

**LEGAL AND PROTECTION POLICY
RESEARCH SERIES**



**The Cartagena Declaration on Refugees and the
Protection of People Fleeing
Armed Conflict and Other Situations of Violence
in Latin America**

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JUNE 2013

PPLA/2013/03

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I INTRODUCTION

The 1984 Cartagena Declaration on Refugees (Cartagena Declaration)¹ is heralded as one of the greatest accomplishments in the development of the refugee protection regime in Latin America. It is most frequently invoked as the source of a broad definition of who should be considered a refugee. Beyond the definition contained in Article 1(A) of the 1951 Convention relating to the Status of Refugees (1951 Convention) and the Protocol relating to the Status of Refugees (1967 Protocol)² (hereafter referred to as the '1951 Convention definition'), the Cartagena Declaration also extends to, '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' (hereafter referred to as the 'regional refugee definition').³

The Colloquium on the International Protection of Refugees in Central America, Mexico and Panama and the Cartagena Declaration were the result of a pragmatic and protection-motivated process that began in the early 1980s as a reaction to the inadequate response of the Organization of American States (OAS) to the Central American refugee crisis. This process focused on creating and maintaining an effective humanitarian space based on solidarity, political will and respect for basic human rights.⁴ The expanded conception and definition of a refugee was only one element of this initiative, which had its antecedents in the Tlatelolco Colloquium of 1981⁵ and in the reiterated alerts formulated by the Inter-American Commission on Human Rights (IACommHR). By drawing from international refugee law, human rights law and international humanitarian law (IHL) the Cartagena Colloquium launched what would eventually become a dynamic atmosphere of protection and humanitarianism.

The Cartagena Declaration did not establish binding law; it is after all the final text of a gathering of academics and practitioners. When the Cartagena Declaration was adopted, most Latin American states had neither national legal frameworks to deal with refugee matters nor refugee status determination (RSD) systems in place. Thus, the Cartagena Declaration definition became a 'common language' of sorts that encapsulated contemporary protection concerns.

¹ Declaración de Cartagena sobre Refugiados, adopted during the Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios, held in Cartagena, 19-22 November 1984 (hereinafter 'Cartagena Declaration').

² Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Convention); Protocol relating to the Status of Refugees (entered into force 4 October 1967) 606 UNTS 267 (1967 Protocol).

³ Cartagena Declaration, Conclusion No. 3. The original document was drafted in Spanish. The official translation reads, '...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 original Spanish text of the definition reads, 'la definición o concepto de refugiado recomendable para su utilización en la región es aquella que además de contener los elementos de la Convención de 1951 y el Protocolo de 1967, considere también como refugiados a 'las personas que han huido de sus países porque su vida, seguridad o libertad han sido amenazadas por la violencia generalizada, la agresión extranjera, los conflictos internos, la violación masiva de los derechos humanos u otras circunstancias que hayan perturbado gravemente el orden público'.

⁴ Recall that at the time, some of the main hosting countries (such as Mexico and Honduras) were not parties to the international refugee instruments.

⁵ Colloquium on Asylum and the International Protection of Refugees in Latin America, Tlatelolco, Mexico, 11-15 May 1981.

As part of this process, the Cartagena refugee definition has gained legal force through its widespread incorporation into national legal frameworks across the region. Nevertheless, today, the Cartagena Declaration is mostly invoked only to recall the origin of the regional refugee definition, ignoring the fundamental humanitarian and legal protection principles that the Cartagena process championed, including active inter-state cooperation to satisfy humanitarian needs, the non-political nature of asylum and the principle of non-refoulement. Paradoxically, the Cartagena Declaration has been seldom applied in practice, guidance on its interpretation is undeveloped and national authorities rarely consult its provisions when providing international refugee protection.

1. Methodology and Structure

This paper is a legal study on the interpretation and application of the regional refugee definition in 17 Latin American countries,⁶ 13 of which currently include a Cartagena-inspired refugee definition in their national laws. The desk-based review includes examinations of national constitutions, laws and policies, administrative decisions, case law and national news on refugee issues.⁷ In analysing administrative practice, this study surveys decisions formally adopted by administrative bodies responsible for determining asylum claims in each country. These findings were enriched by fieldwork conducted in four countries that were considered to have the heaviest caseload of asylum applications: Argentina, Brazil, Ecuador and Mexico.

Refugee matters in most Latin American countries have very little salience in law and politics: production of academic writing is limited, specialized audiences are scarce and interested parties tend to speak amongst themselves. Public discussion of refugee matters is meagre, and most events or developments go unnoticed and unreported. For this reason, I am especially grateful to those who agreed to be interviewed for this study and generously shared their knowledge, guidance, opinions and enthusiasm for the protection of refugee rights.⁸ The interviews with individuals who have been deeply involved in the Cartagena process were especially important to this analysis.

Following the introduction, section two reviews the Cartagena Declaration, including the process leading to its adoption, its content and the way it was initially understood and applied. This study reveals that practitioners in Latin America often overlook this background, generating significant consequences for adequate protection. This section is also an important contribution because the majority of the documentation and analysis of this historical content is not available in English.

⁶ The countries surveyed are: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela. These countries share common legal traditions. None of the Caribbean countries were considered.

⁷ I would like to thank Viviana Tacha, a Colombian attorney and colleague, for her assistance in the desk review and particularly in compiling and systematizing the laws and regulations, news stories and academic pieces in the 17 countries. I am also indebted to Amanda Lyons for her careful review of this text.

⁸ I am indebted to all professionals whom I interviewed—retired UNHCR staff members, officials, members of non-governmental organizations and academics—who openly shared their opinions and readily made materials available for my review. Without their contribution, this study would not have been possible. I am deeply grateful to colleagues in the Department of International Protection (DIP), the Regional Legal Support Unit in the Costa Rica Office and the UNHCR offices in Argentina, Mexico, Brazil and Ecuador, particularly, all protection officers. Their opinions, positions and work were a great source of knowledge.

The third section provides an overview of the extent and manner in which Latin American countries have formally incorporated the regional refugee definition into their national legal frameworks. The regional refugee definition has gained wide acceptance in national jurisdictions, although in some cases substantive variations have been made overall, but by and large national legal frameworks have preserved the main elements of the regional definition.

The fourth section describes the core findings of state practice in relation to the regional refugee definition. The first sub-section analyses the administrative legal context in which the definition is applied. Refugee law is considered to be part of administrative law in the jurisdictions surveyed. As a result, refugee status determination procedures are unregulated, unchecked and driven by discretionary delegation. These qualities substantively impact how the regional refugee definition is—or often is not—applied. These contextual elements are necessary to a proper reading of how the regional refugee definition is applied, which is presented in the second sub-section.

Finally, this study presents in its concluding fifth section a short reflection for future initiatives aimed at reinvigorating international protection and reviving some of the aspirations that made the Cartagena-inspired process so important throughout the region.

II. THE CARTAGENA DECLARATION: A PROCESS DRIVEN BY PROTECTION NEEDS

The events leading to the adoption of a regional refugee definition are critical in explaining its scope and reach today. This study does not intend to fully document this process, but a brief overview is especially important given that much of the literature on the subject is available only in Spanish.⁹ This section sets out the basic regional context that led to the adoption of the Cartagena Declaration, the main accomplishments of the Cartagena process and the main legal elements of the regional refugee definition according to the ‘Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America’, in short the ‘CIREFCA Legal Document’.¹⁰ As will be shown, this text is an outdated legal document that continues to guide state practice today.

1 Regional Backdrop Leading up to the Cartagena Declaration

Latin American countries have a rich tradition of providing asylum to individuals facing political persecution; this has been especially true for members of the political, academic and artistic elite.¹¹ By the late 19th and early 20th centuries, in response to turbulent events in the

⁹ For a comprehensive overview and analysis of the process leading to the adoption of the Cartagena Declaration, see L. Franco and J. Santistevan de Noriega, ‘La contribución del proceso de Cartagena al desarrollo del derecho internacional de los refugiados en América Latina’ in United Nations High Commissioner for Refugees (UNHCR), *Memoria del vigésimo aniversario de la Declaración de Cartagena sobre los Refugiados* (San José, Costa Rica, Editorama, 2005), 79-138. See also F.G. Velez, ‘Protección de refugiados, repatriados y desplazados centroamericanos, 1981-1999’ in UNHCR, *Comisión Nacional de los Derechos Humanos (CNDH) & Universidad Iberoamericana, Protección y asistencia a refugiados en América Latina. Documentos regionales 1981-1999*, (Mexico, 2002), 21-50.

¹⁰ ‘Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America’, January 1990, prepared at the International Conference on Central American Refugees (CIREFCA), Ciudad de Guatemala, 29-31 May 1989.

¹¹ See Franco and Santistevan, note 9 above, 79, 86.

region, countries had consolidated this practice and even began promoting international instruments that espoused asylum as a protection measure.¹² The 1948 American Declaration of the Rights and Duties of Man stipulated the right to receive asylum as, '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'.¹³

The early development of this regime therefore underscored the connection to fundamental rights and liberties and the predominance of political asylum for individuals.

This regional protection scheme faced a major crisis in the 1960s. The mass exodus of Cubans beginning in 1959 and the plight of thousands of exiles from Bolivia, Haiti, Honduras, Nicaragua and Paraguay generated questions as to the capacity of states to absorb and integrate refugees. In 1965 the IACommHR reported on this changing situation:

The problem of the American political refugees has fundamentally changed over the last years. The situation is no longer characterized by the refugees of former times, who were generally few in numbers and were fundamentally constituted by leaders that had some source of wealth. Currently the problem lies in that, as a result of the political movements that have taken place in the majority of American countries and the absence of democratic stability in some of them, a large amount of persons, most of them without means of any sort, are transferring to the territory of other American Republics as a result of being the object of persecution.

This reality, which is compounded by extended periods of exile, has not been adequately addressed by international law or by national legislation of the States; and thus, the situations faced by the American political refugees are disquieting.¹⁴

Upon determining that the situation was not being adequately addressed by international law or national legislation, the IACommHR recommended the preparation of a regional instrument for the protection of refugees. In 1966 the Inter-American Juridical Committee elaborated a draft Inter-American Convention on Refugees,¹⁵ but it was never formally considered by any of the political bodies of the OAS.

The assessment that international law did not adequately address the predicament of refugees in the Americas in 1965 is explained in part by the fact that for the two decades prior, Latin American states had not participated in developing the global refugee regime. Governments in

¹² For example, specific regulation of the asylum-refugee regime took place under the Treaty on Asylum and Political Refuge (adopted 4 August 1939). See also the Treaty on International Penal Law (adopted 23 January 1889) at the First South American Congress on Private International Law, Montevideo, Uruguay. The treaty regulated asylum in its Title II (articles 15-18), in close connection to extradition (addressed under Title III of the treaty).

¹³ American Declaration of the Rights and Duties of Man, OAS Res. XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992), Article XXVII.

¹⁴ Cited in Inter-American Commission on Human Rights (IACommHR), Informe Anual de la Comisión Interamericana de Derechos Humanos 1981-1982, 20 September 1982, OEA/Ser.L/V/II.57, doc. 6 rev.1. See Chapter IV, Section B ('Los refugiados y el sistema interamericano'), para. 3. Available only in Spanish at <http://www.cidh.org/annualrep/81.82sp/indice.htm> (Translation by the author). All URLs last checked on 5 June 2012.

¹⁵ Ibid. para. 4.

the region were reticent to sign the 1951 Convention. American states asserted that the flow of refugees was not something that concerned the region. Franco and Santistevan suggest instead that the most likely explanation for this resistance was a general unwillingness of Latin American states to be subject to any type of international control.¹⁶

In the decade that followed, the Central American refugee situation deteriorated severely as governments stepped up violent actions against the civilian population. Thousands were murdered and disappeared, and hundreds of thousands of peasants, indigenous populations and impoverished urban-dwellers fled to neighbouring countries.

The refugee situation in the region worsened as a result of the growing flight of persons escaping the coups d'état in the Southern Cone. These displaced persons had a different profile than the Central American refugees; nonetheless, they were in dire need of protection. By the end of the 1970s, refugees were scattered en masse and the protection scheme was failing. The depiction provided by the IACommHR is extremely useful to understand the state of affairs:

[T]he events that took place in the 1970s and the first years of the 1980s have signified a change of circumstances in relation to the old tradition of awarding political asylum, as follows:

- a) the number of persons in need of political asylum is several times greater than in any other moment of the history of the region;
- b) the composition of the groups that are requesting political asylum has changed from individual political figures to large groups of persons with a well-founded fear of persecution given the conditions of generalized violence and their involvement in politically vulnerable sectors of society, though they have not necessarily participated in individual political acts;
- c) while the old exiles were generally persons of economic means and a certain level of education, the asylum seekers of recent years are overwhelmingly persons without financial resources, that usually lack education and job skills;
- d) amongst the countries that have traditionally offered refuge to political exiles, some are not only refusing to accept Latin American refugees, but are also, additionally, becoming a main source of refugees in the region;
- e) national legislation and regional treaties related to refugees and exiles are inadequate to address the situations of mass asylum;
- f) the economic conditions experienced by a large portion of the hemisphere, generally poor, make the resettlement of thousands of foreign nationals very difficult; and

¹⁶ See generally Franco and Santistevan, note 9 above, 90-93. The authors provide several illustrations of the lack of interest in the 1951 Convention, the sense of regional segregation and the guarding of the regional asylum regime; only four regional governments (Brazil, Colombia, Cuba and Venezuela) participated in the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons; the 1951 Convention was not mentioned (even once) in the preparation of the Organization of American States Convention on Diplomatic Asylum (adopted 29 December 1954) Treaty Series No. 18; and only four Latin American states ratified the 1951 Convention during its first decade in force (Ecuador, 1955; Brazil, 1960; Colombia, 1961; and Argentina, 1961).

- g) many governments of the region are not willing to receive refugees for ideological or political motives, as they consider them a threat to national security.¹⁷

The Commission documented the changed circumstances and the flaws in protection practice as related to the Inter-American asylum regime and urged states to comply with their human rights obligations in relation to refugees. The IACommHR recommended that the OAS consider establishing an Inter-American authority in charge of assisting and protecting refugees on the continent, to work in close association with UNHCR.¹⁸ States remained impassive.

The lack of official response from both the OAS and individual states led a group of regional experts to come together in 1981 in Tlatelolco, Mexico under the auspices of the Universidad Autónoma de México to examine the relation between the regional asylum regime and the global refugee regime. Formally an academic exercise, the group intended to address the protection gaps that had become apparent.¹⁹ UNHCR discreetly accompanied the exercise. The Colloquium supported and promoted basic principles of international refugee law—including non-refoulement and the humanitarian and non-political nature of granting asylum—and called for an incorporation of both Inter-American and global efforts to adequately protect refugees.²⁰

Notably, the 1981 Colloquium concluded that it was necessary to extend protection in Latin America ‘to those persons that flee their country as a result of aggression, foreign occupation or domination, massive human rights violations, or events that seriously disturb public order, in either part or the whole of the territory of the country of origin’.²¹

Despite these efforts and the IACommHR’s insistence, countries proved unwilling to confront new manifestations of forced migration and referred instead to the region’s traditional definition of asylum. In the meantime, refugee flows and internal displacement grew unabated.

2 ‘Refugees under Cartagena’: Regional Refugee Definition and Other Achievements

As can be drawn from the context described above, the 1984 Cartagena Colloquium developed out of the ongoing need to establish and consolidate the ‘humanitarian practices and principles’ to provide protection to a growing number of Central Americans compelled to leave their home countries.²² The Cartagena Declaration is the pronouncement resulting from that Colloquium. It is not a legally binding instrument or an officially sanctioned statement. Nonetheless, its value

¹⁷ IACommHR, Informe Anual de la Comisión Interamericana de Derechos Humanos 1981-1982, note 14 above, para. 9.

¹⁸ Ibid. para. 12.

¹⁹ See, for example, the introductory remarks presented by the then-director of the Department of International Protection of UNHCR, Michel Moussalli. Instituto de Investigaciones Jurídicas, Asilo y protección internacional de los refugiados en América Latina (1982), 25-32.

²⁰ Conclusions and Recommendations of the Colloquium on Asylum and the International Protection of Refugees in Latin America, Tlatelolco, Mexico, 11-15 May 1981. Instituto de Investigaciones Jurídicas, Asilo y protección internacional de los refugiados en América Latina (1982), 205-208.

²¹ Ibid. Conclusion No. 4. This early proposal clearly reflects the influence of the African treaty addressing the issue of refugees. See Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (entered into force 20 June 1974) 1001 UNTS 45 (OAU Convention), art. 1.2.

²² Franco and Santistevan, note 9 above, 113.

rests on pragmatism and commitment to the application of protection principles as has been endorsed by a large number of states, including in their domestic law.

Therefore, the Declaration must be understood as part of a process of developing a roadmap for protection practices that would prove crucial in addressing the Central American humanitarian crisis of the 1980s and which laid the foundation for much of the work conducted in relation to internally displaced persons (IDPs).²³ The significance of the Cartagena Declaration must not be limited to the adoption of a regional refugee definition. Before a more concentrated discussion of the definition, at least five accomplishments of the Cartagena Colloquium and Declaration should be highlighted.

First and foremost, the process accomplished what it set out to do: it promoted the establishment and consolidation of the humanitarian practices and principles that were necessary to respond to the Central American refugee crisis. A key element of this was the confirmation of ‘the peaceful, non-political and exclusively humanitarian nature of [the] granting of asylum or recognition of the status of refugee’.²⁴ Above all, the Declaration was described by the leading humanitarian actors of the time as a practical framework that contributed to make humanitarian action possible on a daily basis, even under adverse conditions, particularly given that there were more people in need of protection and humanitarian assistance than those covered by the 1951 Convention and the 1967 Protocol.

Second, the consensus reached in the process underscored the centrality of existing international norms²⁵ and the need to establish a basic agreement backing the 1951 Convention and the 1967 Protocol. This consensus was especially important given that countries in the region were giving the Inter-American asylum regime importance and precedence as opposed to participating in global legal developments. Recall that some of the principal asylum countries were not parties to the international refugee instruments; and thus the Cartagena Declaration became common ground.

Third, the Colloquium promoted the dynamic interaction of international human rights law, international humanitarian law and international refugee law in the areas of displacement.²⁶ The Cartagena proponents asserted that the convergence of these three branches of public international law (and their respective protection bodies) offered the best conditions for providing the necessary protection.²⁷

²³ The processes and synergies that grew out of the Cartagena Declaration best depict the accomplishments of the Cartagena Round Table. Nearly 30 years later, the Declaration is still invoked to motivate humanitarian action and protection in the region. This process has been well documented through the accounts of the colloquia that have taken place 10 and 20 years after Cartagena. See for example Instituto Interamericano de Derechos Humanos (IIDH) and UNHCR, *Memoria del Coloquio Internacional. 10 Años de la Declaración de Cartagena sobre Refugiados* (San José, Costa Rica, Imprenta Nacional, 1995); and UNHCR, *Memoria del vigésimo aniversario de la Declaración de Cartagena sobre los Refugiados* (San José, Costa Rica, Editorama, 2005). UNHCR, academics and specialized NGOs are currently preparing *Cartagena plus 30*.

²⁴ Cartagena Declaration, Conclusion No. 4.

²⁵ See, e.g., Cartagena Declaration, Conclusions Nos. 2, 3, and 8.

²⁶ Franco and Santistevan, note 9 above, 118-119.

²⁷ See the seminal work by Antonio Cançado Trindade that underscored this interaction ten years after the Cartagena Declaration. A. Cançado Trindade, ‘Aproximaciones o convergencias entre el derecho internacional humanitario y la protección internacional de los derechos humanos’ in (IIDH) and UNHCR, *Memoria del Coloquio Internacional. 10 Años de la Declaración de Cartagena sobre Refugiados*, 79-168; contained also in

Fourth, the Declaration accentuated the principle of non-refoulement as one of the key protection principles.²⁸ It was seen as emerging from the interaction between international refugee law and international human rights law to safeguard the right to receive protection when a person faces the risk of being exposed to persecution as well as the right to be free from harm to life, liberty or person.²⁹ Based on this principle and general human rights obligations, governments were persuaded that persons should not be returned to places where their life, freedom or safety might be at risk.

Fifth, the Cartagena Declaration also called on countries to use a definition of 'refugee' that, in addition to those covered by the 1951 Convention and its 1967 Protocol, also included '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'.³⁰

This definition drew heavily from the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention), which states, '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'.³¹

Despite the striking similarity between the two definitions, the drafters of the Cartagena Declaration did not leave record of any weighty comparative exercise in relation to the African instrument. Record does not indicate that analysis of the definitional component went beyond imitation and adaptation to the Latin American reality. An interview conducted with one of the central drafters of the text supports this finding.³²

The refugee definition proposed in the Cartagena Declaration was designed to narrow the protection gaps faced by thousands of persons who were forced to flee their countries of origin but were not deemed to be covered under the 1951 Convention definition of refugee. As one of the principal actors behind the Cartagena Declaration recalls:

The adoption of the new definition arose out of a protection need: problems arose and solutions had to be found. (...) Given that it was obvious that persons should not be differentiated so severely as a result of varying causes of their forced displacement, the solution adopted in the African context became very interesting. (...) The success of [the definition adopted by the] Cartagena [Declaration] is that it served to protect persons who had fled in mass numbers. What is surprising now

Seminario interamericano sobre la protección de la persona en situaciones de emergencia (Instituto Interamericano de Derechos Humanos: San José de Costa Rica, 1995), 33 at 40-45.

²⁸ Cartagena Declaration, Conclusion No. 5, emphasizing the value of non-refoulement as a principle of ius cogens. See also, Franco and Santistevan, note 9 above, 119-120.

²⁹ Cançado Trindade, note 27 above, 180-181.

³⁰ Cartagena Declaration, Conclusion No. 3.

³¹ OAU Convention, Art. 1.2.

³² Interview of Leonardo Franco, Buenos Aires, Argentina, 18 May 2012.

is that practice has evolved and the Cartagena definition is applied to individuals seeking asylum.³³

In interviews, several of the participants in the events leading up to the Cartagena Declaration emphasized another development from the process that has been marginalized from practice today. The regional refugee definition was a shift in focus from the subjective and individualised element—fear of persecution of the 1951 Convention—to the objective elements leading to flight: ‘generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order’. In the regional context, this shift allowed for greater expediency in awarding protection and facilitated work with different population groups to search for solutions. Less concerned with individual refugee status determination procedures, the main purpose was to offer a point of reference that justified humanitarian engagement.

Today, and as will be detailed below, the majority of prevailing interpretations of the regional refugee definition has lost sight of these purposes.

The regional refugee definition cannot be detached from the process that launched it. Moreover, the true significance of the Cartagena Declaration is not limited to the definition that emerged. Ensuring humanitarian protection was the objective and the most important accomplishment. Unfortunately, both in practice and in academic consideration, the Cartagena Declaration has been reduced to the regional refugee definition. This has led to a misunderstanding of its purpose and scope.

3 Interpretative Guidelines: The CIREFCA Legal Document

In response to states’ requests for legal guidance on the refugee protection obligations after the adoption of the Cartagena Declaration, the United Nations sponsored the International Conference on Central American Refugees (CIREFCA) in Guatemala City in 1989. The Conference adopted a series of documents, including the benchmark ‘CIREFCA Legal Document’.³⁴

States’ insistence on establishing clear legal guidelines was a double-edged sword. The explicit restatement of international obligations was a positive contribution, but it was ultimately used in a legalistic fashion to limit state engagement and commitment to refugees and others in need of protection. The group of experts commissioned by the 1988 Preparatory Committee of CIREFCA (San Salvador) favoured a generous interpretation that would afford the greatest level of protection. This focus was consistent with the ‘spirit’ of the Cartagena Colloquium and Declaration but in tension with the governments’ push for legal precision throughout the

³³ Ibid.

³⁴ ‘Principles and Criteria for the Protection of and Assistance to Central American Refugees, Returnees and Displaced Persons in Latin America’, note 10 above. In addition to attempting to explain the reach of the regional refugee definition, it insisted on the centrality of the 1951 Convention definition for international protection (Section IV, para. 24); underscored the non-political and humanitarian nature of asylum and the value of non-refoulement for protection and established minimum ground rules for the treatment of refugees (Section V, paras. 42-52); laid down the framework of durable solutions (Section VI, paras. 56-66); explicitly presented the challenges and the need for action in favour of IDPs (section VII, paras. 67-69); and stressed the role of NGOs and human rights bodies in the protection of refugees and IDPs (Sections VIII and IX, paras. 70-73).

process.³⁵ The CIREFCA Legal Document that the Conference adopted was therefore a compromise. It insisted on principled protection but provided definitions that were interpreted in a legalistic fashion.

Arguably the most important assertion or clarification in the CIREFCA Legal Document is that the elements of the regional refugee definition ‘were intentionally depicted in a broad fashion in order to ensure that those persons whose need for international protection is evident are covered, and they may be protected and assisted as refugees’.³⁶ The group of experts explicitly called for flexibility and leeway in applying and interpreting the regional definition in order to ensure its adequate scope for protection purposes. The list of situations provided in the regional refugee definition was intended to be evocative of all situations that existed or could arise to generate refugee flows. It was not intended or seen as a restrictive legal formula; rather, it was a wide-ranging, blanket formulation that allowed humanitarian actors to conduct their operations in favour of persons that were experiencing the consequences of the situation in the region.

The CIREFCA drafters observed that the regional refugee definition contained in the Cartagena Declaration includes ‘the objective situation prevailing in the country of origin and the particular situation of the individual or group of persons who are seeking protection and assistance as refugees’.³⁷ The document thus asserts that the definition requires two features: ‘on the one hand, the existence of a threat to life, safety or freedom; and on the other, that the threat is the result of one of the five elements enumerated in the text’.³⁸

The first element—the existence of a threat to life, safety or freedom—was addressed in the CIREFCA Legal Document through a rights-based approach. Threats to life, safety and freedom should be deduced from infringements on human rights. However, the document goes no further than reasoning that international protection had the purpose of safeguarding physical integrity and was thus triggered as a result of a threat to the right to life, safety and liberty.³⁹

For the second element—the five objective situations foreseen by the regional refugee definition—the document provides restrictive and confused interpretative guidance. The drafters grouped together four of the five situations asserting guidance under IHL, i.e. internal conflicts, foreign aggression, generalized violence and other circumstances that seriously disturb public order. These were interpreted in the following ways.

The guidance that provided for ‘internal conflicts’ was only a reference to IHL applicable to non-international armed conflicts, namely Article 3 common to the Geneva Conventions (1949) and Additional Protocol II (1977).⁴⁰

³⁵ During the second Preparatory Committee of CIREFCA (Antigua) governments insisted on ‘the need to refine, even more, the [content and] reach of the definition contained in the Cartagena Declaration’. *Ibid.* para. 3. As is recognized in the approved document, the group of experts did not incorporate this commentary.

³⁶ *Ibid.* para. 26 (emphasis added).

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.* para. 27.

⁴⁰ *Ibid.* paras 28-30; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31 (First Geneva Convention); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85 (Second Geneva Convention); Geneva Convention Relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135 (Third Geneva Convention); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (entered into

Foreign aggression was considered in light of the 1974 UN General Assembly Resolution on the subject as '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'.⁴¹

Generalized violence was considered to refer 'to armed conflicts as defined by international law, whether international or non-international in nature. For violence to be generalized it must be continuous, general and sustained'.⁴² The drafters' interpretation mistakenly linked this phrase to armed conflict so narrowly as to make the inclusion of 'generalized violence' superfluous as a separate objective situation.

The group of experts also turned to IHL to interpret 'other circumstances that seriously disturb public order'. The document determined that the expression did not include natural catastrophes and referred only to man-made acts, including 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature as long as they seriously disturb public order'.⁴³ The document remitted to the 1951 Convention travaux préparatoires for further interpretation of the notion of public order.⁴⁴

After describing the IHL grouping, the document instructed that 'massive violations of human rights' would be satisfied when internationally recognized rights are subject to widespread or large scale violations—situations of 'gross and systematic denial of civil, political, economic and social and cultural rights'.⁴⁵ To address situations of human rights violations, the document made reference to individuals whose cases were under consideration by special international mechanisms at the time of the drafting.⁴⁶

Based on the case law reviewed and interviews conducted, decision-makers are uncomfortable with the flexibility and breadth of the definition and for political reasons appear to have chosen instead to interpret it conservatively. This has led to the CIREFCA Legal Document being treated as a strict legalistic guide for applying the regional refugee definition in individual RSD proceedings.

force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (Protocol II).

⁴¹ UN GA Res. 3314 (XXIX), 14 December 1974 (cited in the CIREFCA Legal Document, para. 32).

⁴² CIREFCA Legal Document, para. 32.

⁴³ Ibid. para. 33. The limits between internal armed conflict and 'internal disturbances and internal tensions' generated a lot of interest at the end of the 1980s. There were several draft declarations that were being discussed to address situations that were perceived to not be fully covered by IHL or human rights law. Similarly, protection concerns in the Inter-American human rights protection system and academic production of the time concentrated on exploring themes related to the convergence of IHL and human rights law. See, for example, Declaration of Minimum Humanitarian Standards (adopted 2 December 1990) by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, in Turku/ Åbo Finland; or T. Meron, 'Model Declaration on Internal Strife' (1988) 262 Int'l Rev. Red Cross 59. See also 'Internal Disturbances and Tensions: A New Humanitarian Approach?' (1988) 28 Int'l Rev. Red Cross 262.

⁴⁴ CIREFCA Legal Document, para. 33.

⁴⁵ Ibid. para. 34. The Spanish uses the expression 'a gran escala'.

⁴⁶ Ibid. The document makes explicit reference to the mechanism established by UN ECOSOC Res. 1503 that established a confidential review of complaints alleging serious violations. The procedure was considered under the guise of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities.

In its interpretations of the objective situations, especially in light of the evolution of international law, the CIREFCA Legal Document does not adequately restate the law. First, the exclusive reliance on IHL for guidance on situations of generalized violence, foreign aggression, internal armed conflicts and other circumstances that seriously disturb public order is problematic. In principle, IHL only addresses situations that qualify as international or non-international armed conflicts, a designation that is specifically for the purpose of applying the laws of war. Situations that do not fall within the expression ‘armed conflict’ can be construed or inferred through other sources of international law or even comparative law. Situations such as ‘generalized violence’ and ‘other circumstances that seriously disturb public order’ are precisely those types of situations that reveal the gaps in protection and the need for other branches of international law to be considered in order to afford appropriate protection to people in need.⁴⁷

Modern day interpreters of the regional refugee definition should be mindful that the drafters of the Cartagena Declaration and the CIREFCA Legal Document were unsystematic in the usage of terms to describe the gravity of situations. A great variety of qualifiers with no specific or technical meaning attached to them were often employed interchangeably, including grave, gross, flagrant, systematic, generalized, widespread, serious, numerous and massive.⁴⁸ Knowledge of IHL was limited in the region, and its interaction with human rights law was not common. Unlike today, the IACommHR in the 1980s would use terms such as ‘generalized violence,’ ‘mass’ or ‘massive’ as general descriptors for egregious violations rather than technical terms of art with established parameters or thresholds.

Consequently, the list of objective situations leading to flight should not be interpreted as an exhaustive set that would exclude situations not specifically contemplated. The final clause—‘other circumstances that seriously disturb public order’—is meant to encompass unforeseen situations that produce similar effects. However, in practice, this ground has been the least used by refugee adjudicators despite the fact that the regional refugee definition was intentionally drafted to promote inclusion by recognising that there were those in need of international protection who do not satisfy the refugee criteria of the 1951 Convention. This intent has been widely ignored or misinterpreted in the current practice and usage.

Beyond these definitions, no further guidance is provided. Even for the late 1980s, these interpretations are conservative at best and did not explore all relevant sources of law. Nonetheless, since that time, the CIREFCA Legal Document is held to be a sort of unassailable dogmatic manual. The document has transcended unabated and without critique and continues to be the most frequently, if not the only, source cited by most national authorities to interpret the regional refugee definition in current day practice.⁴⁹ Given the limited doctrinal development of the regional refugee definition, this document from the 1980s has been wrongly elevated in importance by practitioners eager for guidance. As one practitioner stated, ‘It is difficult. We do

⁴⁷ Recent exercises have drawn attention to the intersection of the different branches of international law and could inform this exercise. See, e.g., UNHCR and International Criminal Tribunal for Rwanda (ICTR), ‘Summary Conclusions, Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law’, Arusha, Tanzania, 11-13 April 2011, Summary Conclusions.

⁴⁸ See, e.g., IACommHR, 1980-1981 Annual Report, Chapter V; or IACommHR, 1984-1985 Annual Report, Chapter IV; IACommHR, 1985-1986 Annual Report, Chapter IV.

⁴⁹ Every operator interviewed for this study in the context of RSD in Argentina, Brazil, Mexico and Ecuador cited the CIREFCA Legal Document as the source of their current-day interpretation of the objective situations laid out in the Cartagena Declaration. This text is promoted by UNHCR regionally, and, as will be demonstrated in the next section, it is also cited as the source of interpretation in RSD administrative resolutions.

not have a manual; all we have is CIREFCA. There are no tools. Each one of us moves or advances through the cases as she can. For those that are just starting it is very difficult, especially for those of us who are not lawyers. What do you read? You read CIREFCA. It is all there'.⁵⁰

The uncritical reliance on the CIREFCA Legal Document compounded by a general on-going absence of appropriate guidelines is a key factor in explaining the slow development of the regional refugee definition.

The CIREFCA Legal Document should be recalled primarily as a historical reference. Contemporary interpretation should recover the 'spirit' of Cartagena and invoke the basic principles of protection. The demand for guidance as to the interpretation and application of the Cartagena Declaration could be met more meaningfully through deeper analysis, modern hermeneutical practice and reference to up-to-date developments of IHL, international human rights law, international refugee law and comparative constitutional law.

III. FORMAL ADOPTION OF THE REGIONAL REFUGEE DEFINITION IN NATIONAL LEGAL FRAMEWORKS: REPRODUCTION AND VARIATIONS

The regional refugee definition has been widely adopted in national laws. Seven of the 17 countries—Argentina, Bolivia, Chile, El Salvador, Guatemala, Mexico and Nicaragua—have directly imported the definition contained in the Cartagena Declaration into their national regimes, with six other countries using slightly different wording.⁵¹ Only three countries, Costa Rica, Panama and Venezuela, have not incorporated the regional refugee definition into their national regime in any way.⁵² Prior to a recent (May 2012) retrogressive modification to its legal regime, Ecuador had included the regional refugee definition in its national legislation, and it was widely applied.⁵³ In fact, Ecuador was the first Latin American country to introduce the regional refugee definition in 1987 into domestic law. Given the particularities of this case, it will be addressed independently in a following section.

⁵⁰ Interview with a member of one of the national commissions conducted between May and June 2012, on file with the author.

⁵¹ Ley N° 26.165 de 2006, Ley General de Reconocimiento y Protección al Refugiado, Art. 4b (Argentina); Ley 215 de 2012, Ley de protección a personas refugiadas, Art. 15(I)(b) (Bolivia); Ley 20430 de 2010, Establece disposiciones sobre Protección de Refugiados, Art. 2.2 (Chile); Decreto 918 de 2002, Ley para la determinación de la condición de las personas refugiadas, Art. 4c (El Salvador); Acuerdo gubernativo 383 de 2001, Reglamento para la protección y determinación del estatuto de refugiado en el territorio del Estado de Guatemala, Art. 11c (Guatemala); Ley sobre Refugiados y Protección Complementaria. Se reforman, adicionan y derogan diversas disposiciones de la Ley General de Población, 2011, Art. 13 (II) (Mexico); and Ley 655 de 2008, Ley de Protección a Refugiados, Art. 1c (Nicaragua).

⁵² See Ley 8764 de 2009, 'Ley General de Migración y Extranjería' Sección V (Costa Rica); Decreto ejecutivo 23 de 1998, 'Por el cual se desarrolla la Ley No. 5 del 26 del octubre de 1977 que aprueba la Convención de 1951 y Protocolo de 1967 sobre el Estatuto de Refugiados, se derogan el Decreto No. 100 del 6 de julio de 1981 y la Resolución Ejecutiva No. 461 del 9 de Octubre de 1984, y se dictan nuevas disposiciones en materia de protección temporal por razones humanitarias' (Panama); and Ley orgánica sobre refugiados o refugiadas y asilados o asiladas, 13 de septiembre de 2001 (Venezuela).

⁵³ Decreto 3301 de 1992, Reglamento para la Aplicación en el Ecuador de las normas contenidas en la Convención de Ginebra de 1951 sobre el Estatuto de los Refugiados y en su Protocolo de 1967, Art. 2 (Ecuador).

Though all national legislative frameworks present specific characteristics, some trends or groupings can be underscored. In the first place, four countries—Brazil, Colombia, Paraguay and Peru—have limited the definition of refugee to persons that are ‘forced’ or ‘obligated’ to leave their country as a result of the objective situation. This modification adds the element of compulsion, duress or obligation to the impetus of flight.⁵⁴ In contrast, the regional refugee definition recommended by the Cartagena Declaration requires only that flight be a consequence of the (generic) threat to life, safety or freedom generated by one of the five objective situations contemplated.

Secondly, some national laws have introduced changes to the objective situations defined in the Cartagena Declaration that lead to the person’s flight or status as a refugee. These include the national laws of Brazil, Honduras, Peru and Uruguay. For example, the Uruguayan framework incorporates the list from the regional refugee definition but adds the situation of terrorism.⁵⁵ Peru varies from the definition by excluding generalized violence and adding ‘foreign occupation or domination’,⁵⁶ following the formulation contained in the OAU Convention.

Honduran legislation includes ‘generalized violence’ and adds that such violence must be ‘grave and continuous’. It incorporates an anti-technical formula referring to ‘mass, permanent and systematic violence of human rights’; and Honduran legislation does not include ‘other circumstances that seriously disturb public order’. Honduras’ extended definition also recognises persons that flee from ‘persecution derived from sexual violence or other forms gender-based violence’. Finally, Honduras included definitional elements for ‘foreign aggression’ and ‘internal armed conflicts’.⁵⁷

Brazil has arguably most drastically varied the original wording proposed in the Cartagena Declaration. The regionally inspired definition was incorporated into Brazilian legislation in 1992—a time when only a few countries in South America had included the regional refugee definition in their legislation (namely Bolivia, Colombia and Ecuador). Brazilian legislation includes recognition of refugees as defined by the 1951 Convention and further articulates that recognition shall be granted to any individual that ‘due to gross and generalized violations of human rights is forced to leave his/her country of nationality to seek refuge in another country’.⁵⁸

In addition to these variations, Mexican practice is worth underscoring. Mexico initially incorporated the regional refugee definition without variation in 1990, even before acceding to the international refugee instruments and incorporating the universally recognized definition into its legislative framework. Through its recently enacted legislation, it has adopted both the

⁵⁴ Lei no 9.474, de 22 de julho de 1997, ‘Define mecanismos para a implementação do Estatuto dos Refugiados de 1951, e determina outras providências’, Art. 1 (III) (Brazil); Ley 27.891 de 2002 ‘Ley del Refugiado’, Art. 3b (Peru); Decreto 4513 de 2009, Por el cual se modifica el procedimiento para el reconocimiento de la condición de refugiado, se dictan normas sobre la Comisión Asesora para la determinación de la condición de refugiado y se adoptan otras disposiciones, Art. 1b (Colombia); and Ley 1938 de 2002, Ley General sobre Refugiados, Art. 1b (Paraguay).

⁵⁵ Ley 18076 de 2006, Estatuto del Refugiado, Art. 2b (Uruguay).

⁵⁶ Ley 27.891 de 2002 ‘Ley del Refugiado’, Art. 3b (Peru).

⁵⁷ Ibid. ‘Foreign aggression is understood as the use of force by one state against the sovereignty, territorial integrity or political independence of the country of origin (of the asylum seeker)’. Ibid. Art. 42.3 b. Internal armed conflicts are those that take place among ‘the armed forces of the country from where flight originates and (other) armed forces or groups’. Ibid. Art. 42.3 c.

⁵⁸ Lei no 9.474, de 22 de julho de 1997, ‘Define mecanismos para a implementação do Estatuto dos Refugiados de 1951, e determina outras providências’, Art. 1 (III) (Brazil).

universal and regional refugee definitions⁵⁹. Mexico is the only state that has produced and adopted internal interpretive guidelines. The executive branch adopted a decree with administrative regulations for the national Law on Refugees and Complementary Protection in February 2012.⁶⁰ Its provisions include general definitions of the concepts contained in the regional refugee definition:

VII. Generalized violence: confrontations in the country of origin or habitual residence (of the asylum seeker) of continuous, general, and sustained nature, in which force is used in an indiscriminate manner.

VIII. Foreign aggression: the use of armed force by one state against the sovereignty, territorial integrity, and political independence of the country of origin or of habitual residence of the asylum seeker.

IX. Internal conflicts: the armed confrontations that take place in the territory of the country of origin or habitual residence (of the asylum seeker) between its armed forces and organized armed groups or among those groups.

X. Mass violations of human rights: conduct that violates human rights and fundamental freedoms in the country of origin, taking place on a wide scale and according to a determined policy.

XI. Other circumstances that have gravely disturbed public order: the situations that gravely alter public peace in the country of origin or habitual residence of the asylum seeker and that result from acts attributable to mankind.⁶¹

As they were only recently adopted, these internal interpretative guidelines have yet to be used, and decision-makers with whom the author spoke are split on their efficacy.

Although variations of the regional definition in national legislation have been substantive, their impact on state practice has been limited. This is because, as will be seen in the next section, the actual use of the regional refugee definition itself is minimal, and there are problems in practice when it is applied.

IV. STATE PRACTICE IN APPLYING THE REGIONAL REFUGEE DEFINITION: FAR FROM THE 'SPIRIT' OF CARTAGENA

The main findings of this study regarding state practice and the development of the regional refugee definition in Latin American countries are overwhelmingly negative. Generally speaking, the national systems are poorly regulated and developed. Although the regional refugee definition formally exists in law, it is seldom applied. Officers generally consider asylum requests on what is deemed the 'principal bracket' or 'primary fragment or clause' of the

⁵⁹ Ley sobre Refugiados y Protección Complementaria. Se reforman, adicionan y derogan diversas disposiciones de la Ley General de Población, 2011, art. 13 (Mexico).

⁶⁰ Presidencia de los Estados Unidos Mexicanos, Reglamento de la Ley sobre refugiados y protección complementaria, 21 February 2012 (Mexico).

⁶¹ Ibid. Art. 4 (Translation by the author).

national refugee definition, which is the definition of the 1951 Convention. The statement of one practitioner is illustrative, 'There is no hierarchy between the two variants included in the law; it would be a mistake to consider one over the other. However, we do haul custom into the equation and probably give greater weight to the definition based on the Convention'.⁶²

Furthermore, its occasional application is not guided or supported by doctrinal or jurisprudential development. Its use is subject to arbitrary, unchecked administrative delegation and a lack of due process protections. The application of the regional refugee definition is intimately linked to the overall protection regime in Latin America. Conclusions regarding how the regional refugee definition is applied cannot be isolated from more general practices. Thus this section addresses concerns of the overall protection regime in order to contextualise the findings.

To implement national law, most countries in the region (15 out of 17) have established an inter-institutional body supported by some sort of secretariat or administrative direction to conduct RSD. The two other countries, Colombia and Honduras, address refugee status requests through intra-institutional agencies linked with the regulation of migration. The operation of these bodies varies in terms of resources, independence, influence of the supporting technical bodies and the role granted to UNHCR. As administrative bodies, these organs apply a branch of national administrative law, thus incorporating practices that are far from a rights-based approach. Practices observed in RSD procedures are not exclusive to refugee frameworks but are part of the idiosyncrasy of administrative law in general in Latin America—mechanical application of the law, incorporation of wide margins of discretion (as a result of the way delegation of authority is perceived), evasion of due process standards and departure from oversight mechanisms.

Claims under the 1951 Convention and the regional refugee definition share the same procedural practice in relation to national RSD procedures. Though variations exist in each country and some better practices will be underscored, RSD in the region is generally conducted in the penumbra of an administrative setup that equates confidentiality with secrecy—out of sight—and operates with little or no public interest—out of mind.⁶³

The commendable acceptance of the regional refugee definition through formal incorporation into national laws is met with less commendable practices in the administrative sphere that debilitate its meaningful application at the national level. These issues are raised in the following five subsections, and include inadequate and often arbitrary application of the law, mistaken understanding of confidentiality, the arbitrary application of the law and the use of unclear evidentiary standards. Finally, in the sixth subsection, the Ecuadorean experience is presented as an outstanding exception to the application of the regional refugee definition. However, that exception is now part of the past, as Ecuador has recently changed its national regime,

⁶² Interview with CONARE officials, Buenos Aires, Argentina, 17 May 2012. Similar statements were recorded in interviews with officials in Brazil and Mexico.

⁶³ Few writings explore the practical implications of the way refugee law is applied in national regimes. Importantly, Martin Lettieri has recently edited a text on international protection of refugees in the countries of the southern region of South America. V. Abramovich et al., *Protección internacional de refugiados en el sur de Sudamérica* (Buenos Aires: De la UNLa – Universidad de Lanús, 1st edn., 2012).

devaluating many of the protection standards, including the explicit exclusion of the regional refugee definition.

1 The Regional Definition is Seldom Used

Despite the formal adoption of the regional definition in national legislation, administrative authorities infrequently apply it in RSD. Cases that could easily be addressed through the regional refugee definition are assessed instead under complementary forms of protection without any analysis of the regional refugee definition's applicability.

The practice in Mexico best illustrates this finding. Although the Mexican Commission for the Assistance of Refugees (COMAR) considers that certain asylum-seekers merit protection because they would be exposed to threats against their right to life, safety or freedom if returned to their home countries, it does not analyse the cases according to the requirements of the second segment of the national legislation which relies on situations listed in the regional refugee definition. Instead they recommend complementary protection. In one decision,⁶⁴ the administrative body concluded that the applicant did have a well-founded fear of persecution but found no causal link with one of the protected grounds. However, it did not analyse the case under the regional refugee definition even though state protection was not adequate; it proceeded to award complementary protection under the relevant national regime. This practice was documented in several decisions.⁶⁵

One of the main reasons given by national RSD officers for not applying the regional refugee definition as a basis for refugee recognition is political in nature. As one expert commented, 'The definition requires us to qualify a particular situation as one of generalized violence or manifest that a particular country is a gross human-rights violator. There are some political considerations. The Ministry of Foreign Affairs is vigilant'.⁶⁶ This statement is illustrative of others recorded in Argentina and Brazil and most evidently in Mexico, where the RSD process includes consideration of a country-situation report issued by the Ministry of Foreign Affairs. This practice demonstrates that the task of analysing the objective situations contained in the regional refugee definition is interpreted in a way that contradicts the non-political and humanitarian nature of refugee protection, and strays far from the intention of the drafters of the Cartagena Declaration.

As stated by an Argentinean authority, 'We do not necessarily go through all the possible elements of the definition contained in the national regime. You just look at the case and you work it, according to where you believe it fits'⁶⁷. This type of practice reinforces the lack of use of the regional refugee definition. For example, in Argentina and Mexico, where humanitarian protection is extended to minors or other forms of complementary protection are granted to

⁶⁴ COMAR, Dirección de Protección y Retorno, EXP-20121001-5065XXX.

⁶⁵ See, e.g., Dirección de Protección y Retorno, EXP-20122111-5019XXX (concerning a Salvadoran national) and EXP-20122507-54836XXX (concerning a Nicaraguan national).

⁶⁶ Interview with academic and public official, Mexico City, Mexico, 19 June 2012, on file with the author.

⁶⁷ Interview, Buenos Aires, Argentina, May 2012, on file with the author.

asylum-seekers, RSD skips over consideration of the regional definition and proceeds to the 'best fit', according to the respective officer.⁶⁸ While complementary forms of protection at least provide some assistance, they never offer more than refugee protection.

The end result is that the regional refugee definition is used scarcely. Despite the rhetorical attention given to the regional refugee definition, these findings suggest that it is not adequately considered as an independent source of law to grant protection to refugees.

2 Conflating Claims under the Regional Refugee Definition and the 1951 Convention Definition

One of the greatest obstacles in the development of the regional refugee definition (and its national variations) as an authoritative source of law and an autonomous basis for extending protection for persons fleeing one of the objective situations is that authorities do not interpret the definitional elements on their own terms. Instead, they subsume a finding of protection after deciding that the person is covered under Convention grounds. It is possible that a person can satisfy requirements under both Convention and regional grounds; this finding is not problematic.

However, regional standards that uniquely apply to refugee flight in Latin America and more broadly cover circumstances of flight that are not included in the Convention definition are not developed; rather, they are conflated with Convention grounds, which has several deleterious effects. First, in many cases, the default is to use the least inclusive (i.e. Convention definition) rather than most inclusive definition (i.e. Cartagena). Second, when officials purport to use the Cartagena definition, they often do so only if the case falls within the scope of the Convention definition, thereby depriving the regional definition of unique authority or region-specific applicability. Third, by using both definitions together, the regional definition can become an additional qualification to be eligible for protection, rather than a separate, extended legal process.

Several adopted decisions illustrate this inappropriate aggregation of the elements to determine whether a person merits protection. One repeated pattern is for officials to use generalized violence or armed conflict to provide contextual reinforcement to a person's narrative arguing a well-founded fear of persecution. As an Argentinean national RSD officer explained, 'The Cartagena situations help to contextualise claims. It is something we explore, but in relation to petitions under the traditional definition'.⁶⁹ In practice, this type of 'contextualisation' is nothing different than using country of origin information to evaluate an application under Convention grounds. It is not, however, use of the regional refugee definition as an independent source of law.

⁶⁸ Ley sobre Refugiados y Protección Complementaria. Se reforman, adicionan y derogan diversas disposiciones de la Ley General de Población, 2011, Arts. 16, 28-32 (Mexico).

⁶⁹ Interview with CONARE officials, Buenos Aires, Argentina, 17 May 2012.

Another common practice observed in several countries is to provide rather meaningless recognition according to the regional refugee definition in conjunction with Convention grounds. The Salvadoran case involving an Iranian national is illustrative: 'The Commission for Determination of Refugee Status, according to [the Constitution, international law], and items a and c of article 4 [referring to the Convention and the regional refugee definitions, among others] of the Law on Determination of the Status of Refugees DECIDES: 1. To recognize refugee status to [the applicant]'.⁷⁰

Despite this language, the decision is based on grounds squarely and solely found in Convention RSD. There is no analysis or legal reasoning to support the conclusion that the individual qualified under the regional refugee definition.

This practice was also detected in Brazil, which has received some attention for purportedly using the regional refugee definition as autonomous grounds for protection. However, this study has observed the practice in Brazil of subsuming recognition according to the regional variant only if status is granted under the Convention grounds. In its variation of the regional refugee definition, the only objective situation that Brazil includes in its national definition relates to 'gross and generalized violations of human rights'.⁷¹ A past coordinator general of the Brazilian refugee committee (CONARE) suggested in published writings that there are specific conditions used to determine whether such a situation exists.⁷² However, this appears to be his own personal approach as there is no evidence that these conditions ever constituted an institutional practice, particularly now that the author has left his post. Committee members and attorneys interviewed for this study expressed their concern over the regional refugee definition and reported that it is rarely used as an autonomous source for recognition. One senior member confirmed, 'The expression "gross and generalized violations" is indeterminate. It is difficult to apply. It is not clear what the definition means. The criteria presented by [the ex-coordinator] are far from desirable, and they represent his personal opinion'.⁷³ Instead of using the ambiguity of 'gross and generalized violations' to develop legal doctrine and guidance, the office dismissed its use.

A review of the available decisions confirms the failure to properly apply the definition.⁷⁴ As an example of the application of the regional definition variant in Brazil, the ex-coordinator cites a

⁷⁰ Comisión para la Determinación de la Condición de Personas Refugiadas (CODER), decision de 2009 (El Salvador).

⁷¹ Lei no 9.474, de 22 de julho de 1997, 'Define mecanismos para a implementação do Estatuto dos Refugiados de 1951, e determina outras providências', Art. 1 (III) (Brazil).

⁷² See R. Zerbini Ribeiro Leão, 'O reconhecimento dos refugiados no Brasil no início do Século XXI' in L. P. Teles Ferreira Barreto et. al., *Refúgio no Brasil. A proteção brasileira aos refugiados e seu impacto nas Américas* (Brasília: UNHCR and Ministry of Justice: 2010), 72-96 at 89. The former coordinator also asserted that several cases had been determined based on these conditions and the variant of the regional refugee definition.

⁷³ Interviews in Brasília and Rio de Janeiro, May 2012, on file with the author.

⁷⁴ Four cases in particular are repeatedly mentioned as examples of the autonomous application of the regional refugee definition. Independent review of these decisions for this study revealed that two applications were in fact granted according to analysis of the 1951 Convention and not the regional refugee definition. See Brazil, CONARE, Processes Nos. MJ 08400.015093/2000-84 (regarding an applicant from Sierra Leona); MJ 08505.024796/2006-11 (regarding an applicant from Iraq); MJ 08000.013694/2006-51 (regarding an applicant from

case in which the Committee found that as a result of the climate of gross and generalized violations in Colombia, some persons were more prone to suffer discrimination and persecution than were others.⁷⁵ In light of this finding, the Committee found that the Colombian context gave way to arbitrary action by drug dealers, and it therefore extended protection under Convention grounds for persecution experienced as a result of a politically imputed opinion. The Committee ultimately recognized the applicant as a refugee under both the 1951 Convention and the variation of the regional refugee definition contained in Brazilian law. This oft-cited case does not in fact show a meaningful application of the regional refugee definition but is instead an example of the application of the 1951 Convention, implicitly subsuming protection under the regional definition.

3 Confidentiality as Secrecy

Confidentiality is unquestionably a basic right of the applicant and ‘is essential to creating an environment of security and trust for asylum seekers’.⁷⁶ However, state practice in the region has unfortunately misinterpreted confidentiality and equated it with secrecy.⁷⁷ The primary consequence of this mistaken understanding and use of confidentiality is that one key aspect of due process standards is not fully respected. A second important and related consequence is that the national process is isolated from interaction with the legal community (including national practitioners in the same jurisdiction), as well as the basic democratic controls and oversight mechanisms of public administration. Lawyers working in the field of refugee protection cannot easily or officially access decisions that might instruct them as to the way the law is being applied in their country. This has directly impacted the lack of development of a coherent practice and application of the elements of the regional refugee definition and related standards of proof.

The insulation resulting from confidentiality (mistakenly interpreted as secrecy) is demonstrated by the obstacles to conducting this very study. The bulk of decisions reviewed were made available under restricted terms. The remaining decisions were acquired through various personal contacts, to whom I am most grateful. The sense of secrecy also conditioned the content and quality of the interviews, and most interviewees asked not be identified. This general attitude of concealment and secrecy is contrary to the principles of justice, equality and transparency that should characterise administrative acts. Moreover, it demonstrates that the development of the law and practice is taking place outside the scope of any meaningful guidance or oversight.

the DRC); and MJ 08460.024984/2004-41 (regarding an applicant from Colombia). The coordination of the Committee did not provide any additional cases decided using the regional refugee definition variant.

⁷⁵ Case no. MJ 08460.024984/2004-41 (regarding an applicant from Colombia) cited in Zerbini Ribeiro Leão, note 72 above, 77.

⁷⁶ UNHCR, ‘Procedural Standards for Refugee Status Determination under UNHCR’s Mandate’, 20 November 2003, Unit 2.1.1, The Applicant’s Right to Confidentiality.

⁷⁷ This issue has been briefly addressed in the Latin American context by Lettieri. See M. Lettieri, ‘Procedimientos de determinación del estatuto de refugiado y cuestiones de prueba’ in V. Abramovich et al, note 63 above, 110.

The effects of the prevailing confidentiality-as-secrecy attitude are compounded by other practices that violate due process and hinder the development of a coherent body of law and practice around the regional refugee definition. These include ad hoc procedures and standards; incoherency and inconsistency of decisions; absence of proper substantiation of decisions (lack of legal reasoning); and use of inexplicit standards and burdens of proof.

Argentina presents a potential reversal of this trend. There, UNHCR is working with national authorities to publish systematized excerpts of administrative RSD decisions. The extracts provide sufficient information to understand a given case without disclosing information regarding the applicant. The extract includes the reasoning of the decisions to document the interpretation and application of national and international law, standards of proof and other procedural aspects. The project in Argentina is an exceptional, positive development that should be considered by all countries in the region as a step toward promoting a proper understanding of the regional refugee definition and an application of refugee law that is in accordance with due-process standards.

4 Structural Due Process Violations Lead to Arbitrary Application of the Law, including the Regional Refugee Definition

Adequate development of the law—including the implementation of the regional refugee definition—goes hand-in-hand with a strong adherence to due process standards. This study has identified serious and interrelated deficiencies in administrative practice that contribute to the arbitrary application of the regional refugee definition.

First, decision-makers in Latin America generally label RSD as an ad hoc and unique procedure. In practice this means that status determination responds to arbitrary criteria as opposed to a coherent body of law. For example, one RSD official described her assessment of cases in the following way: ‘There is no method; it is done on a case-by-case basis’.⁷⁸ This is a mistaken understanding of specificity or speciality. The case-by-case analysis should not be understood as a wide margin of flexibility or foster unwanted discretionary practices. This approach is contrary to international standards⁷⁹ set out in the Inter-American human rights system, ‘The process of determining who is or is not a refugee involves making case-by-case determinations that may affect the liberty, personal integrity, and even the life of the person concerned. (...) [T]he basic principles of equal protection and due process reflected in the American Declaration require predictable procedures and consistency in decision-making at each stage of the process’.⁸⁰

The case-by-case analysis called for in RSD cannot be taken as a license for arbitrary decisions removed from reference to a consistent set of procedures. The lack of a coherent understanding

⁷⁸ Records of interviews are on file with the author.

⁷⁹ These standards have been studied and analysed in a recent publication in relation to RSD in southern Latin America. See M. Ezequiel Filardi, et al, ‘El debido proceso en el reconocimiento de la condición de refugiado de niños y niñas no acompañados o separados de sus familias’ in V. Abramovich et al, note 63 above, 227-254.

⁸⁰ IACommHR, ‘Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System’, 28 February 2000, OEA/Ser.L/V/II.106, Doc. 40 rev., para. 52. (emphasis added).

of the regional refugee definition is both a consequence and a contributing factor to the predominance of this so-called ad hoc approach observed in this survey of state practice.

Second, and intimately related to the first, refugee determinations in the region are generally not backed by documented, reasoned legal decisions. The international standards and importance of this for due process are clear. The Inter-American Court of Human Rights (IACourtHR) has repeatedly ruled that all administrative decisions with the potential to affect human rights need to be grounded in law and include proper reasoning.⁸¹

Chilean practice is illustrative. Despite acceptable procedures established in domestic legislation, in practice the decisions do not include sufficient legal grounds to discern the consideration made in a given case.⁸² This study reviewed 211 decisions;⁸³ in less than 10 cases did decisions take up two pages. The rest were one page in length, and none provided the *rationes decidendi* of the administrative act. The 114 decisions denying refugee status reflected the use of a boilerplate template. The lack of specific consideration of individual cases and the absence of legal reasoning tailored to the individual claim for protection gravely affect asylum-seekers' rights and the quality of the decisions. Although Chile stood out as an example of particularly problematic practice (perhaps because of the number of decisions made available for study), decisions adopted by the Bolivian, Colombian, Guatemalan, Honduran, Peruvian and Salvadoran authorities demonstrated similar shortcomings.

A third factor that has led to informal and less than consistent practice, and scarce legal development of this branch of administrative law, is that asylum-seekers are discouraged from using legal counsel.⁸⁴ Most public officials who conduct RSD resist the exercise of the right to

⁸¹ '[T]he reasons given for a judgment must show that the arguments by the parties have been duly weighed and that the body of evidence has been analyzed. (...) [W]hen the decision is subject to appeal, it affords them the possibility to argue against it, and of having such decision reviewed by an appellate body'. See, e.g., *The Case of Apitz Barbera et al. ('First Court of Administrative Disputes') v. Venezuela*, 5 August 2008, Inter-American Court of Human Rights, Series C No. 182, para. 78 (internal citations omitted). This holding has been reiterated by the court on several occasions: *The Case of Tristán Donoso v. Panamá*, 27 January 2009, Inter-American Court of Human Rights, Series C No. 193, para. 153; *The Case Yvon Neptune v. Haiti*, 6 May 2008, Inter-American Court of Human Rights, Series C No. 180, para. 108; *The Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, 21 November 2007, Inter-American Court of Human Rights, Series C No. 170, para. 107; *The Case of Claude-Reyes et al. v. Chile*, 19 September, 2006, Inter-American Court of Human Rights, Series C No. 151, para. 120; *The Case of Palamara Iribarne v. Chile*, 22 November 2005, Inter-American Court of Human Rights, Series C No. 135, para. 216; *The Case of Yatama v. Nicaragua*, 23 June 2005, Inter-American Court of Human Rights, Series C No. 127, para. 152; and *The Case of Ivcher Bronstein*, 6 February 2001, Inter-American Court of Human Rights, Series C No. 74, para. 105.

⁸² The Chilean framework sets out a reasonable procedure for the decision of asylum claims that grants proper consideration to due process. See generally Chapter III of the national law. *Ley 20430 de 2010*, art. 29-37 (Chile).

⁸³ All decisions were issued by the Ministry of the Interior of Chile, Sub-Secretary of the Interior, Department of Immigration and Emigration in 2011. Of the 211: 14 decisions closed the case without consideration of the merits; two decisions involved cessation of refugee status; 46 extended temporary visas; 114 rejected asylum requests; nine decisions rejected requests for reconsideration of initial rejection; 14 decisions rejected administrative appeals; and 12 decisions recognized refugee status.

⁸⁴ In the early 1990s, Roger Zetter warned about the risks of 'bureaucratic labelling' in RSD proceedings and demonstrated the 'extreme vulnerability of refugees to imposed labels'. The fact that refugees cannot use counsel and that officials are provided with ample discretion to act illustrate the powerlessness of refugees and their lack

counsel by asylum-seekers. In opinions expressed through the interviews, public servants assert that they can properly weigh and represent the various interests involved, including those of the asylum-seeker and of the administration (whether technical or political).

5 Evidentiary Standards: Treading Mysterious Grounds

A final and related concern with the proper consideration of claims under the regional refugee definition is the use of unclear and changing evidentiary standards.

A few national normative frameworks have established particular probative or evidentiary regimes for RSD. For example, Argentinean law refers to ‘sufficient indicia’ to consider facts to be proven.⁸⁵ Similarly, Chilean law refers to ‘sufficient material proof’ as the ideal standard but allows decisions to be based on ‘indicia, presumptions, and general credibility of the asylum seeker’.⁸⁶ Most normative schemes include a general principle of interpretation to favour asylum.⁸⁷ In line with UNHCR’s Handbook on Criteria and Procedures for Determining Refugee Status, Peruvian laws’ normative scheme explicitly states that where there is doubt, the adjudicator should apply the interpretation most favourable to the asylum-seeker.⁸⁸ Although these are not rules of evidence but rather guidelines for legislative interpretation, most decision-makers point to these provisions as qualifying the evidentiary regime.

The majority of legal regimes base their operation on a flexible model for assessment that is part of Latin American legal culture—known as ‘sana crítica’—in which evidence is considered according to the general rules of logic and experience and based on the totality of the circumstances. Although there is no inherent problem with this model, in practice judicial and administrative authorities often incorrectly interpret this model of assessment as giving them a wide margin of discretion to decide. Instead of basing decisions on the relevant law and the rules of evidence, practitioners revealed the primacy given to intuition, ‘We really do not have a standard’; or ‘The standard is sufficient indicia, but it is a standard that is sui generis’. The lack

of protection in the course of ‘latent and manifest processes of institutional action’. See R. Zetter, ‘Labelling Refugees and Forming and Transforming a Bureaucratic Identity’ (1991) 4 JRS 39.

⁸⁵ Ley N^o 26.165 de 2006, Art. 46 (Argentina).

⁸⁶ Ley 20430 de 2010, Art. 34 (Chile).

⁸⁷ The Argentinean law makes direct reference to the pro homine principle (Ley No. 24.165, Art. 2); in other jurisdictions, such as Brazil and Bolivia, it has been included through practice.

⁸⁸ The Peruvian regime is illustrative of this type of principle. The refugee commission ‘can adopt a decision in favour of an asylum seeker in cases in which doubts arise in relation to the assessment of probative elements required to be considered a refugee’, Ley 27.891 de 2002, Art. 16 (Peru). Venezuela is another positive example: ‘If doubt arises in the interpretation or the application of any norm, that which is most favourable to the exercise of the rights of the (claimant) will be applied’, Ley orgánica sobre refugiados o refugiadas y asilados o asiladas, 13 de septiembre de 2001, Art. 4 (Venezuela). See UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’, January 1992, HCR/IP/4/Eng/Rev.2, para. 34, 73, 196 and 203-204, regarding the application of the benefit of the doubt in favor of the applicant. Additionally, according to UNHCR, ‘Where the adjudicator considers that the applicant’s story is on the whole coherent and plausible, any element of doubt should not prejudice the applicant’s claim; that is, the applicant should be given the “benefit of the doubt”’. See UNHCR, ‘Note on Burden and Standard of Proof in Refugee Claims’, 16 December 1998.

of rigor in analysing the cases has meant that the well-intentioned interpretation clauses designed to favour the claimant lose their desired impact in practice.

With only a few exceptions, it is impossible to assess the standards used to evaluate credibility of asylum claims or of the information backing the claim. One exception is the Argentinean National Refugee Commission (CONARE) whose authorities employ the most extensive evidentiary considerations in their decisions supported by reports from the secretariat staff members. Consideration is largely based on the 1951 Convention and often refers to suggested parameters on standards and burden of proof, including application of legal criteria to the facts, explicit setting out of the standard of proof applied and inclusion of an explanation of the way the factual elements were weighed to reach a decision. However, this is not the case for petitions considered under the regional refugee definition for which the final decisions are not specific. Regardless, Argentina represents the best practice observed in this study in relation to these matters.

Mexico is another exception in terms of considering matters of proof in RSD decisions. However, the standard set out in the decisions adopted by the Mexican Commission for the Assistance of Refugees (COMAR) is problematic. Recent decisions (2011 and 2012) for claims under the Convention or regional refugee definitions repeat a standard paragraph referring to a 'conviction of certainty' that needs to be established.⁸⁹ It is not clear whether 'certainty' is the standard being used in practice or what the administrative body understands 'certainty' to be. However, it is clear that the 'certainty' standard found in the public record is not consistent with international rules⁹⁰ and raises scrutiny to a level that is similar to demanding a level of conviction beyond a reasonable doubt, as is the practice in criminal law.

These decisions demonstrate a misunderstanding of the nexus between the flight and the objective situation under the regional refugee definition. Correctly, decision-makers point to the need of linking the objective situations to the cause of the flight, derived from threat to life, safety or freedom of the person (according to the regional refugee definition); interviewees repeatedly asserted that in addition to the existence of the objective situation, 'something else' has to be demonstrated. When asked about the nature of the threat to which the regional refugee definition refers, national RSD officers offered a full variety of responses including among others: 'The life of the person must be unbearable'; 'whether the person would face serious risk if he were to return to his home country'; and 'a specific intent to cause him harm'.⁹¹

⁸⁹ The paragraph states: 'the information (available) analysed as a whole must assemble a discernment that generates certainty within the authority that the applicant would be exposed to experience harm against his life, liberty, safety and personal integrity if he were to return to his country of origin'. The original Spanish reads: 'información que al ser analizada en su conjunto debe constituir razonamientos que generen en la autoridad, la certeza de que el solicitante sería expuesto a sufrir daño contra su vida, libertad, seguridad e integridad personal en caso de regresar a su país de origen'.

⁹⁰ It is worth reiterating that this analysis is permitted because of Mexico's practice of issuing decisions that are somewhat reasoned. The secrecy and opacity of other national bodies have made it impossible to evaluate whether they comply with proper probative standards.

⁹¹ Interviews conducted in Brazil, Argentina and Mexico, 2012, on file with the author.

The misunderstanding or misinterpretation of the nexus element is often intentional so as to avoid granting international protection to individuals that come from countries exposed to situations of generalized violence or armed conflict. There is an eagerness to avoid a type of prima facie standard that would extend protection simply because a person fled from a particular country presenting one of the prescribed situations. This has had the perverse result of national authorities raising the bar of required elements under the regional refugee definition and making direct victimization a necessary criterion for obtaining protection. The regional refugee definition standard being applied to evaluate refugee applications may be arbitrarily higher than that assigned to the 1951 Convention definition, in direct opposition to the intent and purpose of the Cartagena Declaration—particularly, given that the regional refugee definition was promoted to extend international protection to more people, by using a lesser threshold (threat to life, safety and freedom rather than well-founded fear of persecution).

Two respondents stood out by providing understandings of the nexus that are consistent with the spirit of the regional refugee definition. The first, a relatively senior member of a foreign relations ministry, stated, 'We do not look for particular harm. We do need to look at the situation of the particular individual in relation to the objective situation'.⁹² Along the same lines, a director of the secretariat of one of the national commissions asserted that 'the person does not have to have suffered any harm. All we need to establish is some link between the flight and the objective situation. We are looking for some sort of effect on a person's ability to conduct a normal life as a result of the objective situation. And we use a human-rights lens to detect this situation'. Although these are personal responses and not institutional parameters, they are examples of a proper understanding of the regional refugee definition.

Overall, decisions-makers of national refugee regimes who were interviewed for this study are not certain of any standard to assess threats to life, safety and liberty for the purposes of applying the regional refugee definition. To avoid over-inclusion, they are adopting positions that are not based in law. The interviewees instead confirmed that it was in fact their subjective values (or those of the policymakers) that guide the system.

The drafters of the Cartagena Declaration sought to avoid this type of subjective and individualized finding. The historical context resoundingly refutes any suggestion that the regional refugee definition should be limited only to those who can demonstrate some type of individualized or direct harm. The Cartagena Declaration and, in particular, the regional refugee definition contained therein sought precisely to cover persons who fled turmoil and insecurity in an attempt to protect their rights. The main objective was to protect those fleeing the indiscriminate effects of various levels of violence by recognizing that there were far more people in need of international protection than those able to fulfil the requirement of the 1951 Convention refugee definition with its five persecution grounds. As the examples from this study reveal, the requirements being assigned to the regional refugee definition are in effect higher than those under the 'well-founded fear' standard of the 1951 Convention. The prevailing, asylum-influenced interpretation that requires a person to demonstrate victimization prior to

⁹² Interview, 2012, on file with the author.

flight defeats the protective purpose of the refugee regime and goes against the primary purpose of the regional refugee definition.

6 A Good Practice Gone Awry: Ecuador's Experience with the Extended Registry

Ecuador is the only country in the region that has used the regional refugee definition in a fashion envisaged by those who promoted the Cartagena Declaration. This practice faced an abrupt change in May 2012, when national law was modified by presidential decree.⁹³ For 25 years (1987-2012), Ecuador included the extended regional refugee definition as part of its national law though the definition was not readily used.⁹⁴ However, for a slight window of time, international protection was extended in an unprecedented modern-day application of the Cartagena regime. A confluence of factors that were internal to the refugee-protection logic and also external influences (namely the deteriorating Ecuador-Colombia relations) led Ecuador to realise the need to respond in a humanitarian way to Colombians in its territory. UNHCR was undoubtedly instrumental in advocating for such a decision.

Colombian nationals had fled to neighbouring Ecuador for years, especially as a result of the escalation of the armed conflict and other sources of violence (generalized violence, massive violation of human rights and other circumstances that seriously disturb public order) in Colombia after the year 2000. The worsening of the situation in areas along the border generated greater transnational flight, and by mid-2000 the number of Colombians in Ecuador in need of international protection was growing steadily and was estimated to be in the tens of thousands. For one year (March 2009 to March 2010) Ecuadorean authorities worked together with UNHCR, non-governmental organizations and refugee groups to conduct an extended registry of those Colombians who were on Ecuadorean soil fleeing the conflict and violence in their country. This initiative recognized nearly 30,000 Colombians as refugees. However, this application of the regional refugee definition ended in May 2012 when the Ecuadorean government modified the refugee regime through a presidential decree.⁹⁵ Nevertheless, the exercise merits special consideration as the only recorded regional experience where international protection practices have echoed the practices and concepts contained in the regional refugee definition.

⁹³ Presidente Constitucional de la República, Decreto Ejecutivo No. 1182 del 30 de mayo de 2012 (Ecuador).

⁹⁴ Decreto 3293 de 1987, Reglamento para la aplicación en el Ecuador de las normas contenidas en la Convención de 1951 sobre el Estatuto de los refugiados y en su Protocolo de 1967, 30 de septiembre de 1987, Art. 2 (Ecuador); Decreto 3301 de 1992, Reglamento para la Aplicación en el Ecuador de las normas contenidas en la Convención de Ginebra de 1951 sobre el Estatuto de los Refugiados y en su Protocolo de 1967, Art. 2 (Ecuador).

⁹⁵ Presidente Constitucional de la República, Decreto Ejecutivo No. 1182 del 30 de mayo de 2012 (Ecuador). The reasons for Ecuador's regressive move go beyond the scope of this study and are deeply political, including concerns expressed by the Ecuadorean security sector, confusion regarding the application of the regional refugee definition, political pacts related to upcoming electoral bouts and changing regional politics, particularly in relation to the government of Colombia.

In September 2008, the Ministry of Foreign Affairs, Commerce, and Integration adopted the Asylum Policy of Ecuador.⁹⁶ Though the document purported to be the general refugee policy, it explicitly focused on addressing the situation of approximately 180,000 Colombians.⁹⁷ The policy mandated the implementation of a 'mixed model' addressing the situation of the mass influx of Colombians into Ecuadorean territory while responding to individual asylum claims.

A major concern at the time was the overwhelming backlog of cases that had never been considered by the National Commission for the Determination of the Status of Refugees in Ecuador and the infrequent application of the regional refugee definition.⁹⁸ Accordingly, a streamlined procedure granted international protection to all those who qualified under the regional refugee definition.⁹⁹ Starting in 2000, Ecuadorean policy explicitly recognized the need to address the situation of many persons who had not contacted authorities because of a lack of knowledge or trust and in 2008 were considered 'invisible' asylum-seekers.

In addition to addressing such RSD concerns, Ecuador's policy document also set out basic assistance policies that would require long-term integration efforts by the Ecuadorean authorities. It outlined the intention to establish a 'co-responsibility' scheme with Colombian authorities rather than burden/responsibility sharing mechanisms with the international community. Relevant stakeholders in Ecuador called the document groundbreaking for putting into motion institutional efforts and resources not previously seen.

Without renouncing individual asylum requests, authorities implemented a special mechanism that would address the backlog of cases as well as the new requests. This streamlined mechanism was termed the 'Extended Registry' (registro ampliado), and as an important part of the process, the Ecuadorean government designed a Manual for operation together with UNHCR.¹⁰⁰

The Manual set out the relevant protection principles and standards as well as guidelines for streamlining procedure. Relevant adjustments were made to local legislation to facilitate the implementation of this policy and extended registry.¹⁰¹

The special procedure made the elements of the regional refugee definition operational by establishing a series of geographical and thematic criteria that were used to codify and evaluate the asylum request of each applicant. Based on the asylum-seeker's interview, a series of geographical references were drawn in order to establish the applicant's place of residence and

⁹⁶ Ecuador, Ministerio de Relaciones Exteriores, Comercio e Integración, Dirección General de Refugiados, Política del Ecuador en Materia de Refugio, Quito, 2008.

⁹⁷ Ibid. Palabras Preliminares de la Ministra.

⁹⁸ Contained in Article 2 of Decree No. 3301 of 1992.

⁹⁹ See Asylum Policy of Ecuador, note 95 above, 33.

¹⁰⁰ See generally Ministerio de Relaciones Exteriores, Comercio e Integración, Dirección General de Refugiados and UNHCR, 'Manual de Registro Ampliado', January 2009. The final version was adopted 15 April 2009.

¹⁰¹ Presidential Decree No. 1635, 25 March 2009.

work.¹⁰² This information was then crosschecked with country of origin information including specific regional breakdowns according to objective threats and risk factors (human-rights violations, presence of armed groups, combats and other sources of violence).

The Manual also presented a series of thematic criteria in order to properly assess the objective situations set out in the regional refugee definition.¹⁰³ The following 12 elements were adopted for establishing the ‘reasons that motivated the person’s flight’:¹⁰⁴

1. Military or warring activity;
2. Attacks against civilian infrastructure;
3. Forced recruitment;
4. Antipersonnel mines and other explosive devices;
5. Intimidation and threats;
6. Victims of forced labour (including coca-production);
7. Kidnapping, extortion and other forms of confiscation of property;
8. Attacks on civilians, massacres, killings, and other acts aimed at producing terror;
9. Enforced disappearances;
10. Lack of state protection and effective access to justice;
11. Aerial aspersion of chemicals conducted by the Colombian government in order to eradicate illicit crops; and
12. Forced displacement, confinement or other forms of restriction of freedom of movement.

Based on the juxtaposition of the geographical and thematic criteria in each individual application, the interviewer would make a recommendation to the Commission, which would then consider each petition and make a final decision. The streamlined procedure did not imply the meting out of collective or generic decisions; rather the Commission considered individual cases and made individualized decisions for each and every applicant. The process was swift but provided substantiated decisions in each case. At the end of each day, the Commission would compile all decisions and adopt an official administrative act. The record for each decision included: a summary of the facts, the recommendation of the official that conducted the interview, the motivation (outlining the geographical and thematic criteria applied) and the resolution (either recognizing refugee status or deferring the case to the ordinary proceeding).¹⁰⁵

The Extended Registry became operational on 23 March 2009 and ended on 31 March 2010. A total of 28,909 Colombians were registered and 27,740 were recognized as refugees. Rejection or denial of refugee status was not an option under the streamlined mechanism; if applications generated doubt they were sent to the ordinary proceeding, but not rejected. Nearly 1,200 cases were sent to the ordinary proceeding for re-consideration.

¹⁰² ‘Manual de Registro Ampliado’, note 100 above, 26-27, addressing the verification of the regional criteria for purposes of recognizing refugee status.

¹⁰³ Ibid. 27-32, including guides to interpret and verify the thematic criteria.

¹⁰⁴ Ibid. 32.

¹⁰⁵ Several of the administrative acts of the Ecuadorean Commission are on file with the author.

This extraordinary process exemplified and implemented the nature and spirit of the regional refugee definition recommended by the 1984 Cartagena Declaration. Unfortunately, the experience came to a close with much opposition and little understanding. Though the situation of Colombians recognized under the streamlined process was by no means perfect, the documented efforts and recognition rates have made this experience one of the most successful in recent history. The humanitarian space has been reduced in Ecuador since the end of the program. This experience serves as a reminder of the importance of political will and the need to support protection efforts worldwide.

V. CONCLUSION

The regional refugee definition appears to have a greater existence in rhetoric than in practice. Thirty years after its adoption, the best acknowledgment of the value of the Cartagena Declaration would be to reinvigorate the commitment to cover persons in need of international protection by promoting policies that are inclusive rather than exclusive in nature. Protection is above all a mind-set and a reflection of political will.

Today, with a few exceptions, the mind-set and political will in Latin America are at odds with the primary objective of the Cartagena Declaration, ‘to promote that countries in the region establish a regime including the basic treatment for refugees, based on the precepts contained in the 1951 Convention and the 1967 Protocol, and the American Convention on Human Rights’.¹⁰⁶

The regional refugee definition in the Cartagena Declaration was meant to provide a concise reference point to expand protection while swiftly responding to the growing plight of refugees who did not fulfil the 1951 Convention definition. Almost thirty years later, the failure of many Latin American states to champion the regional refugee definition, to take concrete steps to make it operable and to faithfully apply its contents has implications that go far beyond the side lining of the regional refugee definition. Officials processing asylum claims do not appear to know how to apply the regional refugee definition in a consistent and coherent manner. This element remains an important regional challenge for the protection of refugees in Latin America. The issues that are at stake are the loss of solidarity toward persons fleeing generalized violence or conflict in the region and the overshadowing of the refugee protection regime by the growing focus on security.

Regardless of the superficial esteem given to this definition, it has been set aside and left undeveloped. Although the regional refugee definition has been incorporated in a number of

¹⁰⁶ Cartagena Declaration, Conclusion No. 8. Conclusion 8 of the Cartagena Declaration also states, ‘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’. This statement reflects the notion that there are more people in need of international protection, who deserve protection though they do not satisfy the refugee criteria of the 1951 Convention.

national legal frameworks, it still falls short of being part and parcel of day-to-day practice in domestic jurisdictions.

As has been demonstrated throughout this study, doctrinal development of the regional refugee definition remains necessary. In developing these parameters, particular attention should be paid to the type of relation that needs to exist between the flight of a person and the objective situations that cause the flight, according to the regional refugee definition. Proper interpretation of the cause of flight—namely, the prevailing situation in the country of origin and a threat to life, safety or freedom—is key to the appropriate application of the regional refugee definition. Likewise, procedural standards need to be adopted to ensure respect for due process. Lastly, a central element in reversing the improper application of the regional refugee definition is confronting the lack of transparency in adjudication of refugee cases in national settings.

As things currently stand in Latin America, refugee law is being applied ‘out of sight and out of mind’, subject to the whims of administrative bureaucracies. What is clear is that refugee law deserves more than rhetorical allegiance, but its place on the public agenda in Latin America remains uncertain.