylum-seekers and refugees. For instance, the Human Rights Committee – the supervisory body of the ICCPR – has considered that the detention of an asylum-seeker is not arbitrary *per se* in view of the fact that illegal entry into the country may require investigation or there may be other particular factors justifying detention of the individual for a specific period of time. However, detention of the asylum-seeker for a prolonged period of time could be arbitrary and therefore violate Article 9 (1) of ICCPR. Moreover, the Committee has underlined the right of every individual to file a petition to the courts to decide upon the legality of his detention.[78]

In general, and in line with the decision of the Human Rights Committee in the case C. v. Australia,[79] we may conclude that in order for the detention not to be considered arbitrary, the following is required: (a) the detention should not exceed the period duly justified by the Contracting State; (b) the State must show that, given the special circumstances of each particular case, that detention is the least drastic means available to apply immigration policy, in contrast with other means such as the obligation to appear before competent authorities or deposit bail; (c) there must be a judicial review available for the

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75 Illegal entry in the country of refuge
1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country. See also: Global Consultations: revised summary of conclusions – Article 31 of the 1951 Convention relating to the Status of Refugees, Round Table of Experts in Geneva, November 8-9, 2001.

76 See, for example, Conclusion No. 72 (XLIV) Personal security of refugees; Conclusion No. 85 (XLIX): general conclusion on international protection (1998); and Conclusion No. 87 (L): General Conclusion on international protection (1999).

77 See UNHCR Guidelines on the criteria and standards applicable relative to the detention of asylum-seekers (February 26, 1999) and Conclusion No. 44 (XXXVII) of the Executive Committee relating to the detention of refugees and asylum-seekers.

78 See, for example, the A v. Australia case [Communication No. 560/1993 decided on April 3, 1997 (DOC. CCPR/C/59/D/560/1993)]. In this case the Human Rights Committee considered that the detention of the asylum seeker for more than 4 years was arbitrary and violated Article 9 (1) of the ICCPR (the right to personal liberty and security). It also considered that under Article 9 (4) of the ICCPR ("Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."), the petitioner had the right to resort to the courts so that they could decide on the legality of his detention. Therefore, the Committee considered that the detention violated this norm due to the lack of a judicial revision.

79 In 1992, "C" entered Australia but was detained by the immigration authorities as a foreigner without an entry permit. "C", an Assyrian Christian, requested refugee status on the basis of well-founded fear of religious persecution in Iran, his country of origin. His request was denied by the State of Australia which kept him under arrest during the determination of his status. Communication No. 900/1999, decided on October 28, 2002 (DOC. CCPR/C/76/D/900/1999).

asylum-seeker which should not be limited only to a simple formal evaluation of the issue (which is generally self-evident) of whether or not the person is a "foreigner" without an entry permit. Instead, it should examine the merits of the case.

As will be examined later, when the person is deprived of his or her liberty, he or she must be treated humanely and with the dignity inherent to human beings. Consequently, States must fulfill several obligations in exceptional situations where the detention of asylum-seekers may be admissible.

4.3.5 Rights and guarantees of asylum-seekers before and during the process of the determination of refugee status

There is no doubt that States must guarantee access to asylum procedures to respect the protection established in international refugee instruments. In addition, during the course of the procedure, States must guarantee the enjoyment by asylum-seekers of other human rights that are essential to ensuring due protection of the asylum institution as a whole.

International Human Rights Law has specified and supplemented the rights that States must guarantee to asylum-seekers during the process of determining refugee status. We will now analyze two categories of rights particularly relevant to this matter.

2. Respect for the norms relating to due process in the process of determining refugee status

Asylum-seekers have the right to a fair and expeditious determination procedure that complies with the guarantees of due process. Within the framework of the Inter-American system of human rights protection, the respect for due process in determining refugee status would result from the same interpretation made by the Inter-American Court of Human Rights. In fact, the Court has stated that the judicial guarantees embodied in Article 8 of the American Convention must be observed at all procedural levels, either of a juridical or administrative nature, which may affect the rights of the individual.[80] Therefore, the administrative procedures for determining refugee status require that States respect the guarantees of Article 8 (1) of the Convention. In this way, and within the jurisprudence of the Court, Articles 22 (7) (the right to seek and be granted asylum) and 22 (8) (*non-refoulement*) of the American Convention must be considered in conjunction with the guarantees embodied in Article 8 (1).[81]

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80 See, for example, the case Baena Ricardo and others, judgment of February 2, 2001, Series C. 72, paragraph 124.

81 *Article 8. Judicial Guarantees*

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
   a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
   b. prior notification in detail to the accused of the charges against him;
   c. adequate time and means for the preparation of his defense;
   d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
   e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
   f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
   g. the right not to be compelled to be a witness against himself or to plead guilty; and
   h. the right to appeal the judgment to a higher court.

To this end, it is necessary that States take the necessary measures so as to make their national legislation and administrative practices, including their migration control measures, compatible with the applicable principles and regulations of Refugee and Human Rights Law established in the pertinent international instruments.

3. To ensure the enjoyment of minimum rights relative to subsistence

The protection of economic, social and cultural rights of asylum-seekers during the determination of refugee status is essential for the effective protection of the asylum institution as a whole. In fact, obligations derived from Refugee and Human Rights Law, such as the principle of *non-refoulement,* may become ineffective if asylum-seekers are not granted due socio-economic protection.

It is easily inferred that some conditions imposed on asylum-seekers such as undue extension of the determination procedure; the lack of economic assistance and the prohibition of the right to work; or prolonged detention can make their stay in the country of asylum so hostile that they may be forced to leave the country as a means of avoiding such situations, which could mean a *de facto refoulement*.

In other words, the denial of economic and social support to asylum-seekers could result in *de facto refoulement*. Without economic support, the possibilities of survival are limited and asylum-seekers are therefore forced to return to their countries without having had access to an adequate determination procedure and without having been given a fair hearing to determine whether they are refugees or not. Without adequate means of subsistence, asylum-seekers are forced to return to their countries while risking their life and integrity.

To avoid such *de facto refoulements,* adequate means of subsistence should be guaranteed to asylum-seekers during the period of refugee status determination or they should at least be allowed to exercise their right to work and the exercise of such a right should be facilitated by the State.[82]

In practice, a large number of States impose restrictions on asylum-seekers regarding the exercise of their right to work. The supervisory bodies such as the Committee on Economic, Social and Cultural Rights seem to grant States some leeway on this matter, particularly when asylum-seekers receive some kind of subsidy or when the unemployment rate is high in the respective country. However, what seems to be prohibited or contrary to human rights regulations is when the right to work is denied to asylum-seekers and when the State does not grant them any kind of benefit or assistance. Human rights would also be violated when, being authorized to work, excessive requirements to obtain a work permit are imposed on asylum-seekers and refugees.[83]

When too many obstacles hinder the exercise of legitimate work for asylum-seekers and refugees, they are forced to seek illegal work which increases the possibility of being taken advantage of with respect to wages and working conditions. Such conditions are usually inhuman and in violation of norms demanding fair and equal wages and working conditions (Articles 2 and 7 ICESCR).

82 The Declaration emphasizes the importance of economic, social and cultural rights of refugees and emphasizes the need to generate gainful employment through the assistance received from international cooperation and channeled through UNHCR.

83 See Germany E/C.12/1998/SR.41/Add.1 (Mr. Ahmed) and Switzerland E/C.12/1998/SR.38 paragraph 27 (Mr.Texier).

Another relevant aspect is that States must not discriminate among different categories of asylum-seekers regarding work permits. Public policies favoring a certain category of asylum-seekers to the detriment of other categories would be against the non-discrimination principle. If the State requires a work permit, this permit must be granted to asylum-seekers in an objective and non-discriminatory manner, and must not be solely based on the discretional power of the authority granting the permit.

It is important to emphasize that, on many occasions, when individuals are granted a temporary authorization to work, they are subject to abuse by their employers and other rights may be jeopardized. It is therefore crucial to guarantee State protection in these cases in order to avoid abuse, and to impose penalties when such abuse occurs.

In conclusion, if we embrace the widely accepted fact that asylum-seekers have the right to an expeditious and fair status determination process, we must also recognize that the existing guarantees of justice and due procedure would be weak without the adequate means to ensure a dignified subsistence during the entire determination procedure.

4. The right to humane treatment with due respect for human dignity

If we consider that asylum-seekers and refugees are frequently detained or forced to live in refugee centers without the possibility to leave such premises it is important to stress the obligations assumed by States as a result of this measure. In these situations, the interdependence and indivisibility of human rights is essential.

UNHCR has referred to detention conditions in various documents such as Conclusion No. 44 (XXXVII) of the Executive Committee relative to the "detention conditions of asylum-seekers" reiterating that such conditions must be humane. There are also various human rights norms establishing the right to dignified treatment such as Article 5 of the American Convention and Article 19 of the Convention on the Rights of the Child, and Article 10 of the International Covenant on Civil and Political Rights.

Article 10 (1) of ICCPR establishes that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." In General Comment No. 21,[84] the Committee observed that "treating a person who is deprived of his liberty with humanity and dignity is a fundamental norm of universal application. For this reason, the norm may not depend on the material resources available to the State Party. This norm must be applied without any distinction of race, color, sex, language, religion, political opinion or national or social origin; property, birth or any other condition".[85]

Both the Human Rights Committee and the Committee on Economic, Social and Cultural rights frequently express their concern for the living conditions of asylum-seekers in detention centers.[86] The

84 Humane treatment of persons deprived of their liberty (Art. 10): 04/10/92. ICCPR, General Comment No. 21.

85 For example, with regard to the Gabon Report, the Human Rights Committee expressed its concern for "the horrific conditions that prevail in refugee centers… which have caused many persons to die from suffocation and dehydration" and recommended the State to "study the possibility of adopting measures to improve the juridical and living conditions of refugees in refugee centers" CCPR/C/79/Add.71 paragraphs 16 and 26.

86 See, for example, Concluding Observations of the Committee on Economic, Social and Cultural Rights: the Netherlands (E/C.12/1/Add.25, 06/16/98 paragraph 18) and Concluding Observations of the Human Rights Committee: Gabon. CCPR/C/79/Add.71, 11/18/96).

Human Rights Committee has warned that prolonged detentions of asylum-seekers under deplorable living conditions raise serious questions under Articles 9 and 10 of the Covenant.[87] In the Inter-American and European systems, the supervisory bodies have emphasized that some detention conditions may constitute inhumane and/or degrading treatment.[88]

It is also important to consider that the norms prohibiting inhuman or degrading treatment must be respected when asylum-seekers are not deprived of liberty. In fact, asylum-seekers may find themselves in one or more of the following situations: (a) facing lengthy determination procedures with uncertainty about their status; (b) subject to restrictions of their freedom of movement; (c) prohibited from working or unable to find employment; (d) living on limited economic resources and limited welfare assistance; (e) receiving less favorable treatment than nationals in terms of their economic, social and cultural rights; (6) having limited possibilities of adaptation due to linguistic barriers.

Even though none of these conditions may be considered as "inhuman or degrading treatment" when analyzed individually, the cumulative effect and combination of these circumstances may well constitute violations to Article 7 of the International Covenant on Civic and Political Rights; Article 1 of the Convention against Torture; and Article 5 of the American Convention. It is important to note that, although such inhuman or degrading treatment may not evolve into torture, we must not lose sight of the fact that inhuman or degrading treatment exists even when such treatment has not been formally induced with the purpose of causing suffering. In addition, the threshold of severity depends on the circumstances of the case such as the length of the treatment, its physical or mental effects; and in some cases, the sex, age and health conditions of the victim.[89]

Various human rights supervisory bodies seem to approve of this position. For example, the Committee against Torture examined the report of Costa Rica and requested the State improve the effectiveness of the refugee status determination procedure in order to reduce the lengthy period of uncertainty which asylum-seekers are subject to.[90] Similarly, in an emblematic case, C. v. Australia,[91] the Human Rights Committee considered that the State had violated Article 7 of the International Covenant on Civil and Political Rights (prohibition of torture) by detaining asylum seekers for a prolonged period of time (two years). During this period, the person became mentally ill due to his imprisonment, inducing a health

88 See, for example, Denmark, Norway, Sweden and The Netherlands v. Greece, Nos. 3321/67;3322/67, 3323/67, 3324/67 admissibility decision of the European Commission on Human Rights, January 24 of 1968; Hurtado v. Switzerland, No. 1754/90, decision of January 28, 1994. At the Inter-American level, see the reports of the Inter-American Commission on El Salvador and Cuba of 1994 and the report on the jail of Challaplaca, Peru of 2003. Also, the jurisprudence of the Court is very clear in this sense. See, for example, the provisional measures adopted in the case of the detention center of Urso-Branco, Brazil in the resolutions of June 18, 2002; August 29 of 2002; and April 22 of 2004; and the decisions on the cases *Bulacio v. Argentina*, judgment of 09/18/2003, Series C, n. 100, paragraphs 126-127 and 138); case *Hilaire, Constantine and Benjamin and Others v. Trinidad and Tobago,* judgment of 06/21/2002, Series C, n. 94, paragraph 165; case *Bámaca-Velásquez v. Guatemala*, judgment of 11/25/2000, Series C, n. 70, paragraph 171; and case *Neira-Alegría and Others v. Peru*, judgment of 01/19/1995, Series C, n. 20, paragraph 60.

89 Ireland v. UK, Series A 25, paragraph 162 (1978).

90 Concluding observations of the Committee against Torture: Costa Rica 05/17/2001. A/56/44, paragraphs 130-136.

91 In 1992, "C" entered Australia but was detained by the immigration authorities as a foreigner without an entry permit. "C", an Assyrian Christian, requested the refugee status based on the well-founded fear of religious persecution in Iran, his country of origin, Iran. His request was denied by the State of Australia and the petitioner was detained while his status was determined. Communication No. 900/1999, and decision of October 28, 2002 (DOC. CCPR/C/76/D/900/1999).

condition he did not posses prior to detention. The decision of the Committee stated that Australia had violated Article 7 of the Covenant because, although the Australian authorities knew about the psychiatric problems of the petitioner caused by his prolonged detention, they did not order his release nor did they take the necessary measures to avoid the deterioration of his health condition, which caused the petitioner's illness to become irreversible.

5. Final Remarks

On the occasion of the commemoration of the 20th anniversary of the Cartagena Declaration, we believe it is important to highlight that the call made by the San Jose Declaration on Refugees and Displaced Persons[92] was noteworthy as it urged States to recognize "the appropriateness of resorting to the Declaration in order to find solutions both to pending problems and to the new challenges posed by uprootedness in Latin America and the Caribbean." (Part II, first conclusion).

During the commemoration process of the Cartagena Declaration, called by the UNHCR and by the Norwegian Refugee Council, governments as well as regional civil society members reiterated the effectiveness of various aspects of the Declaration. This essay has focused on one of them, namely, the call made by the Cartagena Declaration to integrate International Refugee Law and International Human Rights Law.

We must not overlook the fact that most of the States of the region are parties to the main human rights treaties, both universal and regional, and that human rights norms must serve not only as a guide to interpret the instruments of International Refugee Law but must also supplement the protection granted by such instruments.

By analyzing some concrete rights and examples, we have observed that through the convergence of both systems the protection of asylum-seekers and refugees has been strengthened. Asylum-seekers have the right to benefit from protection granted by various human rights instruments which establish basic treatment standards and regulations. Although each State has the right to regulate any individual entering and staying in their territory, this right must be exercised according to international human rights protection standards.

However, we must recognize that there is still much to be done in terms of the protection and observance of the human rights of asylum-seekers and refugees. We believe that an effective and dignified protection must comprise all human rights in an indivisible manner and guarantee the enjoyment of economic, social and cultural rights.

Although one of the main contributions of the Cartagena Declaration has been to urge States to use Human Rights Law, which imposes binding obligations on State parties the challenge to improve conditions for asylum-seekers and refugees still exists in spite of efforts made by the UN treaty bodies.

92 See Note No. 10.

In this sense, it is appropriate to call upon States of the region to incorporate international human rights standards into their domestic legislation and take the necessary measures to ensure their observance. It is also befitting to urge civil society organizations to use the national administrative and judicial procedures to promote respect for the rights of asylum-seekers and refugees, and whenever appropriate, to submit cases to international human rights institutions.

Finally, it is of paramount importance for States of the region to harmonize their refugee legislation in accordance to not only the principles contained in the 1951 Convention and the 1967 Protocol but also those of the American Convention; the Covenant on Economic, Social and Cultural Rights; the Covenant on Civil and Political Rights; the Convention against Torture, and other human rights instruments.

V. Development of the commemorative event

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REPORT OF THE REGIONAL EXPERTS OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Mexico City, 15 November 2004

Madam Chair and Mr. Vice-Chair
Delegates and Observers
Ladies and Gentlemen

1. The Commemorative Meeting of the 20th Anniversary of the Cartagena Declaration on Refugees is the culmination of a process of broad consultations consisting of four preparatory meetings in which UNHCR's Regional Experts participated. A first, introductory meeting was held in Brasilia (27-28 March 2004) and three subsequent sub-regional meetings were held, respectively, in San José, Costa Rica (12-13 August 2004), Brasilia (26-27 August 2004), and in Cartagena de Indias (16-17 September 2004). It is important to note that the preparatory process principally received contributions from State and civil society representatives as well as from organizations such as the Inter-American Institute of Human Rights and the Norwegian Refugee Council. The process was also supported by the two supervisory bodies of the American Convention on Human Rights (the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights).

2. UNHCR's Regional Experts (Mr. Antônio Cançado-Trindade, Santiago Corcuera-Cabezut, Leonardo Franco and Jorge Santistevan de Noriega) noted the significance of this unprecedented level of public participation (much wider than that seen in the past two decades). This broad participation reflects the emergence, within international civil society, of new actors in humanitarian action. Such participation is essential in creating an *opinio juris communis* on this issue bringing us together in Mexico City today. We have verified in the preparatory meetings that despite difficulties, our region remains committed to basic protection principles it has always supported, such as that of inalienability of individual rights, human inviolability and the *non-refoulement* principle, among others.

3. Importance is attributed to the fact that the three sub-regional preparatory meetings reiterated the *jus cogens* character of the *non-refoulement* principle (which has not been fully respected in other continents). The meetings also reflected fundamental values shared by our community of nations such as that of solidarity, which has become incorporated into universal legal thinking. Our region has demonstrated in an exemplary manner that solidarity has no borders by welcoming refugees from other continents and other persons in need of protection in the past years. This is a further contribution of Latin America to the doctrine and practice of International Human Rights Law, and *jus gentium* in general.

4. While progress has been made under the current protection framework, there have also been setbacks in other parts of the world and evidence of similar repercussions in our region. We must remain alert

to avoid such negative reverberations. The UNHCR's Regional Experts recognize the current need to address humanitarian problems affecting various segments of the population and find appropriate solutions to the emerging protection needs of the 21st century. We also recognize the need to address issues related to refugees, displaced persons, migrants (documented and undocumented) and other persons with similar protection needs in light of the interrelated nature of the problems they face.

5. We support preventive protection measures (serving as safeguards for persons in need of protection) as well as durable solutions such as resettlement, the promotion of local integration (for those deciding to stay in receiving countries) and additional measures in the field of international cooperation. These initiatives ideally embody the notions of international solidarity and responsibility sharing. We also recommend making more extensive use of domestic remedies prompting judicial intervention to ensure due protection to those in need. A call is also made to use more extensively international instruments of refugee protection and protection mechanisms embodied in the Conventions of the Inter-American system for the protection of human rights, particularly the American Convention on Human Rights. We also uphold the holistic vision encompassing all the rights of the individual.

6. UNHCR's Regional Experts understand that the Commemorative Meeting of the 20th Anniversary of the Cartagena Declaration is a milestone that transcends the preparatory process itself and will be projected over time. The period leading up to this commemoration has been comprised of significant historical moments such as the process of adopting the Cartagena Declaration, CIREFCA and the 1994 San José Declaration on Refugees and Displaced Persons. The Cartagena *process* includes the achievements throughout these historical moments and their *legitimacy* is undisputed today. Such a process has contributed significantly to the *aggiornamento* of International Refugee Law in our region.

7. The contexts in which the 1984 Cartagena Declaration and the 1994 San José Declaration emerged are different, but the progress made by both of them has had greater cumulative impact over time and today constitutes the legal patrimony of all our peoples. The first Declaration was motivated by urgent needs generated by a concrete crisis of far-reaching scope. As the crisis subsided, the legacy of the Declaration passed on to other regions and sub-regions of our continent. The second Declaration was adopted amidst a different and more diffuse crisis marked by the deterioration of socioeconomic conditions of large segments of the population in various regions and sub-regions of the continent. This entire process has revealed the paths to development and has strengthened the legal safeguards of the individual in our community of nations through the evolving and dynamic interpretation of the legal protection framework.

8. While the Declaration of Cartagena as well as that of San José reflected the protection needs of their respective times their principles could also be applied in the future. While t he Cartagena Declaration emerged amidst the armed conflicts in Central America it also *foresaw* the increasing problem of internally displaced persons. The San José Declaration in turn delved into the issue of protection of refugees and internally displaced persons, and also *foresaw* the increased problem of forced migratory flows.

9. Since then the international community has overcome an anachronistic compartmentalized way of approaching issues. The *convergent points* of the three legal branches of protection were acknowledged, that is, International Refugee Law, International Humanitarian Law and International Human Rights Law. Such convergence- at the normative, interpretative and operational levels-

was reaffirmed in the preparatory meetings of this Commemorative Meeting in Mexico City. and reaches other parts of the world, thus giving way to the most lucid international legal doctrine on the issue.

10. In sum, emphasis has shifted towards identifying the *protection needs* of all human beings regardless of their circumstances. Instead of making subjective categorizations of persons as was done in the past (based on the reasons causing them to leave their homes), today the adoption of a more objective criterion (i.e. the recognition of protection needs) has enabled us to cover a larger number of persons (such as migrants who are as vulnerable as refugees, even more so when they are undocumented). There is no longer a place for *vacatio legis*. There is no limbo or legal gap and *all* those persons are under the protection of the law in all and any circumstances, including when security measures are adopted.

11. UNHCR's Regional Experts hereby express the honor to have been able to contribute throughout the consultation process culminating in this meeting in Mexico. We are confident that this meeting will approve the Draft Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America. Such approval will surely be a new contribution to the continuous expansion and strengthening of the international law for the protection of the individual. The goal is to reach an increasing number of persons in need of humanitarian assistance and safeguard the rights which are inherent to them as human beings. Thank you very much for your attention.

UNHCR Regional Experts

Antônio Augusto CANÇADO TRINDADE, Rapporteur

Leonardo FRANCO

Santiago CORCUERA CABEZUT

Jorge SANTISTEVAN DE NORIEGA

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MR. RAYMOND JOHANSEN,
SECRETARY GENERAL NORWEGIAN REFUGEE COUNCIL

Mexico City, 17 November 2004

Dear Friends,

The commemoration of the 20th anniversary of the Cartagena Declaration on Refugees of 1984 has given the Norwegian Refugee Council an opportunity to work towards the improvement of international protection of refugees and internally displaced persons in Latin America.

The preparatory process has provided a unique forum for States, experts and civil society to analyze current challenges for refugee protection in Latin America and to propose actions to better respond to the humanitarian needs of refugees in the region.

NRC is convinced that the Cartagena Declaration is an important regional instrument for addressing forced displacement in Latin America. The Declaration offers protection to refugees and internally displaced persons and includes *inter alia* the protection of economic, social and cultural rights, a focus on durable solutions, reinforces the principle of *non-refoulement* and provides an extended definition of the refugee that responds to the reality of the region.

NRC has striven to achieve the recognition of the regional application of this Declaration, the need to include it in national legislation, its application by States and monitoring by civil society organisations.

For these reasons, NRC has financed, facilitated and coordinated the civil society contribution to the 20th Anniversary process. NRC has provided a forum for discussion and has contributed to ensuring that the voices of civil society organisations are heard. We have worked hard to guarantee that the Plan of Action reflects the concerns, input and proposed solutions of civil society.

Throughout the process, NRC has been promoting, encouraging and facilitating that local organisations, national human rights institutions (ombudsman, defensorias del pueblo) strengthen their commitment to hold governments to their protection commitments, to recognise the problems encountered in the protection of refugees and IDPs and to assist in the search for adequate solutions.

We believe that the Plan of Action, adopted in this meeting will strengthen the legal and political framework for the protection of refugees and IDPs in the region. While in general this is an important step forward in the progressive development of regional standards of protection, it is crucial (and imperative) for the protection of hundreds of thousands of Colombians which have fled to different countries in the Andean region and beyond (*e.g.* Costa Rica) or are internally displaced within the country.

Responding to the protection needs of Colombians requires greater political will of all parties concerned. This political will has been demonstrated through the adoption of the Plan of Action which reflects a consensus among the countries of Latin America countries and it will make the current problem of forced displacement more visible to the international community.

NRC is convinced that the whole commemorative process, and in particular the Plan of Action, will provide a more effective legal and political framework for the protection of refugees and IDPs in the region. The enhanced protection framework will enable civil society organizations to better monitor compliance by States, provide guidance for their own work and facilitate the search for international assistance and co-operation.

The effective implementation of the Plan of Action will require that national human rights organizations and local NGOs strengthen efforts to build domestic constituencies that are capable of demanding that their Governments support and comply with the Plan of Action. In addition, any strategy for progress on the Plan of Action should include the promotion of serious debate between the Government representatives and civil society organization of the Andean region. Finally, I would like to emphasise that NRC is committed to supporting civil society organizations in the region such that they are able to play a key role in undertaking the protection and assistance activities that are prioritized in the Plan of Action.

Any process which aims to enhance the international protection of asylum-seekers, refugees and IDPs requires, as a matter of priority, the participation of civil society. By financing and coordinating the participation of civil society in this process, NRC has played a crucial role, without which the process would have lacked legitimacy. Now NGOs must empower themselves and take a stake in the process so that the Plan of Action adopted today will mark the beginning of closer monitoring of States under the framework of Cartagena.

MEXICO DECLARATION AND PLAN OF ACTION TO STRENGTHEN THE INTERNATIONAL PROTECTION OF REFUGEES IN LATIN AMERICA

Mexico City, 16 November 2004

Declaration

The Governments of participating Latin American countries,

Gathered in Mexico City to celebrate the 20th anniversary of the Cartagena Declaration on Refugees of 1984, that reinvigorated the generous tradition of asylum in Latin America,

Recognizing Latin America's contribution to the progressive development of international refugee law beginning in 1889 with the Treaty on International Penal Law and continuing with, among other instruments, the American Declaration of the Rights and Duties of Man of 1948, the American Convention on Human Rights of 1969, the Cartagena Declaration on Refugees of 1984, the document entitled "Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America" (CIREFCA-1989), the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" and the San Jose Declaration on Refugees and Displaced Persons of 1994, as well as the doctrine and jurisprudence in this field developed, respectively, by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights,

Reaffirming their solemn commitment towards persons entitled to international protection in Latin America,

Emphasizing that humanism and solidarity are fundamental principles that should continue to guide State policies on refugees in Latin America,

Reaffirming the fundamental human right to seek and receive asylum established in Article XXVII of the American Declaration of the Rights and Duties of Man of 1948, and Article 22(7) of the American Convention on Human Rights of 1969,

Reaffirming also the enduring validity of the principles and norms contained in the 1951 Convention relating to the Status of Refugees and its Protocol of 1967, as well as the complementary nature of international refugee law, international human rights law, and international humanitarian law and, hence, the importance of using, according to the principle of *pro homine*, the norms and principles of these three bodies of international law to strengthen the protection of refugees and other persons entitled to international protection,

Recognizing the *jus cogens* nature of the principle of *non-refoulement*, including non-rejection at the border, the cornerstone of international refugee law, which is contained in the 1951 Convention relating to the Status of Refugees and its Protocol of 1967, and also set out in Article 22 (8) of the American Convention on Human Rights and Article 3 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the commitment of Latin American countries to keep their borders open in order to guarantee the protection and security of those who have a right to enjoy international protection,

Reaffirming the obligation of States to respect the principle of non-discrimination and to take measures to prevent, combat and eliminate all forms of discrimination and xenophobia, guaranteeing the exercise of the rights of all persons under the jurisdiction of the State without any distinction on the grounds of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social status, including refugee status or status of others in need of international protection,

Requesting the media to promote the values of solidarity, respect, tolerance and multiculturalism, underscoring the humanitarian plight of victims of forced displacement and their fundamental rights,

Reaffirming the principles of the indivisibility and interdependence of all human rights and the need to provide comprehensive protection to refugees that guarantees the full enjoyment of their rights, in particular, civil, economic, social and cultural rights,

Recognizing that family unity is a fundamental human right of refugees, and *recommending,* therefore, the adoption of mechanisms to guarantee its respect,

Recognizing the enduring relevance of the Cartagena Declaration on Refugees of 1984 and its importance in continuing to guide public policies for refugee protection and the search for durable solutions to refugee situations faced by Latin America at the present time,

Recognizing the importance of the principles contained in the Cartagena Declaration on Refugees to the provision of protection and finding durable solutions and the need to carry out a more detailed analysis of its recommendations,

Recommending, in the framework of the progressive harmonization of legislation relating to refugees within ongoing regional integration processes, the due incorporation of the principles and norms contained in the 1951 Convention relating to the Status of Refugees and its Protocol of 1967, the American Convention on Human Rights and other relevant international instruments,

Acknowledging the significant progress of some States in the Latin American region in establishing efficient mechanisms for determining refugee status and, likewise, *affirming* the importance of continuing to strengthen these mechanisms,

Encouraging States that have not yet adopted refugee legislation to promulgate such legislation as soon as possible and to request for this purpose UNHCR's technical advice; and States that are in the process of amending their legislation to align it with international and regional standards relating to refugees and human rights, so as to bridge any gaps that may exist between State practice and such standards,

Recognizing the responsibility of States to provide international protection to refugees, as well as the need for international technical and financial cooperation to find durable solutions within the framework of a commitment to consolidate the rule of law in Latin American countries, universal respect for human rights and the principles of international solidarity and responsibility sharing,

Affirming that national security policies and the fight against terrorism should be framed within respect for domestic law and international instruments for the protection of refugees and of human rights in general,

Noting with concern that in some parts of Latin America the internal displacement of persons as well as refugee flows persist,

Highlighting that, in view of the gravity of the problem of forced displacement in the region, it is necessary to address its causes and, at the same time, develop policies and pragmatic solutions to provide effective protection to those who need it,

Reiterating Conclusion 16 of the 1994 San Jose Declaration on Refugees and Displaced Persons which affirmed that "the problem of the internally displaced, albeit the fundamental responsibility of the States of their nationality, is nevertheless of concern to the international community because it is a human rights issue which can be linked to prevention of causes which generate refugee flows…"

Recognizing that persecution can be related to gender and age of refugees; and the need to provide protection and humanitarian assistance in keeping with the differentiated needs of men and women, boys and girls, adolescents and elderly persons, persons with disabilities, minorities and ethnic groups,

Recognizing the existence of mixed migratory movements, including persons who can qualify for refugee status and who require specific treatment, with due legal safeguards to guarantee their identification and access to refugee status determination procedures; and therefore *highlighting* the importance of continuing to take into account the issue of refugee protection in regional multilateral fora in the field of migration and, in particular, the Regional Conference on Migration (Puebla Process) and the South American Conference on Migration,

Highlighting the role in refugee protection of the Ombudsmen and Human Rights Commissioners, understood hereafter as national institutions for the promotion and protection of human rights, as independent state entities that monitor the proper functioning of public administration and the promotion and protection of fundamental human rights,

Highlighting, moreover, the decisive contribution of non-governmental organizations and other sectors of civil society to the protection and assistance of refugees and other persons in need of protection, including their work in providing advice for the development of policies regarding protection and durable solutions,

Recognizing the need to continue promoting international refugee law, international human rights law and international humanitarian law, as well as to disseminate good practices relating to protection and durable solutions in Latin America,

Underscoring the importance of strengthening cooperation between the organs of the Inter-American human rights system and UNHCR, aimed at more effective protection of refugees and other persons in need of protection and urging them to continue strengthening this collaboration,

Convinced that, despite the significant progress in the protection of refugees in Latin America, it is necessary for States to redouble their efforts to provide protection, assistance and find adequate solutions for refugees in the region, within a spirit of international solidarity and responsibility sharing with the support of the international community,

Underscoring that voluntary repatriation is the durable solution *par excellence* for refugees and the fundamental need for governments of countries of origin to take appropriate measures, with the support of the international community, to guarantee the protection of its nationals who have repatriated, in order to ensure that repatriation takes place in safety and dignity,

Reiterating to States, international organizations and civil society the importance of fully involving uprooted populations in the design and implementation of assistance and protection programmes, recognizing and valuing their human potential,

Appealing to the international community, represented by the United Nations, the Inter-American system and, especially, donor countries, to continue supporting this important effort for the protection of refugees by Latin American States with the cooperation of UNHCR and civil society,

Taking note of the conclusions adopted by consensus in the four sub-regional meetings held in Brasilia, Brazil; San Jose, Costa Rica; Cartagena de Indias and Bogota, Colombia, and *expressing the desire* to put into practice the valuable recommendations deriving from the preparatory process, whose implementation will contribute to Latin America's compliance with the Agenda for Protection, adopted by UNHCR's Executive Committee in 2002,

RESOLVE,

To approve this Declaration and of Plan of Action as "Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America".

To request the support of UNHCR and the international community for the implementation of the Plan of Action, including the programmes relating to durable solutions.

To welcome and to support the proposal made by Brazil for the establishment of a regional resettlement programme in Latin America.

To urge UNHCR to request of States, in the exercise of its supervisory responsibility, periodic reports on the situation of refugees in the Latin American countries and, in the signatory countries of Latin America, the status of implementation of the 1951 Convention relating to the Status of Refugees and its Protocol of 1967.

To request UNHCR to redouble its support to Latin American countries for the local integration of refugees.

To take due account of the present Declaration and Plan of Action in order to address the solution of the situation of refugees in Latin America.

To request the organizers and co-sponsors of this event to publish a book containing all of the background documents, reports of the preparatory meetings and the Mexico Declaration and Plan of Action, asking the Government of Mexico, UNHCR and the competent organs of the Organization of American States to adopt the measures required for its broad dissemination.

To request that UNHCR officially transmit the Mexico Declaration and Plan of Action to the Heads of State of the participating countries for its broad dissemination.

To request the President of the United Mexican States, Vicente Fox Quesada, should he consider it appropriate, to provide information regarding the holding of this event at the XIV Iberoamerican Summit that will take place on 18 and 19 November of this year in San Jose, Costa Rica.

Finally, the participants expressed their deep gratitude to the Government and people of Mexico for having hosted this commemorative event on 15 and 16 November 2004 in Mexico City; to the Governments of Costa Rica, Brazil and Colombia for having co-sponsored the preparatory meetings; to UNHCR and the Norwegian Refugee Council for having organized the event; and to the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, and the Inter-American Institute of Human Rights for their sponsorship; as well as to civil society organizations, national institutions for the promotion and protection of human rights, and the experts who, through their advice and appropriate recommendations, have made a fundamental contribution in this process.

Mexico City, 16 November 2004

BLANCA354

Mexico Plan of Action
to Strengthen International Protection of Refugees in Latin America

Preamble

On the occasion of the 20th anniversary of the Cartagena Declaration on Refugees, the United Nations High Commissioner for Refugees (UNHCR), together with the Norwegian Refugee Council, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the Inter-American Institute of Human Rights and the governments of Brazil, Costa Rica and Mexico, brought together governments of Latin America countries, experts and different sectors of civil society to analyze jointly the main challenges to the protection of refugees and other persons in need of international protection today in Latin America, and to identify courses of action to assist countries of asylum in the search for appropriate solutions within the pragmatic and principled spirit of the Cartagena Declaration on Refugees.

To this end, four sub-regional preparatory meetings were held in San Jose, Costa Rica (12-13 August), Brasilia, Brazil (26-27 August), Cartagena de Indias, Colombia (16-17 September) and Bogota, Colombia (6-7 October), in which the refugee situation in each region was analyzed. As the outcome of each gathering, a report was adopted by consensus. Based on the conclusions and recommendations of these regional preparatory meetings, the participants have prepared the following Plan of Action aimed at continuing to strengthen mechanisms for protection and the search for solutions for refugees and other persons in need of protection in the region.

Chapter One
The Situation of Refugees in Latin America

Upon the commemoration of the 20th Anniversary of the Cartagena Declaration on Refugees, there are still situations that generate forced displacement in Latin America, particularly in the Andean Region. In addition to a growing number of Latin American refugees, the region also provides protection and durable solutions to refugees from other continents.

With the exception of the Andean Region, where cross-border movements are driven by a humanitarian crisis characterized by forced displacement within Colombia's borders and which variously affects neighboring countries and other countries of the region, at the present time asylum-seekers and refugees are caught up within migratory flows across the continent.

Furthermore, the magnitude of forced displacement in the Andean Region is made less visible in a context where many people in need of international protection opt for anonymity and dispersion, and therefore, do not formally request international protection.

At the same time, pilot resettlement programmes for refugees recognized in other parts of the world have been launched in the Southern Cone.

As a result, various situations co-exist in Latin America at present: 1) countries that continue to receive a small number of asylum-seekers and refugees immersed in regional and continental migratory flows; 2) countries hosting a significant number of recognized refugees and/or asylum-seekers; and 3) countries with emerging resettlement programmes. All three situations may converge in some countries of the region.

The normative and institutional framework for the protection of refugees has been strengthened in the last twenty years. A large number of Latin American countries have enshrined the right to asylum in their constitutions and the large majority of countries are party to the 1951 Convention relating to the Status of Refugees and/or its Protocol of 1967. Likewise, the large majority have national bodies, norms and procedures for determining refugee status. Some countries recognize that persecution can be related to gender and age, and take into consideration the differentiated protection needs of men and women, boys and girls, adolescents and elderly persons. However, some of these national mechanisms are still at incipient stages of development and require greater human, technical and financial resources to be operative, including training on international refugee law so as to guarantee fair and efficient procedures.

The Cartagena Declaration's refugee definition has been included in the national legislation of a significant number of countries. Nevertheless, during the preparatory process it was observed that there is a need to clarify and specify the criteria for its interpretation, in particular, the restrictive interpretation of the exclusion clauses, the interpretation of the specific grounds and their application in individual cases, using the jurisprudence of human rights organs and tribunals and taking into account the legitimate security concerns of States, through a broad and open dialogue, with a view to systematizing doctrine and state practice.

The enjoyment by refugees of their fundamental rights determines the quality of asylum. The quality of asylum is likewise vital to finding durable solutions to the plight of refugees. To the extent that refugees find effective protection in a receiving country, they will not be obliged to seek protection in third countries through secondary and/or irregular movements. At the same time, it is necessary for refugees' countries of origin, with the cooperation of the international community, to continue to make efforts to create adequate conditions for the safe and dignified return of its nationals who are refugees.

Taking into account the socio-economic conditions prevailing in the countries of asylum, as well as the distinct profiles of refugees and other persons in need of protection in the region, it is necessary to design and implement creative new policies to facilitate the search for adequate solutions. This requires devising new strategies to achieve self-sufficiency and local integration, both in urban centers as well as border areas, as well as the strategic use of resettlement, in a framework of regional solidarity.

In parallel, it is important to strengthen humanitarian and social programmes in border areas, emphasizing a geographic approach instead of a population approach, so that receiving communities benefit on equal footing with refugees and other persons in need of protection.

Chapter Two
The International Protection of Refugees

1. Research and Doctrinal Development:

The preparatory meetings considered it appropriate to acknowledge Latin America's contribution to the progressive development of international refugee law. In this respect, regional instruments such as the Cartagena Declaration on Refugees, the 1948 American Declaration of the Rights and Duties of Man and the 1969 American Convention on Human Rights, as well as the doctrine and jurisprudence developed, respectively, by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have contributed to improve the situation of refugees in Latin America.

In this regard, note is taken of an additional recommendation reiterated in all of the preparatory meetings regarding the strengthening of cooperation among States in the region, as well as between the States and UNHCR, the human rights bodies of the Inter-American system and academic and research institutions in Latin America in the fields of interdisciplinary research, promotion and development of international refugee law.

Within this cooperation framework, it was recommended to initiate a consultative process aimed at clarifying the content and scope of Conclusion III of the Cartagena Declaration on Refugees, in order to strengthen the international protection of refugees in Latin America. In this respect, the development of a Handbook on Procedures and Criteria for Application of the Refugee Definition of the Cartagena Declaration is foreseen.

To deepen knowledge of international refugee law, it is proposed that UNHCR implement the following projects, in cooperation with the human rights bodies of the Inter-American System, as well as research and academic institutions:

- Legal Research Series on *"The International Protection of Refugees in Latin America",*
- Handbook on *"Procedures and Criteria for Application of the Cartagena Declaration's Refugee Definition",* and
- Glossary on "*Concepts and Legal Terminology of International Refugee Law".*

2. Training and Institutional Capacity-building:

The noteworthy efforts of countries in Latin America over the past 20 years to establish an institutional framework to ensure the right to seek and enjoy asylum were acknowledged throughout the consultation process. However, deficiencies in the asylum systems, which make it more difficult for refugees and asylum-seekers to access effective protection, were also noted.

2.1. With the aim of contributing to a broader knowledge of the normative framework and its effective implementation, as well as facilitating the effective use of domestic legal remedies (administrative, judicial and constitutional) for the protection of the rights of asylum seekers and refugees, thus ensuring the right to seek and be granted asylum, it was agreed to request that UNHCR, in collaboration with the human rights bodies of the Inter-American System, the Inter-American Institute of Human Rights,

universities and civil society organizations, and national institutions for the promotion and protection of human rights, develop and implement a "Latin American Training Programme on International Refugee Protection". This Programme will be directed towards State officials and members of civil society "protection networks". The Programme will entail a rigorous selection of participants, and a teaching methodology combining on-the-job training, distance-learning, self- and on-campus study, along with the development of precise evaluation and impact indicators, and proper follow-up of participants, among other technical aspects.

The Programme would give priority to:

- Presidents, members, legal advisers and interviewers of National Eligibility Commissions;
- State officials at borders and airports (police, military and migration staff)
- Judges, public Attorneys and Prosecutors;
- Professional staff from the national institutions for the promotion and protection of human rights;
- Staff from non-governmental organizations and other civil society institutions participating in national and regional protection networks; and
- Legislators.

2.2. The difficulties faced by National Refugee Commissions or other institutions responsible for refugees in identifying specialized staff, setting up computerized registration systems, as well as the slow pace of refugee status determination procedures or the weaknesses of documentation processes owing, among other reasons, to lack of technical, human or financial resources were also noted. In this regard, States were urged to strengthen established refugee status determination mechanisms, allocating to them more financial resources, and UNHCR was requested to provide training and technical advice.

Recognizing the importance of National Refugee Commissions in guaranteeing effective protection, UNHCR is asked to cooperate with Latin American governments interested in drawing up regional or national projects within the framework and priorities of a "Programme to Strengthen National Refugee Commissions". In this regard, it is necessary to note that the Andean countries that met in Cartagena de Indias on 16-17 September 2004, in the course of the preparatory process, agreed to submit for the consideration of the Andean Council of Ministers of Foreign Affairs the creation of an Andean Committee of Authorities responsible for Refugees.

The consultation process determined that strengthening of the Commissions could aim, *inter alia*, at:

- Guaranteeing respect for due process standards by ensuring asylum-seekers' access to refugee status determination procedures, establishing effective remedies, taking decisions on claims within a reasonable timeframe and establishing procedures for appealing a decision to an independent body; and
- Simplifying procedures and facilitating the issuance of documentation.

2.3. The role of civil society organizations and national institutions for the promotion and protection of human rights in Latin American in the defense and protection of refugees is widely acknowledged by the governments. This important work is carried out by non-governmental organizations and churches, in a spirit of cooperation with State institutions, including national institutions for the promotion and protection of human rights, with UNHCR and other regional and international protection-oriented institutions. During the preparatory process, recommendations were made to further involve civil society in the design of public policies on refugees and to continue building their capacities.

It is therefore proposed to establish a "Programme to Strengthen National and Regional Protection Networks" to address the needs of non-governmental organizations, churches and national institutions for the promotion and protection of human rights. This Programme could cover the following priority areas:

- Reinforcing legal advice and assistance services for refugees and asylum-seekers with a focus on meeting the specific needs of those seeking such services, whether they be men, women, boys, girls, adolescents, elderly persons, persons with disabilities, indigenous persons or other categories of persons;
- Reinforcing awareness of international refugee law and human rights law;
- Systematizing and disseminating best practices and successful programmes developed by some protection networks; and
- Exchanging experiences among the various protection networks.

The following programmes are suggested within this area of Training and Institution-Building:

- Latin American Training Programme on International Protection of Refugees
- Programme to Strengthen National Refugee Commissions
- Programme to Strengthen National and Regional Protection Networks

Chapter Three
Durable Solutions

The preparatory meetings identified operational priorities in the different sub-regions and countries of the region. It was noted that Latin America has a broad tradition of protection and solidarity toward those who have been persecuted and has ben able to find solutions for its own refugees within the sub-continent. It was acknowledged that voluntary repatriation is the ideal solution for refugees, as an individual right to be exercised in a voluntary manner in conditions of safety and dignity. Furthermore, the current need to facilitate self-sufficiency and local integration for an increasing number of refugees, and the challenge that this represents to States, was underlined.

The preparatory process reiterated the need for international cooperation, in keeping with the principles of solidarity and responsibility-sharing, as a means to achieve effective durable solutions, as well as to disseminate best practices in the area of durable solutions in the region, promoting south-south cooperation and the creative approach of the 1984 Cartagena Declaration on Refugees.

In view of the current regional context, two situations were highlighted as requiring urgent attention and international support: the situation of growing numbers of urban refugees living in large urban centers in Latin America; and the situation of a large number of Colombian citizens living in border areas between Colombia and its neighbours Ecuador, Panama and Venezuela, most of whom are undocumented and in need of urgent protection and humanitarian assistance, owing to their acute vulnerability.

1. "*Solidarity Cities*" Programme for Self-Sufficiency and Local Integration

Urban refugees hail from a wide range of nationalities, with a small, but growing, percentage of refugees coming from other continents and cultures. These refugees predominantly settle in urban centers and their self-sufficiency and socio-economic integration remain a challenge for the States and

civil society, especially given the economic difficulties faced by the countries of asylum themselves. When designing integration projects, it is therefore necessary to bear in mind the difficult situation of host communities.

The preparatory process highlighted the following: a) the political will of governments to facilitate the economic self-sufficiency of refugees; b) the lack of resources and experience of state social welfare institutions to achieve this goal; c) recognition of the work and experience of civil society; d) the need to create strategies appropriate to the reality of the asylum countries and to exchange best practices; and e) the need for international technical and financial cooperation.

The preparatory meetings suggested that, in designing this Programme, due consideration should be given to the region's socio-economic realities, in terms of unemployment levels, poverty, and social exclusion, as well as to the socio-economic profiles of the beneficiaries. In the same vein, the following broad goals were mentioned:

- Fostering the generation of sources of employment, in particular, the establishment of micro-credit systems;
- Setting up mechanisms for the expedited issuance of documents and simplifying procedures for authentification and recognition of certificates and diplomas issued abroad; and
- Contemplating mechanisms for the participation of civil society and UNHCR in designing, implementing, monitoring and improving integration projects.

The "*Solidarity Cities*" Programme for Self-Sufficiency and Local Integration seeks to mitigate, to the extent possible, so-called "irregular or secondary movements", but its main aim is to provide effective protection which encompasses enjoyment of social, economic and cultural rights and observance of the obligations of refugees. It would also aim at facilitating the implementation of public policies, within an integrated social strategy, with the technical cooperation of United Nations and civil society organizations, and the financial support of the international community, in order to integrate a number of refugees, to be determined, in a series of "pilot" urban centers in Latin America.

2. Integrated *"Borders of Solidarity"* Programme

In the third sub-regional preparatory meeting, held in Cartagena de Indias, Colombia (16-17 September 2004), representatives of the Governments of Ecuador, Panama and Venezuela indicated that the true magnitude of the refugee problem is not known. In this regard, the 10,000 refugees and 30,000 asylum-seekers in these three countries is likely to represent only a fraction of the total number of Colombian citizens who transit and/or reside in these countries, most of them irregularly, and they also underlined the special plight of provinces and States bordering Colombia.

In light of the situation prevailing in the country of origin, as well as the economic difficulties faced by the receiving countries, it is presumed that a considerable number of Colombians, whether undocumented or in an "irregular" migratory situation, are in need of protection and humanitarian assistance. However, the majority of them remains "invisible" and therefore, vulnerable and marginalized. The hosting countries expressed their will to comply with their international protection obligations but, at the same time, expressed concern about the magnitude of the humanitarian problem whose real dimensions are not yet known.

In order to foster a humanitarian response towards those who are in need of and deserve international protection, and to address basic infrastructure and community services needs, in particular in the areas of health and education, as well as to facilitate employment generation and productive projects, it is necessary to promote the development of border areas through the consolidation of the presence of the State institutions along with specific investments and projects sponsored by the international community.

Government representatives meeting in Cartagena de Indias also mentioned the difficulties faced by local authorities in maintaining basic services in the area of health, sanitation, education and others in view of the overwhelming, and unplanned for, demand. They underlined the compelling need to include local populations as recipients of development aid since these populations are bearing the brunt of solidarity, despite being populations as needy and poor as the refugees themselves.

The preparatory meetings proposed the following priorities in hosting communities in border areas of the mentioned countries:

- Support to implement a programme with the objective of determining in a reliable manner the magnitude and the characteristics of the refugee problem, with a view to identifying protection and assistance needs as well as to propose the most appropriate durable solutions;
- Reinforcement of institutional mechanisms for protection and refugee status determination;
- Implementation of public awareness programmes targeting local populations to prevent negative feelings and all forms of discrimination;
- Formulation of a Regional Strategic Plan to address the protection, basic assistance and integration needs of all of the populations in need, using a territorial and differentiated approach, whose main components could include:
  - Promoting social and economic development, benefiting persons who are in need of international protection and local hosting communities alike;
  - Taking into account the profile of the uprooted population and local hosting communities living in border areas, composed mainly of rural and agricultural populations, the majority of whom are women and children; and
  - Taking due account of the specific protection needs of women and men, ethnic minorities, elderly persons and persons with disabilities.

It was noted that solidarity can only be sustained through active cooperation between the State, civil society and UNHCR, with the financial contribution of the international community, within the framework of responsibility-sharing. The importance of ensuring the participation of civil society in existing and future mechanisms (bilateral, tripartite and international) to consolidate the protection framework for persons in affected border areas, and to analyze the problem of forced displacement in the region, was mentioned. In this regard, participants took note with satisfaction of the proposal made by Brazil to promote the creation of a regional resettlement programme (see paragraph below).

3. Regional *"Solidarity Resettlement"* Programme

In the preparatory meeting held in Brasilia (26-27 August 2004), the Government of Brazil proposed the creation of a regional resettlement programme for Latin American refugees, in the framework of international solidarity and responsibility-sharing. This initiative opens the possibility for any Latin American country, at the opportune time, to participate and to receive refugees who are in other Latin American countries. The announcement of this programme was well received by the countries of the

region who currently host an important number of refugees, as a tool to help to mitigate the effects of the humanitarian situation these countries face.

Latin American countries agree upon the importance of establishing resettlement policies that include a framework of principles and eligibility criteria, with due regard for the principle of non-discrimination. Furthermore, based on the experience of Brazil and Chile as emerging resettlement countries, they appeal to the international community to support the strengthening and consolidation of these initiatives, in order to improve and replicate them in other countries of Latin America.

In any case, it is underlined that resettlement, as a durable solution in the region and for the region, should not be viewed as "burden-sharing" but, instead, as a duty deriving from international solidarity, and the need for technical and financial cooperation from the international community for its strengthening and consolidation was reiterated.

Chapter Four
Promotion, Implementation, Follow-up and Evaluation Mechanisms

In order to implement this Plan of Action, a series of activities are foreseen at different levels:

At the national level (during the first semester of 2005)

To carry out an assessment of the number of persons who could benefit from this Plan of Action as a basis for the formulation of projects within the programmes herein contemplated. Preparation of national projects within the framework of the Plan of Action. Furthermore, countries interested in the *"Solidarity Borders*" programme should present a study on the impact of the presence of asylum-seekers, refugees and other persons in need of international protection in the geographical areas covered by the programme. UNHCR shall provide all of its support and expertise in the formulation of these projects, which will be submitted for the consideration of the international community.

The national institutions for the promotion and protection of human rights will issue a regular evaluation and follow up report on the projects and programmes formulated within the framework of this Plan of Action.

At the regional and sub-regional level

To organize at least two meetings per year to facilitate the exchange of information and experiences, the design of regional projects and the supervision of the implementation of this Plan of Action, with the participation of governments, the United Nations High Commissioner for Refugees, other UN agencies, the Organization of American States, donors, representatives of civil society, national institutions for the promotion and protection of human rights and experts.

At the international level

Within the framework of the Executive Committee of the High Commissioner's Programme, organize an annual meeting with donor countries and financial institutions, with the participation of civil society, in order to present the Plan of Action programmes and projects and to provide information on their implementation and impact on the beneficiary populations.

VII. Participant list

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COMMEMORATION OF THE TWENTIETH ANNIVERSARY OF
THE CARTAGENA DECLARATION ON REFUGEES
(México City, 15-16 November 2004)

Chairperson of the commemorative event

Mrs. Patricia Olamendi, Deputy Secretary of Multilateral Affairs and Human Rights, Secretariat of Foreign Affairs

Deputy Chairperson of the commemorative event

Mr. Luiz Paulo Teles Ferreira Barreto, Deputy Minister of Justice and President of the National Refugee Committee (CONARE)

Governmental representatives

Argentina

Dr. Jorge Cardozo, Advisor of the Minister of Foreign Affairs, and Expert in International Refugee Law
Mr. Fabián Oddone, First Secretary, General Directorate on Human Rights, Ministry of Foreign Affairs
Dr. Ricardo Eusebio Rodríguez, National Director of Immigration and President of the Eligibility Refugee Committee (CEPARE)
Dra. Adriana Alfonso, Chief of the Office on International Matters of the National Directorate for Migrations, Ministry of Interior
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Economic Commission for Latin America and the Caribbean (ECAC)

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European Commission

Mr. Germano Straniero Sergio, Attaché d' Affairs, Delegation in Mexico
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Inter-American Commission of Human Rights

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Inter-American Court of Human Rights

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Mr. Luis Gerardo Aguilar Esponda, Legal Advisor

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Mr. José Pires, Regional Representative for Central America and Mexico, and Chief of Mission in Costa Rica
Mr. Juan Artola, Project Officer, Mexico

Japan International Cooperation Agency (JICA)

Mr. Eiji Hashimoto, Deputy Vicepresident of Japan International Cooperation Agency
Mr. Ken Kinoshita, General Director General for Latin America and the Caribbean
Mr Koji Kawai, Resident Representative
Mr. Takayuki Ando, Deputy Resident Representative
Mrs. Maki Shinohara, Special Assistant to Mrs. Sadako Ogata

Norwegian Refugee Council

Mr. Raymond Johansen, General Secretary
Mrs. Martha Skretteberg, Representative in Colombia
Dra. Magdalena Sepúlveda, Project leader of the commemoration of the Cartagena Declaration
Mr. Richard Skretteberg, Communications officer

United Nations Office for the Coordination of Humanitarian Affairs (OCHA)

Mrs. Nancee Oku Bright, Chief of Section I, Africa

United Nations World Food Programme (WFP)

Mr. Helmut W. Rauch, Representative in Ecuador

Guest of Honour

Mrs. Sadako Ogata, former United Nations High Commissioner for Refugees and President of Japan International Cooperation Agency

Mr. Hernán Escudero, Presidente of UNHCR's Executive Committee and Ambassador of Ecuador in Geneva

Special guests

Belen Hostel-Tapachula, Chiapas
Priest Flor de María Rigoni

Foundation Rigoberta Menchú
Mrs. Claudia Garduño Nájera, Project Coordinator
Mr. Emilio Godoy Alvarado, Responsible for Communications

Mr. Antonio Fortín, independent expert, former UNHCR staff

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Mr. Horacio Esber, Ombudsman's Office
Padre Ildo Griz, General Secretary, Argentinan Catholic Commission for Migration Foundation, FCCAM

Bolivia
Mr. Rielma Loreta Mencias R., Deputy Delegate for the attention of citizens, Ombudsman's Office
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Mrs. Gloria Inés Florez, MINGA
Mr. Jorge Rojas, CODHES
Mrs. Fanny Uribe, Human Mobility

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Mr. José Manuel Echandi, Ombudsman
Mrs. Soraya Long, CEJIL Mesoamerica
Mrs. Gloria Maklouf Weiss, Director, Association of International Consultants and Advisors
Mrs.Kathya Rodriguez, Director of Special Protection, Ombudsman's Office

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Mrs. Ana Varela Esponda, Director of the Ecumenic Service for Human Dignity, SEDHU

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Mrs. Bárbara Nava, Jesuit Refugee Service

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Mr. Ruud Lubbers, United Nations High Commissioner for Refugees
Mrs. Hope Hanlan, Director of the Americas Bureau
Mr. Philippe Lavanchy, Appointed Director of the Americas Bureau
Mrs. Mérida Morales-O'Donnell, Regional Representative for Mexico, Central America, Belize and Cuba

Mrs. Virginia Trimarco, Regional Representative for Northern South America
Mr. Roberto Meier, Representative in Colombia
Mr. Luis Varese, Representative in Brazil
Mr. James Kovar, Representative in Costa Rica
Mr. Gonzalo Vargas Llosa, Representative in Panama
Mr. José Euceda, Representative in Ecuador
Mr. José Riera, Political Officer, Geneva and Secretary of the commemorative event
Mr. Carlos Maldonado, Coordinator for the 20th Anniversary of the Cartagena Declaration on Refugees
Mr. Davide Torzilli, Executive Assistant of the Director of the Americas Bureau
Mr. Roberto Quintero, Deputy Representative for Mexico, Central America, Belize and Cuba
Mr. Mario Bettencourt, Programme and Administration Officer for Mexico, Central America, Belize and Cuba
Ms. Anna Greene, Regional Protection Officer for Mexico, Central America, Belize and Cuba and member of the Secretariat for the commemorative event
Mr. Ariel Riva, Head of the Office in Tapachula, Mexico
Mr. Juan Carlos Murillo, Senior Legal Officer, Regional Legal Unit of the Americas Bureau, member of the Secretariat of the commemorative event

VIII. Annexes

BLANCA374

1984 CARTAGENA DECLARATION ON REFUGEES

Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 - 22 November 1984

I

Recalling the conclusions and recommendations adopted by the Colloquium held in Mexico in 1981 on Asylum and International Protection of Refugees in Latin America, which established important landmarks for the analysis and consideration of this matter;

Recognizing that the refugee situation in Central America has evolved in recent years to the point at which it deserves special attention;

Appreciating the generous efforts which have been made by countries receiving Central American refugees, notwithstanding the great difficulties they have had to face, particularly in the current economic crisis;

Emphasizing the admirable humanitarian and non-political task which UNHCR has been called upon to carry out in the Central American countries, Mexico and Panama in accordance with the provisions of the 1951 United Nations Convention and the 1967 Protocol, as well as those of resolution 428 (V) of the United Nations General Assembly, by which the mandate of the United Nations High Commissioner for Refugees is applicable to all States whether or not parties to the said Convention and/or Protocol;

Bearing in mind also the function performed by the Inter-American Commission on Human Rights with regard to the protection of the rights of refugees in the continent;

Strongly supporting the efforts of the Contadora Group to find an effective and lasting solution to the problem of Central American refugees, which constitute a significant step in the negotiation of effective agreements in favour of peace in the region;

Expressing its conviction that many of the legal and humanitarian problems relating to refugees which have arisen in the Central American region, Mexico and Panama can only be tackled in the light of the necessary co-ordination and harmonization of universal and regional systems and national efforts;

II

Having acknowledged with appreciation the commitments with regard to refugees included in the Contadora Act on Peace and Co-operation in Central America, the bases of which the Colloquium fully shares and which are reproduced below:

(a) "To carry out, if they have not yet done so, the constitutional procedures for accession to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees."
(b) "To adopt the terminology established in the Convention and Protocol referred to in the foregoing paragraph with a view to distinguishing refugees from other categories of migrants."
(c) "To establish the internal machinery necessary for the implementation, upon accession, of the provisions of the Convention and Protocol referred to above."
(d) "To ensure the establishment of machinery for consultation between the Central American countries and representatives of the Government offices responsible for dealing with the problem of refugees in each State."
(e) "To support the work performed by the United Nations High Commissioner for Refugees (UNHCR) in Central America and to establish direct co-ordination machinery to facilitate the fulfillment of his mandate."
(f) "To ensure that any repatriation of refugees is voluntary, and is declared to be so on an individual basis, and is carried out with the co-operation of UNHCR."
(g) "To ensure the establishment of tripartite commissions, composed of representatives of the State of origin, of the receiving State and of UNHCR with a view to facilitating the repatriation of refugees."
(h) "To reinforce programmes for protection of and assistance to refugees, particularly in the areas of health, education, labour and safety."
(i) "To ensure that programmes and projects are set up with a view to ensuring the self-sufficiency of refugees."
(j) "To train the officials responsible in each State for protection of and assistance to refugees, with the co-operation of UNHCR and other international agencies."
(k) "To request immediate assistance from the international community for Central American refugees, to be provided either directly, through bilateral or multilateral agreements, or through UNHCR and other organizations and agencies."
(l) "To identify, with the co-operation of UNHCR, other countries which might receive Central American refugees. In no case shall a refugee be transferred to a third country against his will."
(m) "To ensure that the Governments of the area make the necessary efforts to eradicate the causes of the refugee problem."
(n) "To ensure that, once agreement has been reached on the bases for voluntary and individual repatriation, with full guarantees for the refugees, the receiving countries permit official delegations of the country of origin, accompanied by representatives of UNHCR and the receiving country, to visit the refugee camps."
(o) "To ensure that the receiving countries facilitate, in co-ordination with UNHCR, the departure procedure for refugees in instances of voluntary and individual repatriation."
(p) "To institute appropriate measures in the receiving countries to prevent the participation of refugees in activities directed against the country of origin, while at all times respecting the human rights of the refugees."

III

The Colloquium adopted the following conclusions:

1. To promote within the countries of the region the adoption of national laws and regulations facilitating the application of the Convention and the Protocol and, if necessary, establishing internal procedures and mechanisms for the protection of refugees. In addition, to ensure that the

national laws and regulations adopted reflect the principles and criteria of the Convention and the Protocol, thus fostering the necessary process of systematic harmonization of national legislation on refugees.

2. To ensure that ratification of or accession to the 1951 Convention and the 1967 Protocol by States which have not yet taken these steps is unaccompanied by reservations limiting the scope of those instruments, and to invite countries having formulated such reservations to consider withdrawing them as soon as possible.

3. To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who 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.

4. To confirm the peaceful, non-political and exclusively humanitarian nature of grant of asylum or recognition of the status of refugee and to underline the importance of the internationally accepted principle that nothing in either shall be interpreted as an unfriendly act towards the country of origin of refugees.

5. To reiterate the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*.

6. To reiterate to countries of asylum that refugee camps and settlements located in frontier areas should be set up inland at a reasonable distance from the frontier with a view to improving the protection afforded to refugees, safeguarding their human rights and implementing projects aimed at their self-sufficiency and integration into the host society.

7. To express its concern at the problem raised by military attacks on refugee camps and settlements which have occurred in different parts of the world and to propose to the Governments of the Central American countries, Mexico and Panama that they lend their support to the measures on this matter which have been proposed by the High Commissioner to the UNHCR Executive Committee.

8. To ensure that the countries of the region establish a minimum standard of treatment for refugees, on the basis of the provisions of the 1951 Convention and 1967 Protocol and of the American Convention on Human Rights, taking into consideration the conclusions of the UNHCR Executive Committee, particularly No. 22 on the Protection of Asylum Seekers in Situations of Large-Scale Influx.

9. To express its concern at the situation of displaced persons within their own countries. In this connection, the Colloquium calls on national authorities and the competent international organizations to offer protection and assistance to those persons and to help relieve the hardship which many of them face.

10. To call on States parties to the 1969 American Convention on Human Rights to apply this instrument in dealing with asilados and refugees who are in their territories.

11. To make a study, in countries in the area which have a large number of refugees, of the possibilities of integrating them into the productive life of the country by allocating to the creation or generation of employment the resources made available by the international community through UNHCR, thus making it possible for refugees to enjoy their economic, social and cultural rights.

12. To reiterate the voluntary and individual character of repatriation of refugees and the need for it to be carried out under conditions of absolute safety, preferably to the place of residence of the refugee in his country of origin.

13. To acknowledge that reunification of families constitutes a fundamental principle in regard to refugees and one which should be the basis for the regime of humanitarian treatment in the country of asylum, as well as for facilities granted in cases of voluntary repatriation.

14. To urge non-governmental, international and national organizations to continue their worthy task, co-ordinating their activities with UNHCR and the national authorities of the country of asylum, in accordance with the guidelines laid down by the authorities in question.

15. To promote greater use of the competent organizations of the inter-American system, in particular the Inter-American Commission on Human Rights, with a view to enhancing the international protection of asilados and refugees. Accordingly, for the performance of this task, the Colloquium considers that the close co-ordination and co-operation existing between the Commission and UNHCR should be strengthened.

16. To acknowledge the importance of the OAS/UNHCR Programme of Co-operation and the activities so far carried out and to propose that the next stage should focus on the problem raised by massive refugee flows in Central America, Mexico and Panama.

17. To ensure that in the countries of Central America and the Contadora Group the international norms and national legislation relating to the protection of refugees, and of human rights in general, are disseminated at all possible levels. In particular, the Colloquium believes it especially important that such dissemination should be undertaken with the valuable co-operation of the appropriate universities and centres of higher education.

IV

The Cartagena Colloquium therefore
Recommends:

- That the commitments with regard to refugees included in the Contadora Act should constitute norms for the 10 States participating in the Colloquium and be unfailingly and scrupulously observed in determining the conduct to be adopted in regard to refugees in the Central American area.

- That the conclusions reached by the Colloquium (III) should receive adequate attention in the search for solutions to the grave problems raised by the present massive flows of refugees in Central America, Mexico and Panama.

- That a volume should be published containing the working document and the proposals and reports, as well as the conclusions and recommendations of the Colloquium and other pertinent documents, and that the Colombian Government, UNHCR and the competent bodies of OAS should be requested to take the necessary steps to secure the widest possible circulation of the volume in question.

- That the present document should be proclaimed the "Cartagena Declaration on Refugees".

- That the United Nations High Commissioner for Refugees should be requested to transmit the contents of the present declaration officially to the heads of State of the Central American countries, of Belize and of the countries forming the Contadora Group.

Finally, the Colloquium expressed its deep appreciation to the Colombian authorities, and in particular to the President of the Republic, Mr. Belisario Betancur, the Minister for Foreign Affairs, Mr. Augusto Ramírez Ocampo, and the United Nations High Commissioner for Refugees, Mr. Poul Hartling, who honoured the Colloquium with their presence, as well as to the University of Cartagena de Indias and the Regional Centre for Third World Studies for their initiative and for the realization of this important event. The Colloquium expressed its special recognition of the support and hospitality offered by the authorities of the Department of Bolivar and the City of Cartagena. It also thanked the people of Cartagena, rightly known as the "Heroic City", for their warm welcome.

In conclusion, the Colloquium recorded its acknowledgement of the generous tradition of asylum and refuge practised by the Colombian people and authorities.

Cartagena de Indias, 22 November 1984

BLANCA 380

PRINCIPLES AND CRITERIA FOR THE PROTECTION OF AND ASSISTANCE TO CENTRAL AMERICAN REFUGEES, RETURNEES AND DISPLACED PERSONS IN LATIN AMERICA

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PREFACE

1. This document was prepared by the Group of Experts for the International Conference on Central American Refugees pursuant to specific objective {a) in paragraph 3 of the San Salvador Communiqué on Central American Refugees of 9 September 1988. According to this objective the conference is to 'assess the progress achieved in respect of the principles underlying the protection of and assistance to refugees and their voluntary repatriation with a view to encouraging their dissemination and application'.

2. In order to facilitate the work of the Conference in relation to the above-named objective, the Group has sought to identify the basic set of principles and criteria by which States are guided in their treatment of refugees, among which solutions to the problems of refugees may also be found. The Group has also referred extensively to the sources of the various principles and criteria, indicating by means of footnotes the documents in which they are contained. These are mainly treaties or conventions of international or regional scope, resolutions or decisions of international inter-governmental conferences or documents prepared by experts and organizations, to mention only a few examples. In the context of an assessment, these notes are of particular importance, as the character of these principles and criteria of international law varies according to the source from which they derive.

3. Account was taken of the comments on the first version of the document that were made by the Governments concerned which participated in the second meeting of the Preparatory Committee held in Antigua, Guatemala. It will, however, be noted that some of these document at comments have not been dealt with in the present document. These include references to the need further to clarify the scope of the definition of the term "refugee" contained in the Cartagena Declaration

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and the guarantees and rights of returnees, as well as the desirability of assessing the manner in which countries apply, internally, international rules relating to refugees. The Group believes that these comments merit special attention which cannot be devoted to them in the framework of this study.

4. It will be noted that the document refers not only to principles and criteria for the protection of and assistance to refugees, but also to principles and criteria relating to the returnees and displaced persons, since the International Conference will also be concerned with solving the problems of these categories of persons. Even though considerable progress has been made in recent years in respect of these additional categories, much still remains to be done. In particular, the Group shares the view, reflected in some of the comments of Governments, that it is necessary to reach a clearer and more specific understanding of the concept of 'displaced person.'

5. The Group of Experts presents this document in the hope that it may be useful for the purposes of consultation and guidance. It hopes that the contents of the document may provide material for the dissemination action referred to in its final chapter.

1. INTRODUCTION

6. The States which decided to convoke the Conference on the Central American Refugees have identified as one of its specific objectives to 'assess the progress achieved in respect of the principles underlying the protection of and assistance to refugees and their voluntary repatriation, with a view to encouraging their dissemination and application'.[1] These very principles are contained in the Cartagena Declaration on Refugees[2] and have been further complemented through the practice of the States concerned and of international organizations. Taken together, they not only give guidance to States for the treatment of refugees but also constitute a framework within which solutions to the problems of refugees can be identified. It is the purpose of the present document to describe this framework through the evolution of applicable legal norms and practices in order to permit its evaluation. In this manner, it is hoped that the document will he used for the purposes of consultation and orientation.

7. The development and diversification of conflicts in a number of Central American States in the late 1970s have led to the forced displacement of large segments of populations. As of that moment, the region witnessed a massive displacement of persons who, because of the violence, abandoned their homes and in many instances their countries of origin[3]. Hundreds of' thousands of people fled to neighbouring countries in search of protection and assistance and some travelled onwards to other States. This unprecedented phenomenon of displacement of Central Americans constituted a serious challenge, primarily to the Central American States themselves, including Belize and Mexico.

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1 San Salvador Communiqué on the Central American Refugees of 9 September 1988, U.N. doc. A/AC.96/XXXIX/CRP.2.

2 The Cartagena Declaration on Refugees, hereinafter referred to as Cartagena Declaration, published as pamphlet by UNHCR; also contained in *La Protección Internacional de los Refugiados en América Central*, *México y Panamá*: *Problemas Jurídicos y Humanitarios,* Universidad Nacional de Colombia, pp. 332 et seq.; part III, containing conclusions, is also reproduced in Annual Report of InterAmerican Commission on Human Rights 1984-1985, OEA/Ser.L/V/II.66, doc. 10, rev. 1, pp. 190-193.

3 Annual Report of the Inter-American Commission on Human Rights of 1980-8l: OEA/Ser.L/V/II.54, doc. 9, p. 127; 1981-82: OEA/Ser.L/V/II57. doc. 6, rev. 1, pp. 134 et seq.; 1982-83: OEA/Ser.L/V/II/ X/63, doc. 10, pp. 136, and 146; and 1984-85: OEA/Ser.L/V/II.66, doc, 10, rev. 1, pp. 177 et seq.

8. Whether displaced externally as refugees, or internally, the persons concerned had mostly been forced to abandon their houses at a moment's notice and flee through areas of conflict. Consequently, their needs in terms of protection arid assistance were acute. At the same time, their entry into and presence in neighbouring States had profound effects upon those societies particularly in the social, economic and political spheres. Although the refugees were assisted by the international community, the receiving States found their resources being stretched to meet the demands for subsistence of the additional populations.

9. Responding to the demands created by this unprecedented situation, the countries concerned initiated a process of identification and implementation of humanitarian measures for the protection and assistance of the refugees. This process was advanced further with the holding of a Colloquium[4] in Cartagena, Colombia in November 1984, where the Cartagena Declaration on Refugees,[5] which contains a set of principles and criteria for the protection of and assistance to refugees, was adopted.

10. Latin American States have, of course, a long tradition of providing humanitarian treatment to persons seeking protection and asylum. A century ago, the Treaty of International Penal Law[6] was signed in Montevideo on 23 January 1889 on the occasion of the first South American Congress on Private International Law. It contains the first provision on asylum in international treaty law, with a stipulation (Article 16) to the effect that 'asylum for persons persecuted for political crimes is inviolable'. Since then a number of additional treaties have been concluded in the region which deal with issues relating to the right to asylum.

11. These initiatives of Latin American States to regulate asylum matters at the international level were eventually followed by the adoption by States in 1951 of the United Nations Convention relating to the Status of Refugees[7] which, together with the 1967 Protocol relating to the Status of Refugees,[8] constitute the only universal instruments on refugee protection. There are to date 105 State parties to one or both of these international instruments, 16 of which are Latin American States.

12. Whether regional or universal, all these instruments have as common denominator that of being geared primarily to the needs of individuals for protection. Although they remain of fundamental importance for refugee protection worldwide, the large-scale displacement of victims of armed conflicts or similar events points to the need to develop complementary norms for their protection and assistance.

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4 *International Protection of Refugees in Central America, Mexico and Panama: Juridical and Humanitarian Problems*.
5 Op. cit., above, note 2.
6 OAS Official Records, OEA/Ser.X/1. Treaty Series 34.
7 189 UNTS 137 (No. 2545), hereinafter referred to as the 1951 Refugee Convention.
8 606 UNTS 267 (No. 8791), hereinafter referred to as the 1967 Protocol; this instrument extends the definition contained in the 1951 Convention to include persons who had sought refuge as a result of events which had occurred after 1 January 1951.

13. The phenomenon of masses of people crossing international boundaries in search of protection was first witnessed on the African continent during the decolonization period. It led to the adoption by African States in 1969 of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.[9] This Convention represents the first effort by States to complement the universal refugee instruments with provisions for the protection and assistance of refugees in a particular region and, in that sense, serves as inspiration for the Cartagena Declaration. In particular, this Convention extends the refugee definition in the African context to include also a person who, 'owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of the 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.'[10]

14. A similar evolution in Central America led to the adoption of the Cartagena Declaration. Although not a legally binding instrument for States, it is nevertheless of fundamental importance as it reflects consensus on particular principles and criteria and has guided States in their treatment of refugees for the last five years. In fact, the Declaration revitalizes the tradition of asylum in Latin America while aiming at consolidating a regional custom for the treatment of refugees, returnees and displaced persons.[11] In addition, it has acquired added prestige through different pronouncements of recognition and support by the United Nations General Assembly,[12] the General Assembly of the Organization of American States,[13] the Inter-American Commission on Human Rights,[14] the Andean Parliament[15] the European Parliament,[16] and the Executive Committee of the Programme of the United Nations High Commissioner for Refugees.[17]

15. The Central American refugee problem, whether viewed from the point of view of the individuals and their need for protection and assistance, or the receiving State, is inextricably linked to both the history of and the current situation in the region. Indeed, political, social and economic developments influence the phenomenon of displacement and vice versa. Similarly, the legal norms for the treatment of the refugees are inter-related with and dependent on social and economic realities. Massive flows of refugees might not only affect the domestic order and stability of receiving States, but may also have an impact on the political and social stability and development of entire regions, and thus endanger international peace and security.[18]

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9 1001 UNTS 45 (No. 14691), hereinafter referred to as the OAU Convention.

10 Ibid., article 1(2); this Convention also contains other complementary provisions, notably in the areas of asylum and voluntary repatriation.

11 *Report of the Advisory Group on Possible Solutions to the Problems of the Central American Refugees,* (Geneva, 25-27 May 1987), p. 2, para. 4.2.

12 UNGA res. 42/110, A/42/808.

13 OAS res. AG/Res. 891 (XVII-87), AG/doc. 2370/88.

14 *Annual Report of the Inter-American Commission on Human Rights* 1984-85: OEA/Ser.L/V/1I.66, doc. 10, rev. 1, pp. 177 et seq.

15 Decision No. 173/VI of 16 Mar. 1987.

16 Council of Europe, Parliamentary Assembly 1987, Report on Migration Flows concerning Latin America, para. 18 C(ii): CE A/doe. 5718.R.

17 UNHCR Executive Committee Conclusion No. 37 (XXXVI) on Central American Refugees and the Cartagena Declaration.

18 UNGA res. 36/148; *International Co-operation to Avert New Flows of Refugees, Note by the UN Secretary General*: UN doc. A/41/324, para. 4.

16. The solution to the problems of displacement constitutes therefore an important component of the peace process in the region, something which peace efforts in the region have always taken into account.[19] Hence, the Procedure for the Establishment of a Firm and Lasting Peace in Central America - Esquipulas II - dedicates one chapter to the need to protect and assist refugees and displaced persons as well as to their voluntary repatriation.[20]

2. APPLICABLE LEGAL NORMS AND PRACTICE

17. Under international law, treaties constitute the principal sources of obligations which are binding upon the States which have adhered to them in accordance with their constitutional procedures. At the universal level, the 1951 Refugee Convention[21] and its 1967 Protocol[22] apply particularly to refugees. In addition, the principles and rules concerning the basic human rights of the individual benefit refugees and returnees, as we as displaced persons since these apply to all individuals on the territory of a State. Thus it is important in the refugee protection field to highlight the International Covenant on Civil and Political Rights,[23] and the International Covenant on Economic, Social and Cultural Rights.[24] Similarly, international humanitarian law relating to armed conflicts provides important guidance for the protection of refugees, returnees and displaced persons when these are located in areas of international or non-international armed conflicts. The relevant instruments include the four Geneva Conventions of 1949[25] and the two Additional Protocols of 1977.[26]

18. At the regional level, a large number of treaties are of direct importance to refugees, returnees and displaced persons. These include, first of all, the American Convention on Human Rights[27] the so-called Pact of San Jose, and the Treaty on International Penal Law signed in Montevideo on 22 January 1889,[28] the Convention on Asylum signed in Havana on 20 February 1928,[29] the Convention on Political Asylum signed in Montevideo on 26 December 1933,[30] the Treaty on Asylum and Political Refuge signed in Montevideo on 4 August 1939,[31] the Treaty on International Penal Law signed in Montevideo on 19 March 1940,[32] the Convention on Territorial Asylum[33] and the Convention on Diplomatic Asylum,[34] both signed in Caracas on 28 March 1954 and the Inter-American Convention on Extradition signed in Caracas on 25 February 1981.[35]

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19 See, for example, the *Contadora Act on Peace and Co-operation in Central America*, hereinafter referred to as *Comadora Act*, and its chapter dealing with refugees which is reproduced in *La Protección Internacional de los Refugiados en América Central, México y Panamá*: *Problemas Jurídicos y Humanitarios*, Universidad Nacional de Colombia, pp. 333 et seq., part II, as well as the Acapulco Commitment for Peace, Development and Democracy.

20 Procedure for the Establishment of a Firm and Lasting Peace in Central America, signed at Guatemala City, 7 Aug. 1987: UN doe. A/42/521-5/19085, Annex, para. 8.

21 See above, note 7.

22 See above, note 8.

23 Hereafter referred to as the 1966 Covenant on Civil and Political Rights; Annex to UNGA res. 2200A (XXI), 16 Dec. 1966.

24 Hereafter referred to as the 1966 Covenant on Economic and Social Rights; Annex to UNGA res. 2200A (XXI), 16 Dec. 1966.

25 75 UNTS 31, 85, 135, 287.

26 1125 UNTS 12 (No. 17512); 1125 UNTS 609 (No. 17513).

27 OAS Official Records, OEA/Ser.K/XVI/1.1.

28 See above, note 6.

29 OAS Official Records, OEA/Ser.X/1. Treaty Series 34.

30 Ibid.

31 Ibid.

32 Ibid.

33 Ibid.

34 Ibid.

35 Ibid.

19. While international treaties constitute the principal source of international law, many other bases exist which provide guidance to States and international organizations for identifying and interpreting legal principles and criteria. In the refugee context, and still at the universal level, these include the United Nations Universal Declaration of Human Rights,[36] the Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR),[37] the United Nations Declaration on Territorial Asylum[38] and the General Assembly Resolution on Assistance to Refugees, Returnees and Displaced Persons from Central America[39] to mention but some of the more salient examples. Furthermore, there exist similarly relevant resolutions of the United Nations General Assembly, the Economic and Social Council (ECOSOC) and decisions as well as conclusions of the Executive Committee (EXCOM) of the High Commissioner's Programme.

20. In Latin America, the American Declaration on the Rights and Duties of Man,[40] resolutions of the Organization of American States, reports of the Inter-American Commission on Human Rights and judgements and advisory opinions of the Inter-American Court of Human Rights[41] provide an additional set of principles and criteria on matters relating to human rights and refugees protection. For example, successive resolutions of the OAS General Assembly have dealt with the issue of refugees, returnees and displaced persons[42] as did, amongst others, the 1984-85 Annual Report of the Inter-American Commission on Human Rights.[43]

21. Moreover, the practice of the States in the region confirms many of the principles and criteria applied for the protection of and assistance to refugees, returnees and displaced persons. This is particularly true in the area of the voluntary return of refugees where several initiatives have been taken. Some of these have been formalized through especially constituted so-called tri-partite commissions, comprising representatives from the countries of origin and asylum and UNHCR. In another instance, the mechanism is bilateral with UNHCR participation in an advisory capacity. On the other hand, constitutional provisions, national laws and administrative regulations other respective States confirm the efforts to provide protection and assistance to refugees, returnees and displaced persons.[44]

3. THE REFUGEE INSTRUMENTS AND INTERNAL APPLICATION

22. In accordance with international law, every treaty in force is binding upon the parties to it and must be performed in good faith,[45] and a party may not invoke the provisions of its internal law

36 UNGA res. 217 A(III), 10 Dec. 1948.
37 Annex to UNGA res. 428(V), 14 Dec. 1950.
38 UNGA res. 2312(XXII), 14 Dec. 1967.
39 UNGA res. 42/110.
40 Reproduced in Brownlie, I., ed., *Basic Documents on Human Rights* (2nd ed., 1981), 381-387.
41 See for example Inter-American Court on Human Rights, Habeas Corpus in Emergency Situations (Arts. 27(2), 25(l) and 7(6), American Convention on Human Rights), Advisory Opinion OC-8/ 87, 30 Jan. 1987; Series A, No. 8.
42 OAS General Assembly resolutions AG/RES.774 (XV - 0/85), AG/Res. 838 (XVI-0/86), AG/Res. 891 (XVII -0/87); see also the 1988 resolution contained in document OEA/Ser. P AG/ doc. 2370/88.
43 OEA/Ser.L/V/I1.66, doc. 10, rev. 1, pp. 190-193.
44 Only the constitutions, national laws and regulations of Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Mexico are referred to.
45 Art. 26, 1969 Vienna Convention on the Law of Treaties.

as justification for its failure to perform a treaty.[46] In addition, the principle that international legal norms, including refugee law, which are contained in universal and regional treaties, are directly applicable in national legal systems and part of the internal law is acknowledged as a general rule in Latin America. This principle is expressly reflected in the constitutions of the great majority of the countries most directly affected by the Central American refugees.[47]

23. The universal character and importance of the 1951 Refugee Convention and its Protocol and the need for further States to adhere to these instruments has repeatedly been recognized.[48] Similarly, the importance of establishing procedures for the determination of refugee status under the international instruments, has also been reiterated.[49] The call for accession to universal and regional treaties extends beyond the 1951 Refugee Convention and its 1967 Protocol and includes also the main human rights instruments which have a direct bearing upon the protection and assistance to refugees, returnees and displaced persons.[50] These principles and criteria have been recognized and reaffirmed in the Cartagena Declaration.[51]

4. THE CONCEPT OF REFUGEE

4.1 Universal definition

24. 'The universal refugee definition is contained in Article 1 A(2) of the 1951 Refugee Convention, which includes as refugees persons who have a 'well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion'.[52] Detailed guidance as to how to interpret this definition is contained in the Handbook on Procedures and Criteria for Determining Refugee Status issued by UNHCR at the request of States.[53]

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46 Ibid., art. 27.

47 Constitution of Costa Rica, art. 7; Constitution of Guatemala, art. 46; Constitution of Honduras, art. 16; Constitution of Mexico, art. 133; Constitution of El Salvador, art. 144.

48 Statute of the Office of UNHCR, Chapter II, para. 8(a); Memorandum of the Secretary General to the *Ad Hoc* Committee on Statelessness and Related Problems of Refugees and Stateless Persons, 3 Jan. 1950: UN doc. E/AC.32/2, p. 2; UNGA resolutions 428 (V), 1959 (XVIII), 2294(XXII), 2594 (XXIV), 2650(XXV), 32/67, 33/26, 34/60, 37/195, 38/121, 39/140, 40/118, 41/124, 42/109; UNHCR Executive Committee Conclusions No. 4 (XXVIII) on International Instruments; No. 8 (XXVIII) on Determination of Refuge Status; No. I 1 (XXIX) on International Protection; No. 14 (XXX) on International Protection; No. 16 (XXXI) on International Protection; No. 21 (XXXII) on International Protection; No. 25 (XXXIII) on International Protection; No. 29 (XXXIV) on International Protection; No. 33 (XXXV) on International Protection; No. 36 (XXXVI) on International Protection; No. 41 (XXXVII) on International Protection; No. 42 (XXXVII) on Accession to International Instruments and their Implementation; No, 43 (XXXV II), Geneva Declaration on the 1951 Refugee Convention and the 1967 Protocol; No. 46 (XXXVIII) on International Protection; No. 50 (XXXIX) on International Protection; UNHCR, *Note on Accession to International Instruments and the Detention of Refugees and Asylum-seekers:* UNHCR doc. EC/SCP/44, 19 Aug. 1986, pp. 1-6.

49 UNHCR Executive Committee Conclusions No. 8 (XXVIII) on Determination of Refugee Status; No. 28 (XXXIII) on Follow-up on Earlier Conclusions of the Sub-Committee of the Whole on International Protection on the Determination of Refugee Status, inter alia, with Reference to the Role of UNHCR in National Refugee Status Determination Procedures.

50 OAS General Assembly res. AG/Res. 110(III-0/73).

51 Cartagena Declaration, part III. 1 and 2.

52 See above, note 7.

53 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, UNHCR doc. HCR/IP/4/Eng., Geneva, 1979.

4.2 Regional definition

25. Recognizing the particular characteristics of the flow of displaced persons in the region, the Cartagena Declaration extends the notion of refugee to include, apart from those covered by the universal refugee concept, also other externally displaced persons who are in need of protection and assistance. Consequently, the Declaration also considers as refugees persons 'who have fled their country because their lives, security or liberty have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order'.[54]

26. The regional refugee concept contained in the Cartagena Declaration calls for examining the objective situation in the country of origin and the particular situation of the individual or group of persons who seek protection and assistance as refugees. This definition calls for the affected persons to fulfill two characteristics: on the one hand, that a threat to the life, security or liberty is in existence and, on the other hand, that this threat results from one of the five grounds listed in the text. These grounds were purposely written in a broad and encompassing manner to ensure that persons who are clearly in need of international protection can also be protected and assisted as refugees.

4.3 Protected rights

27. The Cartagena Declaration takes the individual's need for international protection and, in particular, the need to protect the physical integrity of the person as the starting point for developing the refugee definition; it is the right to life, security and liberty of a person including the right not to be subjected to arbitrary arrest or detention[55] or to torture[56] as defined in international law which are the protected rights. Consequently, the first of the two characteristics of the Cartagena Declaration's extended refugee definition is met when in a particular instant there is a threat to any one of these rights.

4.4 Humanitarian law grounds

28. Four of the five grounds included in the Cartagena Declaration's regional refugee concept, i.e. generalized violence, foreign aggression, internal conflicts and other circumstances which have seriously disturbed public order, reflect the fact that the conflicts faced by several of the Central American States are at the origin of much of the external displacement which has taken place in the region. These four grounds should better be understood in light of international humanitarian law provisions relating to armed conflicts which categorizes several situations involving different levels of violence.

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54 *Cartagena Declaration*, part III.3. Cf. Memorandum of Understanding between the Government of Honduras and UNHCR Regulating the Treatment of Refugees, hereinafter, Memorandum of Understanding between Honduras and UNHCR, art. 2 (1).

55 Arts. 3 and 9, 1948 Universal Declaration of Human Rights; arts. I and XXV, 1948 American Declaration on the Rights and Duties of Man; arts. 6, 9, 10 and 11, 1966 Covenant on Civil and Political Rights; arts. 4, 7, 1969 American Convention on Human Rights.

56 Report of the Inter-American Commission on Human Rights, 1986-87, p.304, art.5, 1969 American Convention on Human Rights.

29. First of all, international armed conflicts covered by the Geneva Conventions and Protocol I involve all cases of declared war or of any other armed conflict which may arise between two or more parties, even if the state of war is not recognized by one of them.[57] An armed conflict includes any difference arising between two States which leads to the intervention of members of the armed forces of one or both of the States.[58]

30. Secondly, Article 3 common to the Geneva Conventions of 1949, and Additional Protocol II, deal with non-international armed conflicts. Additional Protocol II, without modifying the existing conditions and applications of Common Article 3, defines these as all armed conflicts, which are not covered by Article I of Additional Protocol I and 'which take place in the territory of "State party" between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations an to implement this Protocol'.[59]

31. A third situation involves violence not of a nature to constitute an armed conflict. This includes situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.[60]

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57 Common art. 2 to the Geneva Conventions of 1949. Article 1.4 of Protocol I also includes as international armed conflicts those armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as contained in the Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

58 ICRC, *Commentary on the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War,* ICRC Geneva, 1958, p. 20.

59 Additional Protocol II to the Geneva Conventions, art. 1.1.

60 Ibid. art. 1.2. The ICRC Commentary to Protocol II, ICRC Geneva, 1987, p. 1355, describes internal disturbances as 'situations in which there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order. The high number of victims has made necessary the application of a minimum of humanitarian rules'. Internal tensions include 'in particular, situations of serious tension (political, religious, racial, social, economic, etc.), but also the sequels of armed conflict or of internal disturbances. Such situations have one or more of the following characteristics, if not all at the same time: loge scale arrests; a large number of 'political' prisoners; the probable existence of ill-treatment or inhumane conditions of detention; the suspension of fundamental judicial guarantees, either as part of the promulgation of a state of emergency or simply as a matter of fact; allegations of disappearances. In short, as stated above, there are internal disturbances, without being an armed conflict, when the State uses armed force to maintain order; there are internal tensions, without being internal disturbances, when force is used as a preventive measure to maintain respect for law and order.'

32. Turning to the four humanitarian law grounds enumerated in the Cartagena Declaration, it is clear that 'generalized violence' involves armed conflicts as defined in international humanitarian law, whether it takes place in an international or non-international conflict. To be generalized, the violence must be regular, general and sustained. In other words, internal disturbances and tensions, as defined in Additional Protocol II but excluded from its field of application, do not amount to generalized violence.[61] As regards 'foreign aggression', the United Nations General Assembly has defined this concept[62] as including the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.[63] 'Internal conflicts' can be taken to correspond to non-international armed conflicts covered by Article 3, common to the Geneva Conventions and Additional Protocol II.

33. Finally, 'other circumstances which have seriously disturbed public order', must be man-made and cannot constitute natural disasters. They may, however, amount to no more than situations of internal disturbance and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature[64], as long as they seriously disturb public order.[65]

4.5 Human rights ground

34. The fifth ground included in the Cartagena Declaration refers to massive violations of human rights. This ground can be considered fulfilled when violations are carried out on a large scale and affect the human rights and fundamental freedoms as defined in the Universal Declaration of Human Rights and other relevant instruments. In particular, the denial of civil, political, economic, social and cultural rights in a gross and consistent pattern[66] can be considered to constitute massive violations of human rights which include those which are subject to Resolution 1503.[67]

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61 Ibid.

62 UNGA res. 3314(XXIX), 14 Dec. 1974.

63 Ibid. annex. Article 3 enumerates the following acts, regardless of a declaration of war, as qualifying as aggression: 'the invasion or attack by the armed forces of a State of the territory of another State, military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; the blockade of the ports or coasts of a State by the armed forces of another State; an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; the sending by or on behalf of a State of armed bands, groups, irregular or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.'

64 See above, note 60.

65 For more extensive discussion on the concept of public order, see also the *travaux préparatoires* of the 1951 Refugee Convention: UN doc.A/CONF.2/SR.14, pp. 18 et seq.

66 *International Cooperation to Avert New Flows of Refugees*, *Note by the UN Secretary General*: UN doc. A/41/324, para. 35.

67 ECOSOC res. 1503 (XLVIII) establishes a special procedure for instances which reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.

4.6 Civilian character of the refugee concept

35. The refugee concept contained in the Cartagena Declaration, like other definitions, is predicated on the assumption that the persons concerned are civilians. Refugees, both in the ordinary and legal sense, means persons not taking part in the hostilities. To be a refugee, it is a *sine qua non* that the persons concerned are civilians. In other words, combatants, whether members of regular armies or irregular forces, are not refugees.[68] Other persons, such as former combatants, may however be considered as refugees should they fulfill the criteria of the definition.

4.7 Special categories

36. A particular group of persons who may need international protection as refugees consists of draft evaders and deserters from mandatory military service. Normally, such persons do not qualify for refugee status in accordance with the 1951 Refugee Convention.[69] Nevertheless, they may qualify as refugees if they can show that the performance of military service would require them to participate in military action contrary to their genuine political, religious or moral convictions or to valid reasons of conscience,[70] or where the type of military action with which they do not wish to be associated is condemned by the international community as contrary to basic rules of human conduct.[71] This exception may, however, normally not be invoked when the country in question exempts such persons from mandatory military service or offers them an alternative activity.[72]

37. Persons who leave their country or their place of habitual residence for personal reasons, either to work or to improve their living conditions, known as economic migrants,[73] do not generally fulfill the criteria for refugee status. According to the definition of the Cartagena Declaration, adverse economic conditions are not normally of a nature to constitute a threat to the life, security and liberty of the individual. On the other hand, economic measures affecting a person's livelihood may, in a particular instance, be of such severity as to amount to persecution if they are motivated by political, racial, or religious aims or intentions directed against a particular group in which case the affected persons may well be refugees.[74]

38. Economic migrants should not be confused with victims of natural disasters. These victims do not qualify as refugees, unless special circumstances arise which are closely linked to the refugee definition.

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68 See also OAU Convention, preambular para. 4; UNHCR Executive Committee Conclusion No.48 (XXXVIII) on Military and Armed Attacks on Refugee Camps and Settlements; Declaration by the Attorney General of Costa Rica on 5 June 1985.

69 See above, note 53, para. 168.

70 Ibid., para. 170.

71 Ibid., para. 171.

72 Ibid., para. 173.

73 Cf. definition of "economic migrant' contained in report of meeting in Guatemala of Advisory Group on possible Solutions to Central American Refugee Problems, Annex 1.

74 See above, note 53, paras 62-64.

39. Externally displaced persons constitute a fourth special category which is composed of individuals who are outside their country and have no legal status or documents authorizing them to stay. In general, they have been obliged to leave their country for reasons that are not clearly defined, among which reasons of an economic nature are mixed with the non-immediate consequences of conflicts and widespread violence.[75]

40. Finally, special mention should be made of those persons who, while meeting the criteria of the refugee concept, have not been identified and therefore not been formally granted refugee status. Such individuals are considered as refugees given the declaratory and *non constitutive* nature of the decision to grant refugee status.[76] These persons find themselves in a particularly precarious situation and deserve special attention by the international community.

4.8 Persons not deserving international protection as refugees

41. Persons who have commited a crime against peace, a war crime, a crime against humanity, a serious non-political crime outside the country of refuge prior to admission or who are guilty of acts contrary to the purposes and principles of the United Nations[77] fall into this category and are therefore denied refugee status.[78] These dispositions are of particular importance when considering claims to refugee status by former combatants. In case they have committed atrocious acts or other grave violations of human rights, their request for refugee status will be denied.[79] As regards mercenaries,[80] they are also denied refugee status since their activities are 'contrary to fundamental principles of' international law', as determined by the United Nations General Assembly.[81]

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75 Cf. definition of 'externally displaced persons' contained in report of meeting in Guatemala of Advisory Group on Possible Solutions to Central American Refugee Problems, Annex 1.

76 See above, note 11, para. 4.6 and 4.7; see also para. 47 below.

77 Art. 1 F, 1951 Refugee Convention; Statute of the Office of the United Nations High Commissioner for Refugees, Chapter II, para. 7(d); see also art. I(5), 1969 OAU Convention.

78 Ibid.

79 See above, note 53, paras. 175-180.

80 Defined as 'a person who is especially recruited locally or abroad in order to fight in an armed conflict, does in fact take a direct part in the hostilities, is motivated to take part in the hostilities essentially by the desire of private gain and, in fact, is promised by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party, is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict, is not a member of the armed forces of a party to the conflict and has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.' See art. 1, Second Revised Consolidated Negotiations Basis of a Convention Against the Recruitment, Use, Financing and Training of Mercenaries, Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries: UN doc. Supp. No. 43(A/43/43). See also Additional Protocol I to the Geneva Convention of 1949, art. 47.

81 UNGA res. Res. 43/107. See also the Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation, *Report on the Question of the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-Determination*, submitted by the Special Rapporteur: UN doe. E/CN.4/1988/14.

5. ASYLUM AND PROTECTION STANDARDS

5.1 The nature of the grant of asylum

42. It is a universally-accepted principle that the grant of asylum as well as the recognition of refugee status have a peaceful, non-political and exclusively humanitarian nature. No aspect of these acts shall be interpreted as unfriendly towards the country of origin of the refugees. These same principles are reflected in several instruments and legal material, including the Cartagena Declaration.[82]

43. These principles are complemented by the criteria which call upon States to do everything within their power to prevent a refugee problem from becoming a source of tension between States.[83] Some instruments go further and call upon States to prohibit refugees from performing acts contrary to the public peace.[84]

44. It follows from the above principles that the work of the Office: of the United Nations High Commissioner for Refugees shall be of an entirely non-political character and that it shall be humanitarian and social.[85] Similarly, these principles dictate that the treatment of refugees and the search for solutions to their problems should take place on a purely humanitarian and non-political basis.[86]

5.2. The principle of non-refoulement

45. The principle of *non-refoulement* constitutes the cornerstone of the international system for the protection of refugees and is the most fundamental of refugee rights. It signifies being protected from expulsion or return in any manner whatsoever to the frontiers of territories where the

82 United Nations Declaration on Territorial Asylum, contained in UNGA res. 2312 (XXIII), 10 Dec. 1967, preambular para. 4 and art. 1.1; 1969 OAU Convention, art. 11.2; UNHCR Executive Committee Conclusion No. 48 (XXXVII) on Military and Armed Attacks on Refugee Camps and Settlements; Cartagena Declaration, part III. 4, Cf. Constitution of Costa Rica, art. 31, General Law on Migration and Aliens (Costa Rica), art. 36; Constitution of El Salvador, art. 5; Law on Migrations (El Salvador), art. 8; Regulations relating to the Law on Migration (El Salvador), art. 27; Constitution of Guatemala art. 27; Law on Migration and Aliens (Guatemala), arts. 22 and 23; Constitution of Honduras, art. 101; Law on Population and Migratory Policy (Honduras), art. 73(4); Memorandum of Understanding between Honduras and UNHCR, preambular paras. 1, 2 and 5; Constitution of Nicaragua, art. 42; Law on Immigration (Nicaragua), art. 34; Constitution of Mexico, art. 15; General Law on Population (Mexico), art. 42, Regulation relating to the General Law on Population (Mexico), art. 101.

83 1951 Refugee Convention, preambular para. 5; art. III (1), 1969 OAU Convention.

84 Art 2(5), 1928 Havana Convention on Asylum, 20 Feb. 1928; See also art. 11, 1939 Montevideo Treaty on Asylum and Political Refuge, 4 Aug. 1939 - to prevent refugees from committing within its territory acts which may endanger the public peace of the country of origin; art. 4, 1967 United Nations Declaration on Territorial Asylum - not to permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations; art. III (2), 1969 OAU Convention - to prohibit refugees from attacking member States of the OAU, by any activity likely to cause tension between member States, and in particular by the use of arms, through the press, or by radio; art. 8, 1954 Caracas Convention on Territorial Asylum, 28 Mar. 1954 - to restrict the freedom of assembly or association of refugees when such assembly or association has as its purpose to foment the use of force or violence against the country of origin.

85 Statute of the Office of the United Nations High Commissioner for Refugees, Chapter I, para. 2.

86 See above, note 1, para. 2.

refugee's life or freedom would be threatened.[87] This principle, which is fully recognized in the Cartagena Declaration, extends beyond expulsion and return and also applies to measures such as rejection at the frontier.[88] Moreover, it applies not only to persons who have a well-founded fear of persecution in the sense of the 1951 Refugee Convention, but also to those who fall under the regional refugee concept contained in the Cartagena Declaration.[89]

46. The American Convention on Human Rights is of particular importance in the region for protecting refugees from refoulement. Going beyond the traditional statement of the *non-refoulement* principle, it holds that 'in no case may an alien be, deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, car political opinions'.[90]

47. The application of the principle of *non-refoulernent* is independent of any formal determination of refugee status by a State. or all international organization[91] and is considered by many as a peremptory rule of international law,[92] In other words, *non-refoulement* as a fundamental principle of refugee protection is applicable as soon as certain objective conditions occur. Thus, also those persons who, while meeting the criteria of the refugee concept, have not been identified and therefore not formally granted refugee status, are also protected by the *non-refoulement* principle.

5.3 Minimum standards of treatment for refugees

48. The 1951 Refugee Convention and its 1967 Protocol provide standards of treatment for refugees as defined in these instruments, which are recommended for application also to other categories of refugees.[93] Moreover, there is a broader and direct relationship between the observance of human

87 Art. 33, 1951 Refugee Convention; art. 22(8), 1969 American Convention on Human Rights; art II (3), 1969 OAU Convention; art. 3(1), 1967 United Nations Declaration on Territorial Asylum; UNGA resolutions 32/67, 33/26, 34/60, 35/41, 36/125, 37/195, 38/121, 39/140, 40/118, 41/124, 42/109; UNHCR Executive Committee Conclusions No. 6 (XXVIII) on Non-Refoulement, No. 17 (XXXI) on Problems of Extradition Affecting Refugees; No. 19 (XXXI) on Temporary Refuge; No. 22 (XXXII) on Protection of Asylum-Seekers in Situations of Large-Scale Influx; No.25 (XXXIII) on International Protection; Constitution of Costa Rica, art. 31; Law on Migration and Aliens (Guatemala), art. 26; Constitution of Honduras, art. 101; Constitution of Nicaragua, art. 42; Law on Aliens (Nicaragua), art. 31. Cf. Constitution of Mexico, art. 15; Memorandum of Understanding between Honduras and UNHCR, art. 2(2).

88 *Cartagena Declaration;* part III.5; see also art. II (3), 1969 OAU Convention; art. 3(1), 1967 United Nations Declaration on Territorial Asylum; UNHCR Executive Committee Conclusions No. 6 (XXVIII) on Non-Refoulement; No.21 (XXXII) on International Protection; No. 22 (XXXII) on Protection of Asylum-Seekers in Situations of Large-Scale Influx; Regulations on Migration of 1947 (Guatemala), art. 21; Law on Migration (Nicaragua), art. 31. Cf. Regulation relating to General Law on Population (Mexico), art. 101 (1).

89 *Cartagena Declaration,* part III.3 and 5; art. II (5), 1969 OAU Convention; UNHCR Executive Committee Conclusion No. 22 (XXXII) on the Potection of Asylum-Seekers in Situations of Large Scale Influx.

90 Art. 22(8), 1969 American Convention on Human Rights.

91 *Report* of the United Nations High Commissioner for Refugees; UNGAOR, Fortieth Session, Supp. No. 12 (A/40/12), paras. 22-23; *Report* of the Twenty-eighth Session of the High Commissioner's Programme, para. 53(4) (c): UN doc. A/AC.96/549 (1977).

92 UNHCR Exeutive Committe Conclusion No. 25 (XXXII) on Internacional Protection; UNHCR, *Note on Internacional Protection:* UN doc. A/AC.96/713, para. 3.

93 Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, recommendation E.

rights standards and protection problems.[94] States should therefore ensure that their treatment of refugees conforms to existing international law and humanitarian principles and practice.[95]

49. It is a fundamental principle of international law that the principles and rules concerning basic human rights of the individual, are obligations owed by States to the international community at large.[96] These are rights from which no derogation is permitted, even in times of exceptional circumstances. They benefit everyone as a result of which also refugees, returnees and displaced persons should benefit from such non-derogatory human rights as the right to protection from the arbitrary deprivation of life,[97] and against torture or cruel or inhuman treatment or punishment,[98] the rights not to be subjected to slavery or servitude,[99] or to retroactive criminal penalties,[100] the rights to recognition as a person before the law[101] and to freedom of thought, conscience and religion[102] and the right to be protected from discrimination.[103] Additional non-derogatory rights are included in the American Convention on Human Rights such as protection of the family, the rights of the child, the right to a nationality, political rights and the right to judicial guarantees.[104]

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94 UNHCR Executive Committee Conclusion No. 50 (XXXIX) on International Protection, para. (b); see also 1951 Refugee Convention, preambular para. 1; 1969 OAU Convention, preambular para. 6.

95 UNHCR Executive Committee Conclusion No. 50 (XXXIX) on International Protection, para. (c). Minimum humanitarian standards are also contained in art. 3 common to the Geneva Conventions of 1949, which states that persons taking no active part in the hostilities 'shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'.

96 United States Diplomatic and Consular Staff in Tehran, Request for the Indication of Provisional Measures, I.C.J. Rep., 1979, p. 7. Cf. UNGA resolutions 31/86 (XXXI), 32/66 (XXXII), 33/51 (XXXIII), 34/45 (XXXIV), 35/132 (XXXV), 36/58 (XXXVI), 37/191 (XXXVI), 38/116 (XXXVIII) and 36/136 (XXXIX).

97 Art. 3, 1948 Universal Declaration of Human Rights; art. 1, 1948 American Declaration of the Rights and Duties of Man; art. 6, 1966 Covenant on Civil and Political Rights; art. 4, 1969 American Convention on Human Rights.

98 Art. 3, 1948 Universal Declaration of Human Rights; arts. 25, 26, 1948 American Declaration of the Rights and Duties of Man; arts. 7, 10(1), 1966 Covenant on Civil and Political Rights; art. 5(2), 1969 American Convention on Human Rights; art. 2, 1984 UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

99 Art. 4, 1948 Universal Declaration of Human Rights; art. 34, 1948 American Declaration of the Rights and Duties of Man; art. 8, 1966 Covenant on Civil and Political Rights; art. 6, 1969 American Convention on Human Rights.

100 Art. 11(2), 1948 Universal Declaration of Human Rights; art. 15, 1966 Covenant on Civil and Political Rights; art. 9, 1969 American Convention on Human Rights.

101 Art. 6, 1948 Universal Declaration of Human Rights; art. 17, 1948 American Declaration of the Rights and Duties of Man; art. 16, 1966 Covenant on Civil and Political Rights; art. 3, 1969 American Convention on Human Rights.

102 Art. 18, 1948 universal Declaration of Human Rights; art. 3, 1948 American Declaration of the Rights and Duties of Man art. 18, 1966 Covenant on Civil and Political Rights; art. 12, 1969 American Convention on Human Rights.

103 Arts, 2, 7, 1948 Universal Declaration of Human Rights; art. 11, 1948; American Declaration of the Rights and Duties of Man: arts, 2. 3, 26, 19661 Covenant on Civil and Political Rights; arts. 2, 3, 1966 Covenant on Economic and Social Rights: art. 1, 1969 American Convention on Human Rights.

104 Arts. 17. 20, 23, 1969 American Convention on Human Rights.

50. The Cartagena Declaration underlines the importance of the countries in the region establishing minimum standards of treatment for refugees, on the basis of the provisions of the 1951 Refugee Convention and its 1967 Protocol and of the American Convention on Human Rights.[105] It calls on the States parties to this latter instrument to apply it in dealing with *asilados* and refugees who are in their territories.[106] Furthermore, it recognizes the validity of the Conclusions of the Executive Committee of the High Commissioner's Programme, and in particular its Conclusion No. 22 on the Protection of Asylum Seekers in Situations of Large Scale Influx.[107] Complementing the non-derogatory human rights, these Conclusions identify, inter alia, a set of minimum basic standards which should benefit refugees and asylum-seekers.

51. Amongst these minimum basic standards, the Conclusion identifies the principle that refugees should enjoy the fundamental civil rights internationally recognized, in particular those set out in the Universal Declaration of Human Rights.[108] It also points out that they should not be discriminated against on the grounds of race, religion, political opinion, nationality, country of origin or physical incapacity,[109] and should not he penalized or exposed to any unfavorable treatment solely on the ground that their presence in the country is considered unlawful.[110] Furthermore, they should not be subjected to restrictions on their movements other than those which are necessary in the interest of public health and public order.[111]

52. Recognizing that the family deserves special protection in international law, the Conclusion furthermore holds that the family unit should be respected and refugees and asylum-seekers should benefit from the fundamental principle of family reunification,[112] Furthermore, they have a right to register births, deaths and marriages[113] and adequate provisions should be made for the protection of minors and unaccompanied children.[114]

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105 Cartagena Declaration. part III.8.

106 Ibid., Part III.10.

107 Ibid., Part III.8.

108 UNHCR Executive Committee Conclusion No, 22 (XXXII) on the Protection of Asylum-Seekers in Situations of Large-Scale Influx, chapter II, para. B 2(b).

109 Ibid., chapter 11, para. B 2(c); arts,2, 7, 1948 Universal Declaration of Human Rights; art. 11, 1948 American Declaration on the Rights and Duties of Man; arts. 2(1), 3, 26, 1966 Covenant on Civil and Political Rights; arts. 2(2), (3), 3, 1966 Covenant on Economic and Social Rights; art. 1, 1969 American Convention on Human Rights: art. 3, 1951 Refugee Convention.

110 UNHCR Executive Committee Conclusion No. 22 (XXXII) on the Protection of Asylum-Seekers in Situations of Large-Scale Influx, chapter 11, para. B 2(a); art. 31, 1951 Refugee Convention.

111 Ibid.

112 *Cartagena Declaration,* part III. 13; art. 16 (3), 1948 Universal Declaration of Human Rights; art. 6, 1948 American Declaration on the Rights and Duties of Man; art. 23 (1), 1966 Covenant on Civil and Political Rights; art. 10, 1966 Covenant on Economic and Social Rights; art. 17, 1969 American Convention on Human Rights; the Helsinki Final Act; *Report of the Ad Hoc Committee on Stateless Persons,* UN doc. E/AC/32/5 (E/1618), 40; Recommendation B, Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: UN doc. A/CONF.2/108; 1959 United Nations Declarations of the Rights of the Child, principle 6; UNHCR Executive Committee Conclusions No.9 (XXVIII) on Family Reunion; No.15 (XXX) on Refugees Without an Asylum Country; No. 22 (XXXII) on the Protection of Asylum-Seekers in Situations of Large-Scale Influx, Chapter II, para. B 2 (h); No. 24 (XXXII) on Family Reunification; arts. 25-27, 49 and 82, Fourth Geneva Convention 1949; arts. 74, 75 and 78, Additional Protocol I to the Geneva Conventions; art. 4, Additional Protocol II to the Geneva Conventions.

113 UNHCR Executive Committee Conclusion No. 22 (XXXII) on the Protection of Asylum- Seekers in Situations of Large- Scale Influx, Chapter II, para. B 2(m); *Report* of the Advisory Group on Possible Solutions to Central American Refugee Problems, (Geneva, 25-27 May 1987), p. 5, para. 6.4.

114 UNHCR Executive Committee Conclusion No. 22 (XXXII) on the Protection of Asylum- Seekers in Situations of Large- Scale Influx, Chapter II, para. B 2 (j); and No. 47 (XXXVIII) on Refugee Children.

5.4 Refugee camps

53. It follows from the principle that the grant of asylum is a peaceful, non-political and exclusively humanitarian act and that refugees by definition are civilians, that refugee camps or settlements also have an exclusively civilian and humanitarian character.[115] As a consequence they should also have a civilian administration. Such camps and settlements do not enjoy any status of extra-territoriality but are part of the territory of States and refugees living there, like others, have a duty to conform to the laws and regulations of the country of asylum, including lawful measures taken for the maintenance of public order.[116] Thus, refugees have a duty to abstain from any activity likely to detract from the exclusively civilian and humanitarian character of the camps and settlements.[117] Such activities do, however, not comprise the exercise for peaceful purposes of fundamental human rights, such as the right to freedom of thought, expression, association and assembly.[118]

54. In order to safeguard the human rights and the protection of refugees, their camps or settlements should, whenever possible, be set up at a reasonable distance from the border with the country of origin.[119] States should also refrain from attacking such camps and settlements; acts which should be condemned as they are against the principles of international law and, therefore, cannot be justified.[120]

55. Refugee camps are by their very nature temporary in character. The establishment of makeshift or closed camps is sometimes unavoidable; at the beginning of a massive influx of refugees, as they make it easier to provide effective emergency assistance and ensure the protection of refugees during the initial stage. Nevertheless, such camps may, in time, have a series of harmful effects, such as: restrictions on freedom, internal control leading to human rights abuses, mental health problems, internal violence and disturbances of public order, artificial means of support and dependency on external aid. Furthermore, such camps lead to an urbanization of rural refugees resulting in difficulties in becoming integrated, whether in the context of voluntary repatriation, local integration or resettlement.[121] As a result, it is necessary eventually to gradually open closed camps[122] or relocate the refugees so that they can become part of another more appropriate scheme.[123]

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115 UNHCR Executive Committee Conclusion No. 48 (XXXVIII) on Military and Armed Attacks on Refugee Camps and Settlements.

116 Art. 2, 1951 Refugee Convention; UNHCR Executive Committee Conclusion No. 48 (XXXVIII) on Military and Armed Attacks on Refugee Camps and Settlements; General Law on Migration and Aliens (Costa Rica), art. 121; Law on Migration and Aliens (Guatemala), art. 25. Compare Constitution of Honduras, art. 30; General Law on Population (Mexico), art. 42(V); Law on Nationality and Naturalization (Mexico), art. 32.

117 See above, note 115.

118 Arts. 7, 8, 1954 Caracas Convention on Territorial Asylum.

119 UNHCR Executive Committee Conclusions No, 22 (XXXII) on Protection of Asylum - Seekers in Situations of Large-Scale Influx, Chapter II, paras. B 2(g); No. 48 (XXXVIII); on Military and Armed Attacks on Refugee Camps and Settlements; *Cartagena Declaration*, part III.6; art. 9, 1954 Caracas Convention of Territorial Asylum; art. II. 6, OAU Convention.

120 See also UNGA resolutions 40/118, 41/124, 42/109.

121 Report of the Advisory Group (above, note 113), paras. 6.1 and 6.2.

122 Ibid.

123 Ibid. See also *Cartagena Declaration*, part III.6.

6. DURABLE SOLUTIONS

6.1 Voluntary repatriation

56. Voluntary repatriation is the preferred solution to the problems of refugees since it achieves the ultimate goal of international protection, namely the re-establishment of refugees in a community, in this case their own.[124] It is a purely humanitarian and non-political act[125] which gives substance to the right of refugees, and others, to return voluntarily to their country of origin, and re-avail themselves of its protection. Their right to voluntary repatriation is fully recognized in the region in both law and in practice.[126] Similarly, refugees have a right to be protected in a manner that they can effectively exercise their right to return voluntarily to their country.[127]

57. They have also the right to receive objective and complete information on the prevailing situation in their country of origin so as to be able to take a fully informed decision.[128] One manner in which this right may be exercised is through the arrangement of visits of groups of refugees to their country of origin to allow them to inform themselves on the spot of the current situation there.[129]

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124 UNGA resolutions 30/71, 31/35, 32/67, 33/26, 34/60, 35/41, 36/125, 37/195, 38/121, 39/140, 40/118, 41/124, 42/109, UNHCR Executive Committee Conclusions No. 18(XXXI) on voluntary Repatriation; No. 40(XXXVI) on Voluntary Repatriation; UNHCR, Notes on *International Protection*: UN doc. A/AC.96/680 (1987), UN doc. A/AC.96/700 (1988), UN doc. A/AC.96/713 (1989). Communiqués from the seven meetings held in 1986-1988 of the Tripartite Commission on Voluntary Repatriation composed of El Salvador; Honduras and UNHCR, hereafter referred to as the Communiqué of El Salvador, Honduras and UNHCR. Voluntary Repatriation Support Programme COMAR/CEAR of 17 February 1987, hereinafter referred to as the COMAR/CEAR Voluntary Repatriation Programme; Declaration by the Government of Nicaragua on the Voluntary Repatriation of Nicaraguans of December 1987, hereinafter referral to as the Declaration of Nicaragua on Voluntary Repatriation; Declaration by the Government of Costa Rica on Voluntary Repatriation of Nicaraguans of December 1987, hereinafter referred to as the Declaration of Costa Rica on Voluntary Repatriation.

125 Sec OAS General Assembly resolutions AG/RES.838 (XVI-0/86); OEA/Ser. P. AG/doc.2370/88.

126 Art. 13(2), 1948 Universal Declaration of Human Rights; art. 8. 1948 American Declaration on the Rights and Duties of Man; art. 12(4), 1966; Covenant on Civil and Political Rights Covenant; art. 22(5), 1969 American Convention on Human Rights; art. 5(d)(ii), 1965 International Convention on the Elimination of All Forms of Racial Discrimination; Analysis of the current trends and developments regarding the right to leave any country, including one's own, and to return to one's own country, and some other rights or consideration arising therefrom, *Final Report* prepared by the Special Rapporteur, UN doc. E/CN.4/Sub.2/1988/35; Draft Declaration on Freedom and Non-Discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country: UN doc. E/CN.4/Sub.2/1988/35. Add.1; OAS res. AG/Res.89/(XVII-0/87); Constitution of El Salvador, art. 5; Constitution of Guatemala, art. 26; Constitution of Nicaragua, art. 31. Communiqués of El Salvador, Honduras and UNHCR. COMAR/CEAR Voluntary Repatriation Programme; Declaration of Nicaragua on Voluntary Repatriation; Declaration of Costa Rica on Voluntary Repatriation.

127 *Report* of the Advisory Group (above, note 113), para. 7.3(e); UNHCR Executive Committee Conclusion No. 18 (XXXI) on Voluntary Repatriation.

128 *Report* of the Advisory Group (above, note 113), para. 7.3(d); UNHCR Executive Committee Conclusion No. 18 (XXXI) on Voluntary Repatriation; COMAR/CEAR Voluntary Repatriation Programme; Declaration of Nicaragua on Voluntary Repatriation; Declaration of Costa Rica on Voluntary Repatriation.

129 *Report* of the Advisorsy Group (above, note 113), para 7.9; UNHCR Executive Committee Conclusion No. 18 (XXXI) on Voluntary Repatriation.

58. Voluntary repatriation may be facilitated and provided through various forms of repatriation mechanisms, sometimes formally constituted as tri-partite commissions involving representatives from the refugees' country of origin, the country of asylum and UNHCR.[130] Such mechanisms can concern themselves with both the joint planning and implementation of a repatriation programme while providing an effective means of securing consultations between the main parties concerned.[131] It is of fundamental importance that all aspects of a repatriation movement be clarified with all the parties concerned, including the returning refugees, prior to any movement.[132]

59. A foremost principle of refugee protection in the context of voluntary repatriation is the one which proclaims that the repatriation of refugees must take place at the individually and freely-expressed wish of the refugees themselves.[133] Voluntary repatriation must take place under conditions of safety and dignity, preferably to the refugees' place of origin or previous residence in their country if they so wish.[134] This core element in refugee protection flows from the fundamental human rights of security and liberty and from the right to freedom of movement and free choice of residence.[135] In the regional context in which a great majority of the refugees are of peasant origin, it is particularly important that they can return to their previous economic activities and recuperate their former land and possessions.[136]

60. Returnees should also benefit, at the time of their return, from adequate guarantees of non-discrimination and full respect for their human rights under the same conditions to those of their compatriots.[137] Under no circumstances should they be disadvantaged or penalized for having sought asylum and protection as refugees in another country.

61. Both former countries of asylum[138] and UNHCR as the agent of the international community, have a recognized interest in the development of the return.[139] In that respect they have a right

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130 *Report* of the Advisory Group (above, note 113), para. 7,1: UNHCR Executive Committee Conclusion No. 18 (XXXI) on Voluntary Repatriation; No. 40 (XXXVI) on Voluntary Repatriation; UNHCR*, Note on InternationalProtection:* UN doc. A/AC.96/680 (1987); UN doc A/AC.96/700 (1988); OAS res. AG/Res.891 (XVII-0/87) and in 1988, OEA/ Ser. P, AG/doc. 2370/88. COMAR/CEAR Voluntary Repatriation Programme; Declaration by Nicaragua on Voluntary Repatriation; Declaration of Costa Rica on Voluntary Repatriation.

131 UNHCR Executive Committee Conclusion No. 40 (XXXVI) on Voluntary Repatriation; Communiqués of El Salvador, Honduras and UNHCR.

132 Statement by the High Commissioner on 30 August 1988.

133 UNGA res. 40/118; UNHCR Executive Committee Conclusion No. 18 (XXX) on Voluntary Repatriation; No. 40 (XXXVI) on Voluntary Repatriation; Communiqués of El Salvador, Honduras and UNHCR; COMAR/CEAR Voluntary Repatriation Programme; Declaration of Nicaragua on Voluntary Repatriation; Declaration of Costa Rica on Voluntary Repatriation.

134 UNHCR Executive Committee Conclusion No. 18 (XXX) on Voluntary Repatriation; No. 40(XXXVI) on Voluntary Repatriation; UNHCR, *Note on International Protection*, UN doc. A/AC.96/680 (1987), paras. 23-25; A/AC.96/694 (1988), paras. 47-61; A/AC.96/713 (1989), paras. 37-45; *Report* of Advisory Group on Possible Solutions to Central American Refugee Problems, (Geneva, 25-27 May 1987), para.7.3(f) and (g); COMAR/CEAR Voluntary Repatriation Programme; Declaration of Nicaragua on Voluntary Repatriation.

135 See above, note 55.

136 COMAR/CEAR Voluntary Repatriation Programme.

137 *Report* of the Advisory Group (above, note 134), 11. para 7.3(g); see also UNHCR Executive Committee Conclusion No. 18 (XXXI) on Voluntary Repatriation. COMAR/CEAR Voluntary Repatriation Programme, Declaration of Nicaragua on Voluntary Repatriation.

138 *Report* of the Advisory Group (above, note 134), para 7.6.

139 *Report* of the Advisory Group (above, note 134). See also UNHCR Executive Committee Conclusions No. 18 (XXX) on Voluntary Repatriation and No. 40 (XXXVI) on Voluntary Repatriation.

to be informed of the results of any voluntary repatriation operation.[140] For this reason, the High Commissioner's Office should follow closely the situation of the returnees not only during the return movement but also subsequent thereto.[141] Such action is of an exclusively humanitarian nature in order to witness the fulfilment of the agreements which formed the basis for the return. It does not imply special privileges or immunities for the returnees and is carried out in close consultation with the State concerned which provides direct access to the returnees to the High Commissioner's staff.[142]

62. In order to facilitate the reintegration process and also ensure that the returnees can effectively benefit from the protection of the national authorities, it is important that they be provided with the same identity documents as their compatriots.[143] The registration of refugees who have been born abroad should also be regularized to ensure that they obtain their nationality and provision should be made so that they get full and formal credit for studies undertaken while abroad.[144] Whenever the circumstances permit, the documentation and registration process should be carried out prior to the actual return.[145]

63. The success of a voluntary repatriation programme will very often depend upon adequate assistance being made available to the returnees. Such assistance should include transportation and assistance during the movement back to their country of origin as well as assistance upon return during the reintegration process.[146] The latter type of assistance should be compatible with development plans and projects of the community to which the refugees are returning.[147] Such assistance programmes could usefully benefit the community as a whole, including displaced persons,[148] and might also help to improve conditions generally in the places of return and thus stimulate future repatriation movements.[149]

6.2 Local integration

64. It is of fundamental importance for refugees to be able to enjoy their economic, social and cultural rights so that they may lead a productive and dignified life without, for that reason, being privileged vis-à-vis national groups. To this end, the 1951 Refugee Convention stipulates that contracting States shall, for example, in the context of wage-earning employment, accord to refugees lawfully staying in their territory 'the most favourable treatment accorded to nationals of a foreign country

140 Ibid.
141 Ibid.
142 *Report* of the Advisory Group (above, note 134), para 7.6-7; UNHCR Executive Committee Conclusion No. 40 (XXXVI) on Voluntary Repatriation.
143 *Report* of the Advisory Group (above, note 134), para 7.8.
144 Ibid.
145 Ibid.
146 Report of the Advisory Group (above, note 134), para 7.10; UNGA res. 41/124, COMAR/CEAR Voluntary Repatriation Programme.
147 Report of the Advisory Group (above, note 134), para. 7.11.
148 Ibid.
149 Ibid.

in the same circumstances'.[150] In this regard, the Cartagena Declaration recommends that countries in the region study the possibility of integrating the refugees into the productive life of the country by allocating the resources made available by the international community to UNHCR for the creation or generation of employment.[151] Such activities have been initiated in several of the countries concerned, benefiting both rural and urban refugees.[152]

65. In particular, countries in the region have designed projects which provide for integration in the rural sector as well as for the creation of employment opportunities for urban refugees, while attempting to ensure that national workers are not therefore displaced[153] and that the cultural identity of the ethnic groups which may be found amongst the refugee populations is maintained. These projects should be harmonized with local, national and regional development plans as a guarantee of' viability and so as to contribute to the welfare of the refugees themselves and the community which is receiving them. In this context, it is also recommended that nationals are included amongst the participants and direct beneficiaries of the projects.[154] At the same time, it is important that States consider assimilating the rights of refugees with regard to wage-earning employment to those of nationals, to ensure that successful employment insertion schemes do not fail because of restrictive national laws and regulations.[155]

6.3 Resettlement

66. Resettlement of Central American refugees has not constituted a durable solution on par with voluntary repatriation, but has been reserved for particular cases involving persons who, for protection or family reunification reasons, need to be resettled elsewhere. In view of the situation prevailing in some of the refugee camps, and in line with practices established elsewhere,[156] the need has been felt to offer resettlement in third countries to some of the refugees. There is therefore a recognized need to identify other countries which might receive Central American refugees.[157] Such resettlement should, of course, only take place on a voluntary basis.[158]

7. Displaced persons

67. The problem of displaced persons has long been a serious concern of the countries in the region and the need for extending both protection and assistance to them has repeatedly been stressed.[159] Although there is no generally accepted definition, displaced persons have been considered as

150 Art. 17(1), 1951 Refugee Convention, cf. Law on Migration (El Salvador), Art. 21.
151 Cartagena Declaration, part III.11.
152 *Report* of the Advisory Group (above, note 134), Chapter III
153 Ibid.
154 Ibid.
155 Cf. art. 17(3), 1951 Refugee Convention.
156 See also UNGA resolution 42/110, 7 Dec. 1987.
157 Cartagena Declaration, part II.1
158 See above, note 1.
159 Ibid.; *Cartagena Declaration*, part III.9; *Report* of meeting in Geneva of Advisory Group on Possible Solutions to Central American Refugee Problems, chapter II.4; and *Report* of the Advisory Group on Possible Solutions to Central American Refugee Problems, Preparatory Meeting for the International Conference on Central American Refugees, Guatemala City, 27-28 Apr. 1988, Chapter VI; Press *Communiqué* of San Salvador on Central American Refugees, para. V; UNGA res. 42/110, 7 Dec. 1987.

those who have been obliged to abandon their homes or usual economic activities, while remaining within their countries, because their lives, security or liberty have been threatened by widespread violence or prevailing conflict.[160] Their need for protection and assistance is at times as great, if not greater, than that of the refugees who have left the country.

68. Displaced persons have a right to be protected by their national authorities and, in particular, to benefit from fundamental human rights such as the right to life, security and liberty, freedom from torture, etc.[161] Furthermore, in situations involving armed conflicts they benefit from the minimum standards contained in common Article 3 of the four Geneva Conventions since they are persons taking no active part in hostilities.[162]

69. The primary responsibility for aiding displaced persons falls on the State, since these persons are citizens of the State and are also situated within its territory. The possibilities of the States in the region to meet the needs of the displaced persons are, however, severely hampered as their resources are limited and assistance from the international community has not been directed to this category of the population. It is for this reason that the States who decided to convene the international conference included displaced persons as a category in need of special attention by the international community.[163]

8. Non-governmental organizations

70. Non-governmental organizations, both international and national, generally play an important role in the assistance to refugees, returnees and displaced persons. In particular, they co-ordinate and implement a wide variety of assistance programmes and projects.

71. The role of these organizations, which is based on humanitarian principles and on national and international solidarity, has repeatedly been recognized by the international community.[164] Similarly, it has underlined the need for continued and increased co-operation between concerned Governments, UNHCR and other bodies of the United Nations system and non-governmental organizations.[165] Finally, there is a clear need for close co-ordination between UNHCR and non-governmental organizations of their different activities in accordance with directives provided by the concerned Governments.[166]

160 Definition of 'displaced persons' included in Annex I of the *Report* of the Advisory Group on Possible Solutions to Central American Refugee Problems, Preparatory Meeting for the International Conference on Central American Refugees, Guatemala City, 27-28 April 1988.

161 See also para. 48 above.

162 See above, note 95.

163 See above, notes 1 and 20.

164 UNGA resolutions 2789 (XXVI), 2956 (XXVII), 3143 (XXVIII), 33/26, 38/121, 40/118, 41/124, 42/109, 42/110; OAS General Assembly res., AG/Res.774(XV-0/85), AG/Res. 838(XV-0/86); UNHCR Executive Committee Conclusion No. 21 (XXII) on International Protection; No. 29 (XXXIV) on International Protection; No. 41 (XXXVII) on International Protection; No. 46 (XXXVIII) on International Protection; No. 50 (XXXIX) on International Protection.

165 UNGA resolutions 31/35, 3271 (XXIX), 3454 (XXX), 34/60, 38/121, 40/118, 41/124, 42/109, 42/110; OAS General Assembly res. in 1988, OEA/Ser.P, AG/doc. 2370/88, *Cartagena Declaration*, part III. 14.

166 Cartagena Declaration, part III. 14.

9. Human rights mechanisms

72. There is a direct and multiple relationship between the observance of human rights standards, refugee movements and problems of protection.[167] Gross violations of human rights give rise to refugee movements, sometimes on a massive scale, and may impede the attainment of durable solutions to their problems. At the same time, human rights principles and practices provide standards to States and international organizations for their treatment of refugees, returnees and displaced persons.[168]

73. It is this reality, which in Latin America has led to a call for better use to be made of the competent organisms of the inter-American system and, in particular, of the Inter-American Commission on Human Rights, with a view to complementing the international protection of' refugees in the region.[169] This also requires closer cooperation between the Office of the United Nations High Commissioner for Refugees on the one hand, and on the other hand, the Organization of American States,[170] the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights and the Inter-American Institute of Human Rights.

10. Dissemination

74. The last ten years have seen a growing public awareness of the problem of Central American refugees, returnees and displaced persons. In large sectors in the region there is a clear interest and necessity to know in more detail the principles and criteria which make up the legal framework within which adequate solutions are being sought. For this reason, both the Cartagena Declaration and the Preparatory Committee of the International Conference on the Central American Refugees through its San Salvador Communiqué identified the need to promote the dissemination, and consequent compliance, of the relevant principles and criteria.[171] This task requires the support of the governments concerned, UNHCR, non-governmental organizations and the other members of the International Community.

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167 See above, notes 94, 95. See also UNHCR, *Note on International Protection*: UN doc. A/AC.96/713 (1989), paras. 1-8.

168 See also para. 48 above.

169 *Cartagena Declaration*, part III. 15.

170 OAS General Assembly resolutions AG/Res. 739 (XIV-0/84), 749(XV-0/85), 774(XV-0/ 85), 838(XVI-0/86),891 (XVII-0/87); and OAS resolutions of 1988, OEA/Scr.P, AG/doc.2370/88; resolution of the OAS Permanent Council, CP/Res. 3777(510/82); *Cartagena Declaration*, part III. 15 and 16.

171 See above, note 1; *Cartagena Declaration*, part III.17.

Annex

1. COMMENTS OF THE GOVERNMENT OF COSTA RICA

1. A point to be noted first of all is the importance of this type of document for reference purposes. It contains important information on various international instruments relating to refugees, such as United Nations resolutions, international conventions on asylum, etc. The document also provides a legal and historical analysis of refugee protection in Latin America and a legal assessment of the situation of refugees in Central America.

2. The following comments on the document may nevertheless be made:

The application of the Geneva Convention and the recommendations proposed at the Cartagena Colloquium with regard to the determination of refugee status give rise to certain doubts. The Geneva Convention is obviously restricted in its scope and is not applicable in the case of massive flows of refugees. The Cartagena Colloquium has broadened the notion of refugee but it did not deal with other cases, such as that of externally displaced persons, cases whose direct cause is the economic situation but whose indirect cause is a political situation which, according to the Cartagena Declaration, may give rise to recognition of refugee status. An effort should therefore be made at the Conference to clarify and define more precisely when a refugee situation corresponds to the Convention's traditional definition, when it corresponds to the 'Cartagena' notion and when it is one of the other non-typical situations where depending on the broadness of the Government's view the person concerned may or may not be deemed a refugee.

3. The document outlines the elements that are included in the definition as factors or grounds for the grant or recognition of refugee status and it explains them clearly. However, it does not distinguish these from the situation of other categories of persons who leave their country for reasons that are different from, but are nevertheless linked with, the above-mentioned grounds. While not direct causes, they are factors which foster the condition of socio-economic despair. This is the case of the socio-economic refugees who have to abandon their country because the political situation described in the Cartagena Declaration prevents them from working or producing or, worse still, prevents their survival. The document should explain whether this aspect comes under the heading `human rights ground', where reference is made to '. . . a consistent pattern of gross denial of civil, political, economic, social and cultural rights . . .'. This aspect, too, should be clarified.

4. The document indicates the precedence of international law over internal law, stating: '. . . every treaty in force is binding on the parties to it and must be performed in good faith, and a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. It should be noted, however, that the document makes no reference to the case of constitutional provisions which, in certain of their aspects, conflict with the Convention. It should in fact be pointed out that the jurisprudence often does not apply with full rigour the principle of the precedence of international law over ordinary internal law. This is a particularly serious matter in countries such as Costa Rica where the courts have great autonomy and independence and where the remedy does not exist of claiming the unconstitutionality of a law because it violates an international treaty. Although this is a technical point, it is most important that it should be examined since whether a treaty will have full effect in the internal legal system will depend on it.

5. As for the requirement that a person must be a civilian to be a refugee--a point made clear in the Cartagena and other definitions, this principle has been adopted by Costa Rica and was the subject of a pronouncement by the Attorney General's Office on 5 June 1985.

6. A subject closely linked with the question of camps for temporary refugees is that of finding durable solutions to refugee problems. We share the view expressed in the document that a period longer than is necessary spent in such camps produces very harmful effects both for the refugees and for the country of asylum. It should be noted, however, that durable solutions aimed at repatriation or resettlement in third countries result in a situation of insecurity and instability for the refugee programmes. If, therefore, neither of these options is sound or viable, the logical course is to place emphasis on integration of the refugees in the community of asylum and to compensate the receiving country so that the impact of the refugees on the population will not be so harmful as to affect the country's social stability, 'with unfavourable consequences for both the refugees and the local population. In this connection, the document looks at refugees independent of the citizens of the host country and, in particular, those who have limited resources. The correct approach must necessarily take account of the country's own citizens socially-marginalized or in a vulnerable position. For the government concerned and the international organizations to apply international norms to the detriment of vulnerable local populations would be an irresponsible act with highly dangerous consequences that might prove disastrous.

7. In this connection it is pointed out that repatriation must provide guarantees and rights for the returnees. The Conference should establish principles leading to a declaration and, at a later stage, a convention on returnees. This should include a substantive part relating to the local bodies which receive the returning refugees and it should provide for suitable procedures and fundamental guarantees, as well as control measures designed to avoid irreparable situations. In this process there must be a willingness of both States and international aid agencies to act together. From the legal standpoint, too, there must be an agreement between the country of asylum, the country of origin of the returnees and the international community.

CONCLUSION

8. While the document is to be commended for the features mentioned earlier: a substantial fund of information, an appropriate historical and legal analysis of the refugee problem and a call for information to be made available on a systematic basis, it does not make any effort to identify the legal principles and institutions for dealing with refugee problems at the level of internal law. The text is obviously entirely satisfactory from the standpoint of international refugee law, but there also exists an internal standpoint from which refugee law must be viewed. This involves all domestic legislation on such matters as asylum, migration, labour, commerce and health that is applicable to refugees. This document naturally does not aim to provide a comparative study of the domestic law of each country but it ignores the fact that the application of international law requires the enactment of complementary legislation, the appropriateness and viability of which may be open to question but the need for which cannot be denied. Apart from the proposed specific refugee legislation, harmonized with and complementing the international legislation on this subject, there already exists a whole internal system of law arising from the regulations and guidelines that are needed for putting the international law into effect. Refugee law had its origin in international law, although the causes of refugee movements are often internal. It is

clear, however, that the application of refugee law calls for the development of a complementary law, having several dimensions: as a value, as a practical reality and as a normative factor. In this context, the main legal challenge for Central America is perhaps to develop a refugee law-both international and domestic, both regional and local-which does not conflict with international refugee law but rather complements and enriches it.

[signed] Guillermo Flores Gamboa
Director-General
DIGEPARE

2. COMMENTS OF THE GOVERNMENT OF EL SALVADOR

l. In the interest of consistent interpretation of the international instruments concerning the protection of and assistance to refugees, returnees and displaced persons, it appears desirable, not only to promote knowledge of these instruments but also to throw more light on, and seek solutions to, refugee problems, because it is precisely these international instruments, combined with national legislation, that define the basic rights of refugees, and the scope of their protection.

2. Refugee law applicable to persons, States and international governmental organizations, incorporating essential principles and norms, is already of considerable scope.

3. The 1951 Convention relating to the Status of Refugees and the 1967 Protocol are applicable to the situation of refugees and have served as the basis for combining the elements which they contain with the introduction of new elements applicable to the specific circumstances of the Latin American region and of Central America in particular, where the refugee problem is most acute and large mass flows have taken place.

4. In order to deal with the situations occurring in Central America and on the basis of a broader concept of refugee protection, the Cartagena Declaration was adopted in 1984. This instrument incorporates not only the basic principles of international protection, such as asylum and *non-refoulement* but also elements applicable to the socio-political context of the Central American region.

5. Thus, efforts are already being made to develop a more effective system for the protection of refugees by combining the basic international instruments with Latina American law, with the aim of further developing refugee, law in Latin America.

6. As far as the international instruments relating to refugees are concerned, El Salvador is a party to the 1951 Convention relating to the Status of Refugees and to the 1967 Protocol, as well as to the American conventions on asylum.

7. El Salvador was present at the Cartagena Colloquium in 1984 and, as a country of origin of refugee movements, expressed, through its delegation, its confidence in they progressive development of machinery and practical means for, solving refugee problems, and therefore its support for international instruments relating to the protection of refugees. It also placed emphasis on observance of the principle of *non-refoulement*, the institution of asylum and the security

and physical integrity of refugees, as well as on the need to ensure the practical effectiveness of solutions to refugee problems in Central America, such as voluntary repatriation and integration of refugees.

8. In the 'Procedure for the establishment of a firm and lasting peace in Central America' (Esquipulas II), the Central American countries undertook to seek solutions to the problem of refugees and displaced persons, recognizing that this formed part of the overall efforts to be made in order to achieve peace.

9. Since 1986, El Salvador has been pursuing a policy that is aimed at finding an appropriate, honourable and comprehensive solution to this problem. In April 1986, a 'Tripartite Commission for the Voluntary Repatriation of Salvadorian Refugees in Honduras', composed of representatives of the Governments of El Salvador and Honduras and of the United Nations High Commissioner for Refugees (UNHCR), was set up to consider methods and machinery for repatriation.

10. The Guatemala Agreement (Esquipulas II) gave further impetus to the application of solutions to refugee problems at the national level and encouraged the establishment, despite problems and constraints of machinery and measurers for offering practical alternatives to meet the needs of refugees, as well as taking other important action on their behalf.

11. The setting up of responsible national bodies such as the Salvadorian Commission for Refugees and Displaced Persons has furthered the efforts that are being made to develop appropriate machinery and find viable solutions for the problem of Salvadorian refugees, such as voluntary repatriation or integration.

12. The voluntary repatriation process was started in October 1987 and continued in 1988. I t has enabled several thousand of Salvadorians who were in Honduran territory to return to their borne country.

13. The situation of displaced persons also calls for urgent attention. The Government of El Salvador has been carrying out a policy of assisting displaced population groups through public and private inter-agency co-ordination of programmes aimed at meeting their most urgent and specific needs, so that they may become integrated in the country's economy and society.

14. In 1986, with the 'National Plan of Aid to Displaced Persons', the Government of El Salvador reoriented its policy in favour of displaced persons and concentrated on the implementation of programmes in the following areas: (1) identification and registration of displaced persons: (2) social welfare; (3) literacy and health; (4) work training; (5) employment and production; (13) settlement; (7) food distribution; (8) administration.

15. These are the objectives aimed at by the National Commission for Aid to Displaced Persons (CONADES).

16. The situation of the Central American refugees is the result of the current political, economic and social conditions in the region. In this connection the Cartagena Declaration makes reference to factors connected with the situation in Central America that need to be taken into account in order to meet humanitarian needs and it proposes a more direct approach in dealing with questions of humanitarian law, asylum and protection.

17. Among the particular or special categories of persons who may need international protection are those whose well-founded fear entitles them to refugee status.

18. Regarding asylum and standards of protection, it is emphasized that, in the search for solutions, there should be co-operation based on the principles of solidarity and humanitarian feeling. There must be observance, not only of the rules concerning treatment of refugees in accordance with the international law in force and humanitarian principles and practices but also of rules of a socio-economic nature, including the right to education and health.

19. Camps in which there are refugees must be used for civilian and humanitarian refugee purposes. They must therefore not be used for the purpose of political or ideological activities and the introduction of elements or activities conflicting with the civilian and humanitarian character of a refugee camp must not be allowed.

20. It is pointed out that, in those cases where refugees are displaced or relocated, this must be done in a planned fashion so as to ensure the safety of the refugees and give them a better opportunity for survival.

21. Adopting one of the durable solutions proposed, El Salvador has arranged, on a voluntary, gradual and planned basis, the repatriation of Salvadorian refugees who were on Honduran territory, allowing them to resettle in their various places of origin, enabling them to obtain papers and furnishing them with assistance, through development plans and programmes established for their benefit.

22. The case of internally displaced persons requires special attention if the main problems of these persons are to be solved. In this connection a call should be made for the aid that is necessary in order to provide them with relief and improve their living conditions. Aid provided by the international community is vital for meeting the specific needs of internally displaced persons.

23. The international organizations, both governmental and non-governmental, through their activities to protect and assist refugees, returnees and displaced persons, obviously constitute the framework of' the main humanitarian efforts in this area.

24. The Office of the United Nations High Commissioner for Refugees (UNHCR) should receive effective and continuing co-operation in the performance of its valuable role and there should be joint support for new approaches to relations with that body. Greater international co-operation is needed to enable UNHCR to develop its services for refugees.

25. Consideration should be given to the special needs of the most vulnerable group among refugees and displaced persons, namely the women and children. Protection efforts should include special programmes to deal with the special needs of these categories of persons.

26. In order to increase the effectiveness of activities for the benefit of women and children, efforts should be made by UNHCR to recruit more female officers.

27. In order to increase support for activities in favour of refugees and displaced persons and to publicise them more effectively at the world level, it will be necessary to ensure the implementation and

dissemination of the latest United Nations resolution and programme on assistance to refugees, returnees and displaced persons and of the resolution on Central American refugees and regional efforts for the solution of their problems that was adopted by the OAS General Assembly at its eighteenth session, held in San Salvador in November 1988.

3. COMMENTS OF THE GOVERNMENT OF MEXICO

1. Considering the importance of the work developed by the Group of Experts and Jurists who undertook the investigation and analysis of the national and international documentation required for the preparation of the document under review, it is indispensable that its official presentation contains the names of the three experts who were convoked by UNHCR. It would also be convenient that the document itself identifies the foundations and agreements which gave rise to the convocation of the Group of Experts such as the San Salvador Communiqué of September 1988.

2. As a recommendation of general character, it would be necessary for the document to be re-arranged so that its contents would be in the following order.

   - Principles emanating from provisions of international agreements, treaties and multilateral conventions.
   - Principles, norms and criteria derived from other international instruments adopted at international and/or regional intergovernmental meetings (declarations, resolutions etc.).
   - Criteria or decisions included in other international documents adopted in or issued by international forums (non-governmental and/or governmental), such as seminars, colloquiums and meetings of experts.

3. Lastly, the paragraph which corresponds to chapter 10 on Dissemination would have to be the subject of a decision by the Conference. Additionally, it is important to underline that the principles and criteria developed in the document do not constitute, in their totality, the legal framework in which adequate solutions can be identified to the problems of refugees, returnees and displaced persons. The document is an excellent basis for consultation and guidance and of great significance for the protection of and assistance to the groups of persons referred to above. Only with this purpose in mind should it be extensively disseminated, for which reason it would better be understood if the words 'for subsequent application' could be eliminated.

BLANCA410

SAN JOSE DECLARATION ON REFUGES AND DISPLACED PERSONS

Adopted by the International Colloquium in Commemoration of the "Tenth Anniversary of the Cartagena Declaration on Refugees",

San José, 5-7 December 1994

CONCLUSIONS AND RECOMMENDATIONS

I

Commemorating the Tenth Anniversary of the *Cartagena Declaration on Refugees*, which has, for the past decade, proven its validity and usefulness in addressing the problems of human displacement in the region;

Recognizing that the said Declaration constitutes an efficient instrument of international protection by serving as a source of guidance for the humanitarian practices of States and by encouraging the adoption of legislative and administrative measures based on the principles contained therein;

Recognizing the importance of the Central American experience which has, amongst other achievements, enabled the mass return of thousands of refugees and the closing of the majority of camps in the region, thus providing opportunities for finding appropriate solutions to a regional crisis;

Stressing that, pursuant to the adoption of the Cartagena Declaration, a significant process in the search for durable solutions has been initiated, whereby such solutions have been integrated within the framework of convergence between respect for human rights, peace-building and linkage with economic and social development;

Appreciating the generous efforts made, with the valuable support of the international community, during the past decade of economic and political crises, by countries of the region to provide protection and humanitarian treatment to persons forced to abandon their homes, while remaining determined to continue the concerted search for solutions to alleviate the human suffering of these persons and help them to resume normal life;

Confirming that the consolidation of democracy in the continent has laid the basis for finding solutions to the challenges of the past decade and for firmly addressing those of the present;

Underscoring the contribution made to this process by the ***Procedure for the Establishment of a Firm and Lasting Peace in Central America (Esquipulas II),*** as well as the Tripartite Commissions for Voluntary Repatriation, and the achievements made possible by the ***Declaration and Concerted Plan***

of Action in favour of Central American Refugees, Returnees and Displaced Persons adopted by the International Conference on Central American Refugees (CIREFCA), held in Guatemala City in May 1989; this experience being viewed as a guiding framework for dealing with similar situations in other regions of the world;

Appreciating the valuable contribution of the documents on ***Principles and Criteria for the Protection and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America*** (1989) and the ***Evaluation of the Practical Application of those Principles. and Criteria (1994)***, which elaborated on the Cartagena Declaration;

Taking into consideration the influence which the Cartagena Declaration and its aforementioned related elaboration have had beyond the Central American region, through the incorporation of some of its provisions into legal measures and administrative practices of other Latin American countries, as well as in its widespread dissemination in academic circles of the Continent;

Recognizing the admirable efforts which the Inter-American Institute of Human Rights has made in identifying and promoting areas of convergence between International Refugee Law, International Human Rights Law, and International Humanitarian Law;

Welcoming the incorporation of the United Nations Development Programme (UNDP) in the efforts to find solutions to the problems of refugees, returnees and displaced persons through their joint sponsorship of CIREFCA, other technical cooperation efforts and the initiation of human development programmes in favour of the affected populations;

Appreciating in particular the outstanding work of UNHCR in the region in fulfilment of its mandate, as well as the creative approach applied thereto, which has enabled the opening of a `humanitarian space' which has favoured peacebuilding and the attainment of new horizons in the field of Refugee Law;

Noting with satisfaction the references made to the Cartagena Declaration and the accomplishments of CIREFCA by the General Assembly of the United Nations, the General Assembly of the Organization of American States, the Executive Committee of the High Commissioner's Programme, and other international fora;

Also bearing in mind the conclusions of the First Regional Forum on Gender Focus in working with Refugee, Returnee and Displaced Women (FOREFEM), held in Guatemala City in February 1992, as well as those of the Partnership in Action Conference between UNHCR and the non-governmental organizations (PARINAC, Caracas, June 1993 and Oslo, June 1994) which, together with the CIREFCA follow-up mechanisms, in the spirit of the Cartagena Declaration, have strengthened cooperation with non-governmental organizations and the beneficiary populations;

Recognizing the challenges posed by the new situations of human displacement in Latin America and the Caribbean, including, in particular, the increase in internal displacement and forced migration due to causes other than those provided for in the Cartagena Declaration; Considering that human rights violations constitute one of the causes of displacement and that, therefore, the safeguarding of those rights is an integral element for both the protection of the displaced and the search for durable solutions;

Also considering that the protection of human rights, and the strengthening of the democratic system are the best means of preventing conflict, refugee flows and serious humanitarian crises;

In compliance with the request to hold this Colloquium made in Conclusion No. 71 (XLIV) of the Executive Committee of the High Commissioner's Programme, as well as by the General Assembly of the Organization of American States at its 24th Session, and including the preparatory technical meetings of Caracas in March 1992, Montevideo in May 1993, and Cocoyoc in March 1994;

II

The participants in the Colloquium have reached the following **conclusions**:

First. To recognize the overriding importance of the Cartagena Declaration in addressing refugee situations generated by the Central American conflicts of the past decade, and, consequently, to stress the appropriateness of resorting to the Declaration in order to find solutions both to pending problems and to the new challenges posed by uprootedness in Latin America and the Caribbean.

Second. To reaffirm the validity of the principles contained in the Declaration as elaborated in the documents **Principles and Criteria for the Protection and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America (1989)**, as well as in the **Evaluation of the Practical Application of those Principles and Criteria (1994)**, and to reiterate, in particular, the value of the refugee definition contained in the Cartagena Declaration, which, by being based upon objective criteria, has constituted an effective humanitarian instrument in support of State practice in extending international protection to persons in need thereof, beyond the scope of the 1951 Convention and the 1967 Protocol.

Third. To stress the complementary nature and convergence between the systems of protection to persons established in International Human Rights Law, International Humanitarian Law and International Refugee Law, and, with the aim of establishing a common legal framework, to reiterate the convenience for those States which have not yet done so to adhere to the pertinent international instruments. In this context, the Colloquium makes an appeal to the States party to the 1969 American Convention on Human Rights to adopt the domestic measures required to ensure the full application and promotion of its provisions, as well as supervision by the pertinent bodies provided for therein.

Fourth. To encourage the commitment of the governments, non-governmental organizations and the jurists of the region in favour of the promotion, development and harmonious application of international human rights law, humanitarian law, and refugee law.

Fifth. To urge governments to encourage, with the collaboration of UNHCR, a process of progressive harmonization of rules, criteria and procedures concerning refugees, based on the 1951 Convention and the 1967 Protocol relating to the status of refugees, the American Convention on Human Rights, and the Cartagena Declaration.

Sixth. To encourage governments to seek humanitarian solutions, within a coordinated framework, to pending problems of refugees and persons displaced as a result of situations which have now been resolved, or which are in the course of being resolved, by reinforcing voluntary repatriation and reintegration programmes in their places of origin, and considering, whenever possible, programmes

to facilitate local integration, the issuance of essential documentation and the normalization of their migratory status, with the aim of preventing such problems from becoming new sources of tension and instability.

Seventh. To call upon governments to increase their region-wide cooperation in admitting refugee groups, including those fleeing from situations foreseen in the Cartagena Declaration, as well as to encourage concerted efforts to find solutions to the problems which generate such forced displacement.

Eighth. To reiterate the responsibility of the States to eliminate, with the support of the international community, the causes of forced mass exodus and, in this way, ensure that refugee status is only granted for as long as required.

Ninth. To underscore the importance of fostering full observance of economic, social and cultural rights, in an effort to contribute to their development and to their legal protection.

Tenth. To reaffirm that refugees as well as those persons who migrate for other reasons, including economic ones, have human rights which should be respected at all times and in all circumstances and places. These inalienable rights should be respected before, during and after their flight or return to their places of origin, with a view to ensuring their well-being and human dignity.

Eleventh. To stress the advisability of improving the situation of refugee and displaced children, taking into account the specific provisions in this regard set forth in the 1989 Convention on the Rights of the Child.

Twelfth. To underline the importance of addressing the needs of refugee and displaced women and girls, particularly those in a vulnerable situation, in the field of health, security, employment and education, as well as to encourage the inclusion of gender-based criteria in the examination of claims for refugee status.

Thirteenth. To recommend the full participation of affected populations, especially women's groups and indigenous communities, by encouraging the development of mechanisms which facilitate concerted action in the design and implementation of programmes aimed at resolving situations affecting refugees, returnees and displaced persons.

Fourteenth. To encourage an integrated approach to the solution of problems of forced displacement, particularly as regards voluntary return and repatriation, within the framework of coordinated efforts in order to ensure, in addition to the security and dignity of the beneficiaries, the durability of solutions. In this sense, reintegration and rehabilitation efforts should be linked to medium and long-term sustainable development efforts intended to alleviate and eradicate extreme poverty, satisfy human needs, and strengthen respect for human rights, with due regard for civil, political, economic, social and cultural rights.

Fifteenth. To stress the contribution of the United Nations and the Organization of American States to the peace process in Central America and the Caribbean through peacekeeping operations and mechanisms for verification of compliance with specific agreements in the field of human rights. At the same time, to urge the organizations responsible for those operations to favourably consider requests made by concerned States that they continue to carry out their activities.

Sixteenth. To affirm that the problem of the internally displaced, albeit the fundamental responsibility of the States of their nationality, is nevertheless of concern to the international community because it is a human rights issue which can be linked to prevention of causes which generate refugee flows. In this regard, persons in this situation should be assured of the following:

(a) application of human rights norms and, when applicable, International Humanitarian Law as well as, by analogy, certain relevant principles of Refugee Law, such as non-refoulement;
(b) recognition of the civilian character of displaced populations and of the humanitarian and apolitical nature of the treatment afforded to them;
(c) access to effective protection by the national authorities and to essential assistance, with the support of the international community;
(d) attention to those rights which are crucial for their survival, security and dignity, as well as other rights such as adequate documentation, ownership of land and other assets, and freedom of movement, including the voluntary nature of return; and
(e) the possibility of attaining a dignified and safe solution to their displacement.

Seventeenth. To support the work of the Representative of the Secretary General of the United Nations for the Internally Displaced; within this framework, to foster and contribute to the preparation of an international declaration founded on a set of principles and basic rules for the protection and humanitarian treatment of internally displaced persons whatever their situation or circumstances, without prejudice to the basic right to seek asylum in other countries.

Eighteenth. To note with particular interest the efforts initiated by the Permanent Consultative Group on Internally Displaced in the Americas, as a regional interagency forum dedicated to the study and consideration of the acute problems faced by the displaced within their own countries for reasons similar to those that result in refugee flows.

Nineteenth. To stress the positive contribution made by the churches, the nongovernmental organizations and other sectors of civil society in providing assistance and protection to refugees, returnees and the displaced in Latin America and the Caribbean, through the coordination of their activities with those of the governments and the international organizations.

Twentiesth. To call upon States to urge existing regional fora dealing with matters such as economic issues, security and protection of the environment to include in their agenda consideration of themes connected with refugees, other forced displaced populations and migrants.

Twenty-first. To urge governments and relevant international organizations to take account of the specific needs of indigenous populations affected by the situations of uprootedness, with due respect for their dignity, human rights, cultural identity and the links which they maintain with their ancestral lands. In situations of uprootedness, the affected population should be consulted directly and specialized approach and the full participation of indigenous populations in assistance programmes and in the planning of durable solutions in their favour, should be guaranteed.

Twenty-second. To support the efforts of the Latin American and Caribbean countries in the implementation of sustainable human development programmes, whose impact is crucial for both the prevention of and solution to the problems of uprootedness and forced migration; and to invite donor countries, financial institutions and the international community to collaborate in these efforts through technical and financial cooperation projects.

Twenty-third. To urge UNHCR to encourage the Latin American and Caribbean countries to disseminate and promote, at all possible levels, the norms relating to the protection of refugees, including those that emanate from the Cartagena Declaration, and their linkage with norms of International Humanitarian Law and, in general, to human rights; and to urge the Inter-American Institute of Human Rights to continue its dissemination and promotion efforts in this regard, in close collaboration with other competent organizations.

III

The participants in the Colloquium therefore, **recommend:**

- That the foregoing Conclusions be duly taken into account in the search for solutions to pending problems related to refugees, returnees and displaced persons, and in addressing new challenges currently being faced throughout the continent;

- That the present document be proclaimed as the San José Declaration on Refugees and Displaced Persons;

- That the working documents, presentations and reports, as well as the Conclusions and Recommendations adopted and other documents of the Colloquium, be published, and that the Inter-American Institute of Human Rights, the United Nations High Commissioner for Refugees, academic institutions and non-governmental organizations adopt the necessary measures for the widest distribution of this publication;

- That UNHCR and the Inter-American Institute of Human Rights, with the support of other pertinent organizations, be requested to sponsor a study of the scope of Article 22 (7) of the American Convention on Human Rights, as it relates the right to asylum, as integrating the right to seek and be granted asylum (Refugio) on the basis of those causes set forth in the refugee definition contained in the Cartagena Declaration, and that this study be subsequently submitted to the consideration of States;

- That the co-organizers be entrusted with officially forwarding the contents of the present Declaration to the Secretary General of the United Nations, to the Secretary General of the Organization of American States and to the Heads of State and Government of the American Continent, so that they in turn submit them to the competent organs;

- That the participants be requested to forward the contents of the present Declaration to their respective governments, so as to contribute to the application of its contents, to its dissemination as well as to its presentation to the Executive Committee of the UNHCR's Programme;

- That an extension of the mandate of the Representative of the Secretary General for Internally Displaced Persons be promoted, and that he considers incorporating the relevant Conclusions of this Colloquium in the reports he presents to the United Nations Human Rights Commission and the United Nations General Assembly;

- That the co-organizers and the Government of Costa Rica, with the support of UNDP, intercede before the World Bank, the International Monetary Fund and the Inter-American Development

Bank, as well as before bilateral aid agencies, in order for them to include the specific needs of displaced populations within programmes aimed at the alleviation and eradication of extreme poverty;

- That the message sent to the Colloquium by the United Nations High Commissioner for Human Rights be acknowledged with thanks, and that the contents of the present Declaration be forwarded to him. Finally, the participants in the Colloquium express their deep appreciation to the United Nations High Commissioner for Refugees and to the Inter-American Institute of Human Rights and, in addition, to the Government of Costa Rica for initiating and carrying out this important event. The participants express their gratitude for the personal interest shown by the President of Costa Rica, Mr. José María Figueres Olsen, and took the liberty to ask him, as he deems appropriate, to inform the participants of the Summit of the Americas, to be held in Miami from 9 to 11 December 1994, about the celebration of this Colloquium.

San José, 7 December 1994

BLANCA420

Countries incorporating the refugee definition of the 1984 Cartagena Declaration on Refugees into their legislation

CARTAGENA DECLARATION ON REFUGEES (22 November 1984)

CONCLUSIONS

Third. To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees **persons who 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.**

ARGENTINA
Refugee Bill and Order No. 465/98 of the Refugee Eligibility Committee
(24 February 1998)

Article 1º - For the purpose of this Act, the term refugee shall apply to any person who:

a. Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country;
b. Not having a nationality and being outside the country of his former habitual residence, is unable or unwilling to return to it, owing to the fear of persecution or the very consequences of not having a nationality;
c. has fled their country of nationality or habitual residence, in the case of statelessness persons, because his life, 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.

Order no. 465 of the Refugee Eligibility Committee

The Committee declares by unanimity
TO RECOMMEND to all competent bodies of the Argentinean State, under the terms of section A of Article 2 of the Decree 464 of 11 March 1985, the adoption of the necessary measures to incorporate the terms of the Declaration issued on 22 November 1984, in Cartagena de Indias, Republic of Colombia, on the occasion of the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, to the definition contained in the Convention relating to the Status of Refugees of 28 July 1951 and the Protocol adopted in 31 January 1967. For this purpose, it is also acknowledged the need to incorporate the principles compatible with the norms currently defining their competences in the analysis of future cases, in order to carry out to the fullest extent the mandate contained in the legislation in force.

BELIZE
Refugees Act (16 August 1991)

4. Subject to the provisions of this section, a person shall be considered a refugee for the purposes of this Act if -

a. owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, he is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or
b. not having a nationality and being outside the country of his former habitual residence, he is unable or, owing to a well-founded fear of being persecuted for reasons of race, religion, membership of a particular social group or political opinion, is unwilling to return to it; or

c. 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, he is compelled to leave his place or habitual residence in order to seek refuge in another place outside his country of origin or nationality.

BOLIVIA
Decree No. 19.640. Refugee Definition (4 July 1983)

Considering
[…]
That the I Seminar on "Political Asylum and the Situation of Refugees" was held on 19 and 22 April of the present year, organized by the Constitutional government in collaboration with the Office of the United Nations High Commissioner for Refugees. It is acknowledged that valuable recommendations resulted from this seminar which should be put into practice.

Article 2 – **Based on humanitarian reasons, the term refugee shall apply to any person compelled to flee his country because internal armed conflict, aggression, foreign occupation or domination, massive violations of human rights or as a result of events of political nature seriously disturbing public order in the source country or country of origin.**

BRAZIL
Act No. 9.474, defining mechanisms for the implementation of the Refugee Status of 1951 and establishing the "National Committee for Refugees"
(22 July 1997)

Art. 1º Every individual shall be recognized as a "refugee" when:
I - Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, social group or political opinion, is outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country;
II – Not having a nationality and being outside the country of his former habitual residence, is unable or unwilling to return to it, on the basis of the circumstances described in the previous clause;
III – Owing to serious and generalized human rights violations, is compelled to leave his country of nationality in order to seek refuge in another country.

ECUADOR
Decree No. 3.301 – Regulations on the application in Ecuador of the norms contained in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol
(6 May 1992)

Article 2 – In the same manner, any person shall be recognized as a refugee in Ecuador when he has fled his country because his life, safety or freedom has been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights and other circumstances which have seriously disturbed public order.

EL SALVADOR
Decree No. 918, Act for the determination of refugee status (in force since 22 August 2002)

Considering:
[…]
II. That, in accordance with Article 12, paragraph 1 of the abovementioned Convention, and Article III of its Protocol, as well as the principles set forth in the American Convention on Human Rights and the Cartagena Declaration on Refugees, it is necessary to enact national legislation to ensure the application of the said international instruments;

Article 4 – Under this Act, the term refugee shall apply to:
(a) Any person who, owing to a well-founded fear of being persecuted for reasons of race, ethnic group, gender, religion or belief, nationality, membership to a particular social group or political opinions, is outside the country of his nationality is unable or, owing to such fear, is unwilling to return to it;

(b) Any person who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it for reasons of race, ethnic group, gender, religion or belief, nationality, membership to a particular social group or political opinions; and,

(c) **Any person who has fled his country because his life, safety or freedom has been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.**

GUATEMALA
Executive Order No. 838-2001. Regulations for the protection and refugee status determination in the national territory of the State of Guatemala

CONSIDERING
That the Constitution of the Republic enshrines the right to asylum, which is granted in accordance with the international standards and practice.

ARTICLE 11. REFUGEES. The following persons shall enjoy the right to be granted the refugee status, in conformity with the provisions of the present regulations:
(a) Any person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership to a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country;
(b) Any person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership to a particular social group or political opinion, and not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it;
(c) Any person who **has fled his country because his life, safety or freedom has been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order; and**
(d) Any person victim of persecution based on sexual violence or other forms of gender-based persecution related to violations of human rights contained in international instruments.

HONDURAS
Decree No. 208-2003. Immigration and Aliens Act (3 March 2004)

Article 42. Refugee Status Recognition.
Refugee status shall be recognized to any person who:

(1) Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership to a particular social or political group, as well as for his opinions, is outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country owing to such fear;

(2) Has fled **his country because his life, safety or freedom has been threatened by any of the following reasons:**
- **(a) generalized, serious and continued violence;**
- **(b) foreign aggression, understood as the use of armed force by a State against the sovereignty, territorial integrity or political independence of the country of origin;**

(c) Internal armed conflict generated by the armed forces of the country from which the person flees, and armed groups or armed forces;
(d) Massive, sustained and systematic violations of human rights; and
(e) Every person victim of persecution based on sexual violence or other forms of gender-based persecution related to violations of human rights contained in international instruments.
[…]

MEXICO
Act on Population (7 January 1974)

Article 42 – Non-immigrant is the alien who temporarily enters the country, with the authorization of the Secretary of the Interior, under one of the following categories:
[…]
VI.- REFUGEE.- To protect his life, safety or freedom, when threatened by generalized violence, foreign aggression, internal conflict, massive violation of human rights or other circumstances which have seriously disturbed public order in his country of origin, forcing him to flee to another country.
[…]

PARAGUAY
Act No. 1.938 – Refugee Act (9 July 2002)

Article 1 – For the purpose of this Act, the term refugee shall apply to any person who:

(a) Is outside the country of his nationality, owing to a well-founded fear of being persecuted for reasons of race, sex, religion, nationality, membership of a particular social group or political opinions, and owing to such fear, is unable or unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it; and

(b) **Was compelled to flee** his **country because his life, safety or freedom has been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.**

PERU
Act No. 27.891 – Refugee Act (20 December 2002)

Article 3 - Refugee Definition
It shall be considered a refugee:

(a) Any person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

(b) Any person who has fled **his country of nationality or habitual residence because massive violation of human rights, foreign aggression, internal conflict, foreign domination or occupation, or as a result of circumstances which have seriously disturbed public order.**

(c) Any person who is legally in the territory of the Republic, owing to subsequent reasons taking place in his country of nationality or residence, is unable or unwilling to return to it, owing to the well-founded fear of persecution mentioned in paragraph a) above.

RIO de JANEIRO DECLARATION ON THE INSTITUTION OF REFUGE
(10 November 2000)

The Ministries of Interior of Mercosur, Bolivia and Chile concerned that international protection should be given to individuals persecuted for reasons of race, nationality, religion, membership of a particular social group, political opinion or victims of serious and generalized violation of human rights, assembled under the framework of the "VIII Meeting of the Ministries of Interior of MERCOSUR":

DECLARE:
[…]
3. Contracting and associate States will study the possibility of including in the refugee definition the protection of victims of serious and generalized human rights violations.

MODEL LEGISLATION FOR THE MERCOSUR COUNTRIES

Article 1 – For the purpose of this Act, the term refugee shall apply to any person who:

Owing to a well-founded fear of being persecuted for reasons of race, gender, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Who has fled his country of nationality or, not having a nationality, his country of habitual residence because his life, safety or freedom has been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

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