

# The Cartagena Declaration at 35 and Refugee Protection in Latin America

Written by Liliana Lyra Jubilut, Marcia Vera Espinoza and Gabriela Mezzanotti

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LILIANA LYRA JUBILUT, MARCIA VERA ESPINOZA AND GABRIELA MEZZANOTTI, NOV 22 2019

On November 22<sup>nd</sup> 2019 the Cartagena Declaration on Refugees (Cartagena Declaration) turns 35. It is a paramount document on refugees' protection in Latin America, setting both normative standards and the regional tone for policies and actions in this area, thus, being a cornerstone of Refugee Law in the region. This is especially relevant as the Latin America is facing contrasting scenarios in terms of migration governance: an increasing politicization of migration and refugees' management and anti-immigrant sentiments, as well as disrespect for human rights and refugee law, coexisting with a regional tradition of granting asylum and the ascertaining of a human-rights based (Grandi, 2017) and *avant-gard* protection for refugees (Freier and Acosta 2015; Jubilut and Lopes 2018).

Assessing the role of the Cartagena Declaration and its relevance on its 35<sup>th</sup> anniversary is also important in light of current regional forced displacements, as Latin America is witnessing massive flows of refugees and other migrants, as (i) in the case of Venezuela with 4,5 million displaced persons (mainly since 2016) and a prediction of reaching 6,5 million next year, also (ii) soaring numbers of refugees and asylum-seekers from the North of Central America (estimated at over 350,000 in the end of 2018), (iii) new displacements from Nicaragua due to a crisis that began in April 2018, (iv) the endurance of Haitian migration, and (v) the continued displacement of Colombians even after the peace agreements, to add to an estimated of 7 million displaced persons during the conflict. This increasing mobility in the region might be joined by new displacements resulting from the social and political strives in Chile and Bolivia.

In this context, it is relevant to present the Cartagena Declaration to a larger audience, celebrate its 35<sup>th</sup> anniversary, and assess whether the framework of protection created by it since 1984 can be a relevant tool in dealing with these competing scenarios in refugee protection in Latin America, as a way to appraise its lasting and current impacts.

### The Cartagena Declaration and Its Regime

#### *Panorama*

The Cartagena Declaration was created in an academic colloquium (Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama) held in Colombia in 1984, in light of the refugee situation in Central America[1], and adopted a regional approach to refugee protection.

The Cartagena Declaration set the basis for the evolution of a specific Latin-American framework of refugees' protection, developing from the region's long-established tradition of asylum (Fischel De Andrade, 2014, Acnur n/d). It dialogues, however, with larger frameworks (Jubilut and Lopes, 2018), such as the international refugee regime (a relation expressed both in the Document's explicit mentions to the 1951 Refugee Convention and its 1967 Protocol[2] and in its support by the United Nations High Commissioner from the beginning[3], Human Rights and other regional schemes such as the Organization of American States (OAS) – which embraced the Declaration[4] and encompasses the United States, Mexico, and the Caribbean States alongside Latin America countries. Due to its normative developments, has been listed together with the 1969 OUA Convention Governing the Specific Aspects of Refugee Problems in Africa as examples of successful developments in regional refugee protection.

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The Cartagena Declaration, initially adopted by 10 States as a soft law instrument, is divided into 3 content parts: the first one with a preamble aspect contextualizing the document and expressing its fundamentals and principles; the second one linking the document to the Contadora Process for Peace and reproducing its normative result[5], and the third part with the substantive contributions of the Document, presented as conclusions.

There are 17 conclusions in the Cartagena Declaration encompassing suggestions specifically tailored to the Central America refugee situation, provisions on the betterment of refugee protection in the States of the region, and contributions to refugee protection at large in Latin America. In the latter, two aspects should be highlighted.

The first is the already mentioned dialogue between refugee protection and human rights. This is a prevalent topic in the Cartagena Declaration, and should be praised both as a pioneering effort in States' practice in this area (in the early 1980s) and as a guideline aiming at guaranteeing integral protection for refugees, i.e. not only the rights they are entitled to due to their migratory status but also all their human rights (Jubilut, Apolinário, 2008). Furthermore, this connection opens up the possibility of refugee protection also benefiting from other institutional arrangements linked to human rights (such as the InterAmerican System of Human Rights from the OAS), and, therefore, being enlarged.

The second aspect regarding refugee protection at large in Latin America is the creation of a regional definition of refugees that goes beyond the international criteria set up by the 1951 Refugee Convention and its 1967 Protocol. This stems from the 3<sup>rd</sup> Conclusion of the Cartagena Declaration, that reads:

the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, **includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.** (highlights added)

These criteria look into the objective situation of the country of origin of the refugee as the main cause for refugee status, not requiring the existence of individual persecution (Jubilut and Carneiro, 2011; 67, Reed-Hurtado, 2013) and closely links refugee status to International Human Rights and International Humanitarian Law (Ibid; Burson and Cantor 2016).

Among the several criteria spelled out in the 3<sup>rd</sup> Conclusion, the one mentioning massive violation of human rights (or gross and generalized violation of human rights as more commonly used in the region[6]) is not only the more encompassing one[7], but also is perceived as the main conceptual contribution of the Cartagena Declaration. This is so due to the fact that albeit not applied in its entire possible width it allows for recognizing refugee status "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'" (Reed-Hurtado, 2013: 14), encompassing, for instance, situations such as dictatorships, internal strives, humanitarian crisis, and war. In this sense, and from a normative standpoint, it is a relevant increase in protection in the region.

## Legacy and Impacts

The creation of a regional concept of refugee, and the inclusion of the possibility of refugee status due to gross and generalized violation of human rights in it, are the first two impacts of the Cartagena Declaration that need to be emphasized. They not only amplify protection in the region but also establish a Latin-American grammar in refugee protection, combining the international criteria for refugee status determination with a tailored regional definition. The latter also reinforces the dialogue between Refugee Law and Human Rights, present from the start in the regional regime as it is incorporated in the region's refugee definition from 1984. The Cartagena Declaration concept of refugee and its peculiarities can be said to be a first pillar in the creation of a regional refugee regime in Latin America.

If one accepts regimes as the existence of rules, principles, and decision-making procedures (Krasner, 1982) this perception is corroborated by the fact that the Cartagena Declaration set up a revision process, with meetings every

## The Cartagena Declaration at 35 and Refugee Protection in Latin America

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10 years to evaluate the region's needs and developments in refugee protection and to adopt follow-up documents and plans of actions.

The first of these meetings was held in 1994, and resulted in the San Jose Declaration, which has as its main specific contribution the fact that, regionalizing the international momentum of the topic[8] and perceiving the region's needs in the issue, strongly dealt with the protection of Internally Displaced Persons as a relevant Latin-America theme in refugee protection[9]. The second follow-up meeting took place in 2004 and resulted in the adoption of the Mexico Declaration and Plan of Action,[10] which embraced a responsibility-sharing optic instead of the more traditional burden-sharing approach to refugee protection, and was divided in two main components: one focusing on protection and the other on durable solutions (Jubilut and Carneiro 2011). In the latter, three regional initiatives were adopted within the solidarity[11] logic that guides all the document: 1) borders of solidarity, focusing on protection at frontiers as well as on actions for local host populations on border towns; 2) cities of solidarities, with a focus on integration in urban settings, the main scenario in Latin America; and 3) resettlement in solidarity, creating new resettlement schemes in the region, for both intra and extra regional refugees and having as its main selection criterion the need for protection (Vera Espinoza 2018a, 2018b; Jubilut and Zamur 2018). The most recent of the meetings happened in 2014 and led to the adoption of the Brazil Declaration and Plan of Action, which reinforces the initiatives previously adopted and the existence of a regional regime of refugee protection in Latin America (Jubilut and Madureira 2014), and continues the Cartagena Declaration legacy.

If the regional refuge definition is the first pillar of the Cartagena Declaration regime of refugee protection, the revisional process and its products are the second. They are also good thermometers of regional adherence to the regime, pointing out a continuous increase in commitments, as one can see that while the Cartagena Declaration was initially adopted by 10 countries and is currently incorporated nationally by 16, the San Jose Declaration was signed by 17 States, the Mexico Declaration and Plan of Action by 20, and the Brazil Declaration and Plan of Action by 31 countries. Furthermore, they showcase an evolution from only declarations to declarations and plans of actions which represents concerns about both normative propositions and actual implementation and policies.

The third pillar of the regional refugee regime can be said to be the aforementioned connection with human rights, which has led the region to be praised internationally (Grandi, 2017). This is relevant as it also sheds light into a fourth pillar and key aspect of refugee protection in Latin America, as it is the coexistence of different systems and regimes (Jubilut and Lopes, 2018: 132). In relation to the former, one can point out (i) the dual nature of asylum in the region, implemented by political asylum and refugee status, (ii) the dialogues among Refugee Law and International Human Rights and International Humanitarian Law, and (iii) the coexistence of the regional definition with the international refugee definition (Ibid).

Regarding the coexistence of regimes of refugee protection in Latin America[12], it is relevant to first recall the previously mentioned relationship between the regime created by the Cartagena Declaration with the InterAmerican Human Rights System, which, through the InterAmerican Court of Human Rights and the InterAmerican Commission on Human Rights, can be said to also have created a regional protection regime for refugees and other migrants within its human rights framework.

A second regime coexistence would take place in relation to the Cartagena Declaration regime and national regimes of refugee protection. Given that, as mentioned, 16 countries have already incorporated the Cartagena Declaration into their national laws, it could be argued that this regime co-existence has not only expanded protection but also transformed, at least in the national level, a commitment transforming a soft law instrument into hard law at least nationally.

If, on the one hand, one can thus see the Cartagena Declaration Regime as having four main pillars – regional definition, revision processes, connection to human rights and the dialogue with other regimes and systems -, on the other, it is also possible to identify three elements that complement this regime, in what is called the “spirit of Cartagena”, understood in relation to: 1) a human rights approach to refugee protection, which is simultaneously a pillar of the Cartagena Declaration regime and a characteristic of the “spirit of Cartagena”, 2) an expanded humanitarian space and 3) a constant effort to assess the region's needs and challenges in refugee protection.

# **The Cartagena Declaration at 35 and Refugee Protection in Latin America**

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The “spirit of Cartagena” can be said to be in place in the debates and adoption of the Cartagena Declaration but also in the development of the regime derived from it, and even influencing other actions regarding the protection of refugees and other migrants (such as humanitarian visas and other alternative pathways for legal stays for instance (Jubilut 2017)) in Latin America. That is to say, the ‘spirit of Cartagena’ and the Cartagena Declaration regime’s pillars can be considered to be lasting impacts and legacies of the Cartagena Declaration in the protection of refugees in Latin America.

## **Current Challenges in Refugee Protection in Latin America**

However, and even though the regional setting showcases the existence of comprehensive regimes of refugee protection, and a regional optic of ascertaining human rights and the implementation of asylum; recent events have – as noted above – created a scenario of contrasting and competing logics, i.e. one the one hand, the Cartagena Declaration and its regime, alongside other structures of protection in the region, and, on the other, the adoption of policies, rhetorics and actions against refugees and other migrants’ protection.

This can start to be explained by the fact that Latin America remains a region that, at the same time, produces and receives refugees (UNHCR, 2019: 68 and 74), and recently has been experiencing a combination of these realities: with a record number of intra-regional refugees, originating mainly from Venezuela and the North of Central America, but also encompassing forced migration from other places (Jubilut and Jarochinski 2018; Jubilut 2016).

The increase in numbers has occurred alongside the rise of populist governments, as well as right-wing local and/or national governments, which either did not impress great significance on refugee protection or adopted a “hard line” in migration governance. The combination of these factors has led to human rights violations, restrictive migratory laws, and violations of Refugee Law (both in its international and regional standards).

Examples of that have been the preferred avenue by States to not apply the regional definition to intra-regional refugees but rather create complementary protection pathways (Jubilut and Fernandes 2018), which could be seen as an implementation of the “spirit of Cartagena” if they were being applied only to migrants other than refugees, and not as a way to diminish protection. Moreover, and in a opposite policy, some countries have not created any strategy to deal with the increased flows, leaving all migrants to apply for refugee status, thus overburdening existing systems and regimes. Furthermore, specific situations have amplified the vulnerability of some migrants, such as in the cases of statelessness persons’ protection (from Haiti in the Dominican Republic), undocumented children migration (from the North of Central America and Venezuela) and migration of indigenous persons (from Venezuela).

One can see then that competing and contrasting logics are in play in Latin America, at the time of the 35<sup>th</sup> anniversary of the Cartagena Declaration. It is relevant to point out this scenario so that setbacks are not allowed, and the regime created by the document is not jeopardized. Moreover, recalling the Cartagena Declaration and the regime it has created, as well as how it is a framework of protection that dialogues with others in the region, helps to highlight that there is a grammar of protection in Latin America, with strong normative structures, and if refugees and other migrants are not being adequately protected it is more a result of lack of political will and of political choices than a lack of regimes and traditions of humanitarian action, granting of asylum and refugee protection.

## **Conclusion**

As argued here, the 1984 Cartagena Declaration and its legacy for the protection of refugees in Latin America, which spans from the document itself to the creation of a regional regime as well as impregnates the region with the “spirit of Cartagena”, is more relevant than ever. The lasting impacts of the Document as well as the longevity of a regional commitment to refugee protection should be celebrated, especially in the occasion of its 35<sup>th</sup> anniversary. However, practical challenges remain, particularly in light of new forced displacement flows in the region that bring to light contrasting scenarios for refugee protection in Latin America.

On the one hand, the most positive characteristics of the region that create Latin America’s grammar of refugee protection, are: the long-lasting tradition of asylum; a human rights approach (that can lead to integral protection); the

# The Cartagena Declaration at 35 and Refugee Protection in Latin America

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spirit of Cartagena; and the coexistence of the Cartagena Declaration Regime, the InterAmerican Human Rights system for the protection of refugees and other (forced) migrants, and national regimes that have adopted expanded refugee status definition as well as humanitarian policies and complementary protection alternatives. On the other, however, anti-migrants rhetorics from around the world also reverberate in Latin America, alongside discriminatory and xenophobic behavior, as well as, the adoption of practices and rules that go against international commitments, so as to escape the reach of International Refugee Law (as with *non-refoulement* and adequate Refugee Status Determination procedures) or International Human Rights standards (in the protection of children and against torture and detention, for instance).

It seems, thus, that even though the instruments (normative and otherwise) are in place, the main challenges arise from the lack of political will to implement them. That is why highlighting the relevance of the Cartagena Declaration by celebrating its 35<sup>th</sup> anniversary, can be an important reminder to the region of its commitments to refugee protection, asylum and human rights.

## Notes

[1] See Cartagena Declaration 2<sup>nd</sup> preambular paragraph.

[2] See, for instance, Cartagena Declaration 4<sup>th</sup> and 8<sup>th</sup> preambular paragraphs, as well as its second, third and eighth conclusions.

[3] UNHCR was represented in the Colloquium that adopted the Declaration and is mentioned throughout the document.

[4] By Resolution AG/RES. 774 (XV-O/8S) of 1985, which highlights the importance of the Declaration and recommends that all Member States apply it to refugees in their territory (paragraph 3) . Available at: <<http://scm.oas.org/pdfs/agres/ag03799S01.PDF>>.

[5] See Cartagena Declaration 8<sup>th</sup> preambular paragraph.

[6] For the different wordings adopted by States in incorporating this aspect of the Cartagena Declaration, see: Piovesan and Jubilut (2011)

[7] For even broader possibilities of application of this criterion see Weerasinghe (2018).

[8] For instance, with the 1998 Guiding Principles on Internal Displacement.

[9] The topic was also present in the Cartagena Declaration (conclusion 9).

[10] All of the documents from the Cartagena Declaration regime, as well as the practices of the InterAmerican Human Rights system, national practices in the region, regional schemes for the protection of migrants that can also benefit refugees, as well as the main current displacement flows from the region, are the objects of study of upcoming volume edited by Jubilut, Vera Espinoza and Mezzanotti (forthcoming).

[11] For more on solidarity as a guiding principle of the Cartagena Declaration regime and a legacy from it (as well as the flexibility of sovereignty impose by the Document) see: Jubilut, Apolinário and Jarochinski (2014).

[12] For more on this see the upcoming volume edited by Jubilut, Vera Espinoza and Mezzanotti (forthcoming).

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