

**MODERNISING GROUNDS FOR REFUGEEHOOD IN THE TWENTY-FIRST  
CENTURY: POST-1951 LESSONS FROM THE CARTAGENA DECLARATION AND  
LATIN AMERICA**

*Elena Macomber\**

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\* LLM., Public International Law Candidate at the London School of Economics (LSE); JD., University of Minnesota Law School.

## A. INTRODUCTION

Over the past seven decades, the 1951 Convention Relating to the Status of Refugees<sup>1</sup> has become the primary instrument for determining who constitutes a refugee across multiple jurisdictions globally. Persecution based on an individual's race, religion, nationality, membership in a particular social group, or political opinion provides the main grounds upon which to qualify for asylum. Many scholars refer to the 1951 formulation as the 'traditional' definition of a refugee.<sup>2</sup> While the 1951 Convention's grounds gained the most traction in national legal systems, it would be incorrect to assume that the grounds upon which an individual could claim asylum were fixed in the middle of the twentieth century. Over the past half-century, regional bodies have formulated other bases for refugeehood.<sup>3</sup>

An enduring critique of the 1951 Convention's conceptualisation of refugeehood is its limited recognition of the reasons an individual or community is persecuted.<sup>4</sup> The 1951 Convention is a product of its post-World War II environment, and while it has been essential in protecting many individuals around the world, it has failed to adequately protect those persecuted for reasons other than their intersecting identities.<sup>5</sup> Recognised grounds of protection reflect post-World War II concerns involving fascist European state actors.<sup>6</sup>

This article explores the formulation, development, and implementation of regional asylum frameworks created in the Global South. Two key regional documents expanded the grounds for asylum, which were originally established in the 1951 Convention: the 1969 Organisation of African Unity (OAU) Convention and the 1984 Cartagena Declaration. These regional documents incorporate considerations excluded by Western drafters of the 1951 Convention – namely, external aggression, internal conflicts, and widespread violation of human rights.<sup>7</sup>

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<sup>1</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

<sup>2</sup> Rachel Schmidtke and Daniela Gutiérrez Escobedo, 'Mexico's Use of Differentiated Asylum Procedures: An Innovative Approach to Asylum Processing' (Refugees International, 20 July 2021). <<https://www.refugeesinternational.org/reports-briefs/mexicos-use-of-differentiated-asylum-procedures-an-innovative-approach-to-asylum-processing/>> accessed 18 November 2024.

<sup>3</sup> James C Hathaway, 'The Evolution of Refugee Status in International Law: 1920-1950' (1984) *International and Comparative Law Quarterly* 348; Guy S Goodwin-Gill, 'The Dynamic of International Refugee Law' (2013) 25 *International Journal of Refugee Law* 651.

<sup>4</sup> L W Marshall, 'Toward a New Definition of 'Refugee': Is the 1951 Convention Out of Date?' (2011) 37 *European Journal of Trauma and Emergency Surgery* 61, 65.

<sup>5</sup> B S Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) *Journal of Refugee Studies* 350.

<sup>6</sup> Eduardo Arboleda, 'Refugee Definition in Africa and Latin America: The Lessons of Pragmatism' (1991) 3. *International Journal of Refugee Law* 185; Luiz Leomil, 'Displaced Venezuelans and the Politics of Asylum: The Case of Brazil's Group Recognition Policy' (2022) *Carta Internacional* 1, 2; Marshall (n 4).

<sup>7</sup> Eduardo Arboleda, 'The Cartagena Declaration of 1984 and Its Similarities to the 1969 OAU Convention – A Comparative Perspective' (1995) 7 *International Journal of Refugee Law* 87; Ulrike Krause, 'Colonial Roots of the 1951 Refugee Convention and Its Effects on the Global Refugee Regime' (2021) 24 *Journal of International Relations and Development* 599.

While these conceptualisations are innovative, aspiration has failed to be met by implementation. A notable exception is the application of the Cartagena Declaration to Venezuelan refugees by the governments of Brazil and Mexico in 2018. At least 47,766 Venezuelans in Brazil and 14,000 Venezuelans in Mexico have received asylum on the basis of widespread human rights violations in Venezuela, a ground recognised under the Cartagena Declaration.<sup>8</sup> Although the application of the Declaration in these specific circumstances may ultimately be primarily driven by social and political considerations of the Brazilian and Mexican governments, the grant of asylum to 61,000 people based on a humanitarian crisis – as opposed to identity-based persecution – warrants recognition. Thus, advocates should build upon the recent momentum of the Cartagena Declaration by pushing international bodies and national governments to implement and apply broader bases of asylum established in these regional documents. By extending protection to those experiencing persecution or harm not accounted for in the 1951 Convention, states can begin to modernise asylum to better address twenty-first-century harms.

## B. LEGAL INSTRUMENTS AND FRAMEWORKS

Since 1951, there have been six major legal formulations of grounds for refugeehood. The first and most well-known is the 1951 Convention Relating to the Status of Refugees, which was updated by the 1967 Protocol Relating to the Status of Refugees. The majority of asylum claims around the world are adjudicated through states' incorporation of these instruments into domestic legislation. In addition to these international instruments, more expansive regional frameworks of refugeehood emerged in conventions and agreements from Africa in 1969 and Latin America in 1984.

### (1) 1951 Convention relating to the Status of Refugees and the 1967 Protocol

The grounds contained in the 1951 Convention were developed in response to the horrors of World War II.<sup>9</sup> One of the primary sources of tension in crafting a definition was how broadly to construe the term

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<sup>8</sup> Comitê Nacional para os Refugiados (CONARE), 'Painel interativo de decisões sobre refúgio no Brasil' (*UNHCR and Ministério da justiça e segurança pública*).

<<https://app.powerbi.com/view?r=eyJrIjoizTk3OTdiZjctNGQwOC00Y2FhLTgxYTctNDNlN2ZkNjZmMWVliwidCI6ImU1YzM3OTgxLTY2NjQ0NDZlZjY1NDNkMmFmODBiZSIsImMiOjh9&pageName=ReportSection>> accessed 18 November 2024; Comisión Mexicana de ayuda a refugiados (COMAR), 'Cierre Marzo 2023-1 Abril' (*Gobierno Mexicano*, 1 April 2023) <[https://www.gob.mx/cms/uploads/attachment/file/814283/Cierre\\_Marzo-2023\\_\\_1-Abril\\_.pdf](https://www.gob.mx/cms/uploads/attachment/file/814283/Cierre_Marzo-2023__1-Abril_.pdf)> accessed 18 November 2024; Schmidtko and Gutiérrez Escobedo (n 2).

<sup>9</sup> Vanessa Holzer, 'The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence' in Volker Türk, Alice Edwards, and Cornelis Wouters (eds), *In Flight from Conflict and Violence: UNHCR's*

‘refugee’, and there were two primary schools of thought: the ‘Europeanists’ and the ‘universalists’.<sup>10</sup> Due to concerns about the financial and resource obligations associated with a broad formulation of refugee status, the Europeanists felt the term should be limited geographically to Europe and temporally to events predating 1951.<sup>11</sup> The universalists, by contrast, advocated for an inclusive definition applicable to those in need of protection, regardless of origin or year.<sup>12</sup> A compromise between these groups produced a definition of refugeehood contingent upon persecution linked to events predating 1951.<sup>13</sup>

Therefore, under Article 1(A)(2) of the 1951 Convention Relating to the Status of Refugees, the term ‘refugee’ applies to an individual who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of *race, religion, nationality, membership of a particular social group or political opinion*, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>14</sup>

Article 1(B)(1) further stipulates that states can choose between applying this definition solely to ‘events occurring in Europe before 1 January 1951’ or ‘events occurring in Europe or elsewhere before 1 January 1951’.<sup>15</sup> Thus, the Convention still maintained a European focus even with compromise between negotiating states.

Notably, recognising the continuing and evolving landscape of refugee crises post-World War II, the United Nations adopted the Protocol Relating to the Status of Refugees in 1967.<sup>16</sup> The Protocol modified the Convention, eliminating the temporal and geographic limitations on the definition of a refugee

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Consultations on Refugee Status and Other Forms of International Protection (Cambridge University Press 2017); Otto Kirchheimer, ‘Asylum’ (1959) 53 *American Political Science Review* 985.

<sup>10</sup> Irial Glynn, ‘The Genesis and Development of Article 1 of the 1951 Refugee Convention’, (2012) 25 *Journal of Refugee Studies* 134, 139-140; Holzer (n 9) 69.

<sup>11</sup> Glynn (n 10) 137-139.

<sup>12</sup> *ibid.*

<sup>13</sup> Guy S Goodwin-Gill, ‘International Refugee Law: Where It’s Come and Where It’s Going’, (2017) 45 *International Journal of Legal Information* 24, 27; Glynn (n 10) 139-140; 1951 Convention (n 9) art 1(B)(1).

<sup>14</sup> Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150 (1951 Convention) art 1(A)(2) (emphasis added).

<sup>15</sup> 1951 Convention (n 9) art 1(B)(1).

<sup>16</sup> Joan Fitzpatrick, ‘Revitalizing the 1951 Refugee Convention’ (1996) 9 *Harvard Human Rights Journal* 229; Marshall (n 4) 61-62.

found in Articles 1(A)(2) and 1(B)(1).<sup>17</sup> The 1951 Convention and 1967 Protocol have been widely incorporated into domestic legal systems across the world, with 146 states party to the *1951 Convention* and 147 to the *1967 Protocol*.<sup>18</sup>

One of the principal shortcomings of the 1951 Convention's conceptualisation of refugeehood is its reflection of mid twentieth century Western conceptions of persecution.<sup>19</sup> Entire communities are subjected to violence for reasons unrelated to identity or belief, yet such persecution often falls outside the definitional scope of the *1951 Convention*. Despite the expansion introduced by the *1967 Protocol*, these documents fail to offer protection from widespread persecution by corrupt and repressive governments.<sup>20</sup> Although regional refugee frameworks offer linguistic recognition of broader grounds, the United Nations High Commissioner for Refugees (UNHCR) reports that the vast majority of asylees receive legal protection through the 1951 Convention and not regional agreements.<sup>21</sup>

## **(2) Convention Governing the Specific Aspects of Refugee Problems in Africa**

The 1969 OAU Convention was designed to complement and not replace the 1951 Convention.<sup>22</sup> The document's legislative history can be traced back to growing concerns over ethnic divisions in Rwanda in 1964.<sup>23</sup> As the 1960s progressed, refugee populations began to emerge across the continent, particularly in the Great Lakes region and eastern Africa.<sup>24</sup> Article 1(1) retains the language of the 1951 Convention, although the Convention is not explicitly cited.<sup>25</sup> The 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa enumerates more expansive bases for asylum in Article 1(2) than those listed in the 1951 Convention:

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<sup>17</sup> Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (1967 Protocol) art 1(2).

<sup>18</sup> UNHCR, 'States Parties, Including Reservations and Declarations, to the 1951 Refugee Convention' (UNHCR) <<https://www.unhcr.org/media/38230>> accessed 18 November 2024; UNHCR, 'States Parties, Including Reservations and Declarations, to the 1967 Protocol Relating to the Status of Refugees' (UNHCR), <<https://www.unhcr.org/media/states-parties-including-reservations-and-declarations-1967-protocol-relating-status-refugees>> accessed 18 November 2024.

<sup>19</sup> Krause (n 7).

<sup>20</sup> Catherine Jane Tinker and Laura Madrid Sartoretto, 'New Trends in Migratory and Refugee Law in Brazil: the Expanded Refugee Definition' (2016) 47 *Revista do Direito* 118, 122; Marshall (n 4) 61-62.

<sup>21</sup> Holzer (n 9) 72.

<sup>22</sup> Bonaventure Rutinwa, 'Relationship between the 1951 Refugee Convention and the 1969 OAU Convention on Refugees: A Historical Perspective', in Volker Türk, Alice Edwards and Cornelis Wouters (eds), *In Flight from Conflict and Violence: UNHCR's Consultations on Refugee Status and Other Forms of International Protection* (Cambridge University Press 2017); Arboleda (n 6) 195.

<sup>23</sup> Rutinwa (n 22) 96-97.

<sup>24</sup> *ibid* 98.

<sup>25</sup> OAU Convention (n 22) art 1(1).

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.<sup>26</sup>

From the outset of negotiations, drafters of the OAU Convention sought to expand the bases of refugeehood arguing that the 1951 Convention was overly European in scope.<sup>27</sup> Although the 1967 Protocol amended this language before the 1969 Convention was adopted, negotiations for the 1969 document started in 1964.<sup>28</sup> The inclusion of those persecuted ‘elsewhere’ in provision Article 1 (B)(1) rendered the 1951 Convention’s application in Africa, or anywhere outside of Europe, rather secondary.

The 1951 Convention failed to capture the political and social realities confronting African states in the mid-twentieth century.<sup>29</sup> Challenges stemming from colonialism and decolonisation were not addressed in the 1951 Convention’s grounds of refugeehood – namely repressive foreign governments, systems of apartheid, arbitrarily drawn borders often dividing ethnic, cultural, and tribal groups, struggles for self-determination, and independence.<sup>30</sup> These factors contributed to substantial mass migration in many African countries, creating at least twelve distinct refugee crises on the continent during the 1960s alone.<sup>31</sup> The prolonged and violent colonial experiences of African states directly account for granting asylum based on external aggression, occupation, or foreign domination.<sup>32</sup> Consequently, the broader OAU Convention’s formulation reflected the distinct and complex factors that contributed to forced mass migration in the African context more effectively than the 1951 Convention.<sup>33</sup>

Additionally, the OAU Convention emphasised community-level persecution, as opposed to individual persecution, in assessing refugee status.<sup>34</sup> The 1951 Convention’s emphasis on individual experiences was seen as incapable of reflecting refugee situations in Africa.<sup>35</sup> Thus, the OAU Convention introduced a Refugee Status Determination (RSD) regime wherein the situation of a country is evaluated as

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<sup>26</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 (OAU Convention) art 1(2) (emphasis added).

<sup>27</sup> George Okoth-Obbo, ‘Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa’ (2001) 20 *Refugee Studies Quarterly* 79, 109; Micah Bond Rankin, ‘Extending the Limits or Narrowing the Scope? Deconstructing the OAU Refugee Definition Thirty Years On’ (2005) 21 *South African Journal of Human Rights* 406; Arboleda (n 6) 189; Bond Rankin (n 27).

<sup>28</sup> Rutinwa (n 22) 94.

<sup>29</sup> José H Fischel de Andrade, ‘Regional Policy Approaches and Harmonization: A Latin American Perspective’ (1998) 10 *International Journal of Refugee Law* 389; Rutinwa (n 22) 99.

<sup>30</sup> Okoth-Obbo (n 27) 109; Arboleda (n 6) 190-191; Rutinwa (n 22) 94; Tinker and Madrid Sartoretto (n 20) 125.

<sup>31</sup> Rutinwa (n 22) 98.

<sup>32</sup> Arboleda (n 6) 189.

<sup>33</sup> Krause (n 7); Arboleda (n 6) 195.

<sup>34</sup> Glynn (n 10) 141.

<sup>35</sup> Chimni (n 5); Rutinwa (n 22) 102-103.

the basis for granting asylum, compared to the individual analysis of the 1951 Convention.<sup>36</sup> As such, asylum seekers under the OAU Convention are not required to demonstrate or declare that they fear persecution, as is required under the 1951 Convention, and thousands of people can simultaneously be granted asylum.<sup>37</sup> A similar practice is found in the Cartagena Declaration, discussed later on.<sup>38</sup>

The country-level focus in the OAU Convention alleviates a significant burden for a claimant, as obtaining asylum simply requires proof of one's connections to a particular country instead of evidence of individualised persecution. This conceptualisation more accurately reflects the reality that violence is not always directed at someone because of a unique part of their identity, but because they are a resident in a particular area or are a citizen of a repressive government. Therefore, at least theoretically, more claimants can more efficiently claim and receive asylum under the OAU Convention's refugeehood bases since RSD is not dependent upon individualised scrutiny by adjudicators.<sup>39</sup>

However, despite broadening the 1951 Convention to reflect migration experiences in Africa, the OAU Convention possesses notable shortcomings. Key terms in Article 1(2), such as aggression, occupation, and foreign domination, remain undefined and unexplained in the Convention's *travaux préparatoires*.<sup>40</sup> Such terms are also not clearly defined in international law.<sup>41</sup> Consequently, it is challenging to adjudicate potential claims under the OAU Convention without a common legal understanding of the legal thresholds for aggression, occupation, or foreign domination.<sup>42</sup> These issues contribute in part to what is arguably the most significant shortcoming of the OAU Convention: its limited practical application to grant asylum.<sup>43</sup> While 46 out of the 56 member states of the current African Union have ratified the Convention, many states have yet to incorporate its provisions into domestic legislation.<sup>44</sup> Despite the OAU Convention's innovative language, refugees across Africa face barriers to seeking asylum based on the

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<sup>36</sup> Arboleda (n 6) 189; Rutinwa (n 22) 102-103.

<sup>37</sup> Arboleda (n 6) 194-195; Rutinwa (n 22) 102-103.

<sup>38</sup> Michael Reed-Hurtado, 'The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America', in Volker Türk, Alice Edwards and Cornelis Wouters (eds), *In Flight from Conflict and Violence: UNHCR's Consultations on Refugee Status and Other Forms of International Protection* (Cambridge University Press 2017); Felipe Sánchez Nájera and Luisa Feline Freier, 'The Cartagena Refugee Definition and Nationality-Based Discrimination in Mexican Refugee Status Determination' (2022) 60 *International Migration* 37, 38.

<sup>39</sup> Rutinwa (n 22) 109.

<sup>40</sup> *ibid* 98, 109.

<sup>41</sup> Arboleda (n 6) 195.

<sup>42</sup> Rutinwa (n 22) 110.

<sup>43</sup> Marina Sharpe, 'The 1969 OAU Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in the Context of Individual Refugee Status Determination' (UNHCR, January 2013).

<<https://www.refworld.org/docid/50fd3edb2.html>> accessed 18 November 2024.

<sup>44</sup> *ibid*; UNHCR, 'African Refugee Convention Turns 50 to Warm Welcome' (UNHCR, 11 September 2019)

<<https://www.unhcr.org/africa/news/news-releases/african-refugee-convention-turns-50-warm-welcome#:~:text=UNHCR%2C%20the%20UN%20Refugee%20Agency,the%201951%20UN%20Refugee%20Convention.>> accessed 18 November 2024.

grounds developed to address African concerns.<sup>45</sup> They must instead rely on the 1951 Convention and 1967 Protocol.

While the OAU Convention has limited practical effect in Africa, it nevertheless directly influenced and contributed to the formation of more expansive refugee bases in the Global South.<sup>46</sup> The subsequent 1984 Cartagena Declaration incorporated Article 1(2) of the 1969 Convention into its own definition of refugee status.<sup>47</sup> By formulating broader grounds for asylum to respond to a wider range of humanitarian crises and realities involving mass migration, the OAU Convention established a critical theoretical precedent in international law.<sup>48</sup>

### (3) Cartagena Declaration on Refugees

Latin America has a longstanding history of regional asylum agreements, the earliest dating back to 1889.<sup>49</sup> However, they found themselves confronted with mass migration which started in the 1960s and continued into the 1980s.<sup>50</sup> Although the legacies of colonialism were less immediate in Latin America than they were in Africa, the region experienced pervasive human rights violations and systemic governmental violence in the mid-twentieth century.<sup>51</sup> Mass migration was particularly intense in the Southern Cone region due to state-sponsored disappearances and murders at the hands of repressive dictatorships.<sup>52</sup> This violence resulted in hundreds of thousands of people fleeing across borders.<sup>53</sup> As in Africa, the grounds for refugeehood in the 1951 Convention and the 1967 Protocol failed to offer sufficient bases for protection in the Latin American social and political contexts and proved ill-equipped to adjudicate the massive number of refugee claims on the continent.<sup>54</sup> Thus, the Cartagena Declaration complemented the 1951 Convention but also accounted for the realities of forced migration in Latin America.<sup>55</sup>

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<sup>45</sup> United Nations Treaty Collection, '2. Convention Relating to the Status of Refugees' (United Nations Treaty Collection) <[https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtmsg\\_no=V-2&chapter=5&Temp=mtmsg2&clang=\\_en](https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtmsg_no=V-2&chapter=5&Temp=mtmsg2&clang=_en)> accessed 18 November 2024; United Nations Treaty Collection, '5. Protocol relating to the Status of Refugees' (United Nations Treaty Collection). <[https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg\\_no=V-5&chapter=5#:~:text=4%20October%201967%2C%20in%20accordance%20with%20article%20VIII.&text=United%20Nations%2C%20Treaty%20Series%20%2C%20vol,606%2C%20p.>](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtmsg_no=V-5&chapter=5#:~:text=4%20October%201967%2C%20in%20accordance%20with%20article%20VIII.&text=United%20Nations%2C%20Treaty%20Series%20%2C%20vol,606%2C%20p.>) accessed 18 November 2024; Okoth-Obbo (n 27) 85.

<sup>46</sup> Fischel de Andrade (n 29).

<sup>47</sup> Cartagena Declaration on Refugees, Sec III, art 3, 22 November 1984 (Cartagena Declaration).

<sup>48</sup> Arboleda (n 6) 195.

<sup>49</sup> Arboleda (n 6) 197-198.

<sup>50</sup> *ibid* 199-200.

<sup>51</sup> Luisa Feline Freier and others, 'The Cartagena Refugee Definition and Venezuelan Displacement in Latin America' (2022) 60 *International Migration* 18, 20.

<sup>52</sup> Reed-Hurtado (n 38).

<sup>53</sup> Fischel de Andrade (n 29); Reed-Hurtado (n 38) 147.

<sup>54</sup> Feline Freier and others (n 51) 20; Arboleda (n 6) 194, 203.

<sup>55</sup> Fischel de Andrade (n 29); Feline Freier and others (n 51) 20; Arboleda (n 6) 194.

Section III, Article 3, of the 1984 Cartagena Declaration on Refugees states that a refugee should be defined according to the 1951 Convention, the 1967 Protocol, as well as:

[P]ersons who have fled their country because their lives, safety or freedom have been threatened by *generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.*<sup>56</sup>

This demonstrates that a refugee can be defined according to the criteria listed in the 1951 Convention and 1967 Protocol.<sup>57</sup> In listing the possible bases for asylum, Article 3 states that “in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee... in the light of the situation prevailing in the region.”<sup>58</sup> This Article also invokes the precedent established by the OAU Convention in justifying the Cartagena Declaration’s expanded bases of refugeehood.<sup>59</sup>

While the Cartagena Declaration drew upon the OAU Convention’s language, it introduced distinct legal innovations in its own right.<sup>60</sup> It remains the sole regional refugee instrument to include ‘generalised violence, internal conflicts, and massive human rights violations’ as bases for asylum.<sup>61</sup> Such language exceeds the already expansive protections of the OAU Convention to ‘constitute the most expansive language so far used to define refugees.’<sup>62</sup> The Cartagena Declaration’s expanded conceptualisation not only affirms the regional historical practice of granting asylum but directly addresses the phenomenon of widespread state violence and human rights abuses.<sup>63</sup>

Section III, Article 3 of the Cartagena Declaration also incorporates a group-based process for adjudicating asylum claims, “in contrast to the individualised procedures prescribed by the 1951 Convention.”<sup>64</sup> Like the OAU Convention, the enumerated grounds of protection in the Cartagena Declaration focus on the factors causing swaths of communities to flee a region or country as opposed to the subjective fear of persecution held by an individual due to their identity or beliefs.<sup>65</sup> The group-based

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<sup>56</sup> Cartagena Declaration on Refugees (n 47) arts 3, 22 (emphasis added).

<sup>57</sup> *ibid.*

<sup>58</sup> *ibid.*

<sup>59</sup> José H Fischel de Andrade, ‘The 1984 Cartagena Declaration: A Critical Review of Some Aspects of Its Emergence and Relevance’ (2019) 38 *Refugee Studies Quarterly* 341; Cartagena Declaration (n 47) Sec III, art 3.

<sup>60</sup> Okoth-Obbo (n 26) 85; Reed-Hurtado (n 37) 151.

<sup>61</sup> Arboleda (n 6) 189.

<sup>62</sup> *ibid* 203; OAU Convention (n 22) art 1(1).

<sup>63</sup> Arboleda (n 6) 203.

<sup>64</sup> Feline Freier and others (n 51) 20.

<sup>65</sup> Sánchez Nájera and Feline Freier (n 38) 38; Reed-Hurtado (n 38) 152.

approach enables enhanced procedural efficiency in granting asylum claims because decision-makers are less preoccupied with analysing the personal experiences of an individual.<sup>66</sup> Consequently, this approach inherently lowers the threshold for determining if one is eligible for asylum under the Cartagena Declaration because an individual need only establish that: (1) a threat to their life, security, or liberty exists; and (2) that this threat emanates from generalised violence, foreign aggression, internal conflicts, massive violation of human rights, or other circumstances that seriously disturb public order.<sup>67</sup> These bases are verifiable with knowledge of violence occurring in another state. It should be noted, however, that not all these grounds possess a singular legal understanding under international law, like the grounds listed in the OAU Convention.<sup>68</sup>

Nevertheless, the Cartagena Declaration has yielded more success in granting asylum claims than the OAU Convention, albeit to a lesser extent than under the 1951 Convention. While the Cartagena Declaration is a non-binding instrument, it was signed by seventeen countries in Latin America.<sup>69</sup> Since its creation, scholars have asserted the document has created regional customary international law and *opinio juris* despite its non-obligatory status.<sup>70</sup>

Although the Cartagena Declaration's formulation has been applied to over 60,000 people, most adjudicators in Latin America give greater weight to the 1951 Convention's bases and rarely invoke the Cartagena Declaration.<sup>71</sup> Furthermore, the Declaration's conceptualisation of refugeehood is often only applied to cases where the more restrictive formulation of the 1951 Convention already found to apply – thus depriving the Declaration of its own independent legal significance.<sup>72</sup>

A further obstacle to implementing the Cartagena Declaration is that it has been inconsistently incorporated into the domestic legislation of Latin American states.<sup>73</sup> Of the seventeen signatory states, seven have directly incorporated Section III Article 3 into their asylum laws, six countries used different language to describe the five additional grounds for asylum protection, and three nations did not incorporate the Declaration's language into their laws at all.<sup>74</sup> Such discrepancies prevent the development of uniform jurisprudence, relegating the Declaration to another source of asylum for those countries that desire it instead of rendering it a readily applicable legal basis for asylum across the region.<sup>75</sup> Consequently, between these legal inconsistencies and the fact that only a few states use the Cartagena Declaration's

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<sup>66</sup> Reed-Hurtado (n 38) 152.

<sup>67</sup> 1951 Convention (n 9) art 1(A)(2); Glynn (n 10) 141; Arboleda (n 6) 203.

<sup>68</sup> Rutinwa (n 22) 110.

<sup>69</sup> Arboleda (n 6) 185; Sánchez Nájera and Feline Freier (n 38) 39.

<sup>70</sup> Arboleda (n 6) 185; Feline Freier and others (n 51) 20.

<sup>71</sup> Reed-Hurtado (n 38) 142, 162; CONARE (n 8); COMAR (n 8).

<sup>72</sup> Sánchez Nájera and Feline Freier (n 38) 39.

<sup>73</sup> Feline Freier and others (n 51) 21.

<sup>74</sup> Reed-Hurtado (n 38) 158.

<sup>75</sup> Feline Freier and others (n 51) 26.

formulation in practice, the Declaration derives much of its value from its broad theoretical conceptualisation instead of actual relief for those fleeing perilous situations.<sup>76</sup> Additional shortcomings and procedural challenges associated with the Cartagena Declaration are explored in Sections Three and Four.

### **C. APPLICATION OF THE CARTAGENA DECLARATION IN BRAZIL AND MEXICO**

As explained, despite the regional bases for refugeehood discussed in Section One, few people have managed to receive asylum based on internal conflict or serious disruption of public order. A notable exception is the recent invocation of the Cartagena Declaration in Latin America. Over 60,000 Venezuelans have received asylum in Brazil and Mexico through the ‘massive human rights violations’ ground stipulated in Section III, Article 3 of the Declaration.<sup>77</sup> Section Three of this Article briefly examines the context behind the widespread deterioration of human rights in Venezuela, before analysing Brazilian and Mexican refugee legislation and asylum responses.

#### **(1) Human Rights Situation in Venezuela**

Venezuela operates as a petrostate, where the ultra-powerful government relies upon widespread corruption and oil exports.<sup>78</sup> President Nicolas Maduro, successor to Hugo Chávez, has led the nation with an iron fist since 2013, and is viewed by many as a dictator.<sup>79</sup> Overdependence on oil revenue, falling levels of oil production, a shrinking GDP, and hyperinflation have caused Venezuela’s economy to collapse in the middle of the last decade.<sup>80</sup> The price of living consequently skyrocketed, making it increasingly difficult to obtain food, medicine, and healthcare.<sup>81</sup> Venezuelans first started fleeing the country *en masse* in 2015, with

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<sup>76</sup> Reed-Hurtado (n 38) 142.

<sup>77</sup> Sánchez Nájera and Feline Freier (n 38) 39; Schmidtke and Gutiérrez Escobedo (n 2); COMAR (n 8); CONARE (n 8).

<sup>78</sup> Amelia Cheatham and others, ‘Venezuela: The Rise and Fall of a Petrostate’ (Council on Foreign Relations, 22 December 2023) <<https://www.cfr.org/backgrounder/venezuela-crisis>> accessed 18 November 2024.

<sup>79</sup> Ryan Dube and others, ‘Venezuela’s Maduro, Clinging to Power, Uses Hunger as an Election’ (Wall Street Journal, 22 March 2018) <<https://www.wsj.com/articles/venezuelas-maduro-clinging-to-power-uses-hunger-as-an-electoral-weapon-1521734622>> accessed 18 November 2024; Cheatham and others (n 78).

<sup>80</sup> *ibid.*

<sup>81</sup> Oriana Van Praag, ‘Understanding the Venezuelan Refugee Crisis’ (Wilson Center, 13 September 2019) <<https://www.wilsoncenter.org/article/understanding-the-venezuelan-refugee-crisis>> accessed 18 November 2024.

numbers rising sharply in the following years.<sup>82</sup> As of August 2023, over 7.7 million people have left Venezuela —comprising almost a quarter of the country’s entire 2014 population.<sup>83</sup>

Approximately 230,000 Venezuelans have obtained asylum around the world since 2013, mostly via the 1951 Convention’s political opinion ground.<sup>84</sup> However, in Brazil and Mexico, over 60,000 Venezuelans received asylum through each country’s respective ‘massive human rights violations’ statutory provision: 47,766 in Brazil and 14,000 in Mexico.<sup>85</sup>

## (2) Brazil’s Asylum Regime and Response to the Venezuelan Crisis

Brazil incorporated the Cartagena Declaration into national law in 1997 through the “*Ley brasileña de protección a personas refugiadas*” (Brazilian Law for the Protection of Refugees).<sup>86</sup> Despite developing one of the most progressive asylum systems in Latin America, Brazil’s incorporation of the Declaration varies more than other countries because of its phrasing of the ‘massive violation of human rights’ ground.<sup>87</sup> Brazilian law grants refugee status to those who are forced to leave their country because of ‘*serious and widespread* violations of human rights’ — a higher standard than the one found in the Declaration.<sup>88</sup>

In Brazil, the trier of fact for asylum cases is *CONARE* or the National Committee for Refugees.<sup>89</sup> Created in 1997 by Article 11 of the Brazilian Law for the Protection of Refugees, *CONARE* possesses jurisdiction to rule on asylum applications across the country.<sup>90</sup> Under Article 12 of this law, *CONARE* officials first consider the 1951 Convention and 1967 Protocol as the primary bases for granting asylum

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<sup>82</sup> Leomil (n 6) 10.

<sup>83</sup> UNHCR, ‘Emergency Appeal: Venezuela Situation’ (UNHCR) <<https://www.unhcr.org/emergencies/venezuela-situation>> accessed 18 November 2024; ‘Population, total - Venezuela, RB’ (World Bank) <<https://data.worldbank.org/indicator/SP.POP.TOTL?locations=VE>> accessed 18 November 2024.

<sup>84</sup> ‘Emergency Appeal: Venezuela situation’ (n 83); *CONARE* (n 8).

<sup>85</sup> Sánchez Nájera and Feline Freier (n 38) 39; *CONARE* (n 8); Schmidtke and Gutiérrez Escobedo (n 2); Law N° 9.474 of 22 July 1997, s 1 (Lei N° 9.474 de 22 de Julho de 1997, s 1 (Braz)).

<sup>86</sup> UNHCR, ‘ACNUR felicita a Brasil por reconocer la condición de refugiado a las personas venezolanas con base en la Declaración de Cartagena’ (UNHCR, 29 July 2019) <<https://www.acnur.org/noticias/comunicados-de-prensa/acnur-felicita-brasil-por-reconocer-la-condicion-de-refugiado-las>> accessed 18 November 2024.

<sup>87</sup> Sánchez Nájera and Feline Freier (n 38) 40; Cartagena Declaration (n 47) Sec III, art 3; Reed-Hurtado (n 38) 162.

<sup>88</sup> Law N° 9.474 of 22 July 1997, s 1 (emphasis added).

<sup>89</sup> UNHCR and *CONARE*, ‘O reconhecimento dos refugiados pelo Brasil Decisões comentadas do’ *CONARE*’ (UNHCR and *CONARE*, 11 November 2007). <<https://www.acnur.org/fileadmin/Documentos/Publicaciones/2007/5780.pdf?file=fileadmin/Documentos/Publicaciones/2007/5780>> accessed 18 November 2024.

<sup>90</sup> Natalia Cintra de Oliveira Tavares and Vinicus Pureza Cabral, ‘La Aplicación de la Declaración de Cartagena sobre Refugiados para los Venezolanos en Brasil: un análisis del proceso de la toma de decisiones por el Comité Nacional para los Refugiados’ (2020) 5 *Latin American Law Review* 121, 122; Tinker and Madrid Sartoretto (n 20) 129; Law N° 9.474 of 22 July 1997, s 11.

before considering the Cartagena Declaration.<sup>91</sup> However, the ideological bent of the executive branch highly influences the outcome of *CONARE*'s decisions, which will be explained later.<sup>92</sup>

Brazil first applied its legal incorporation of the Cartagena Declaration in 2019 to 174 Venezuelans — marking the first time a Latin American country utilised this broad regional refugee framework to grant asylum *en masse*.<sup>93</sup> In December 2019, the government introduced a 'simplified application procedure' to adjudicate Venezuelan asylum claims.<sup>94</sup> Under this procedure, the characterisations to receive automatic asylum are as follows: Venezuelans who currently live in Brazil, do not possess any other residence permit in the country, are over 18 years old, possess a Venezuelan identity document, and have no Brazilian criminal record.<sup>95</sup> Through these expedited asylum proceedings, at least 47,766 Venezuelans obtained asylum, making Brazil the country with the highest number of recognised Venezuelan refugees in the world.<sup>96</sup> In fact, these Venezuelan refugees represent 81% of all successful asylum claims in Brazil since 1985.<sup>97</sup>

This 'serious and widespread violations of human rights' provision thus comprises the backbone of granting asylum status in Brazil in recent years.<sup>98</sup> The government reports a 100% grant rate for those who seek asylum based on the 'serious and widespread violations of human rights' provision.<sup>99</sup> Apart from 47,766 Venezuelans, 1,361 Syrians, as well as several dozen Afghans, Malians, Iraqis, and Palestinians obtained asylum in Brazil on this ground.<sup>100</sup> Thus, nearly 50,000 people received asylum in Brazil based on language originating from the Cartagena Declaration, making the 'serious and widespread violations of human rights' ground by far the most common basis for granting asylum in one of the world's largest countries.<sup>101</sup> In contrast, only 1,150 people received asylum in Brazil based on their political opinion, which is the second most common basis upon which asylum is granted.<sup>102</sup> Brazil's grant of asylum to 47,766 Venezuelans is the largest use of regional asylum definitions in history.

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<sup>91</sup> Fischel de Andrade (n 29); Sánchez Nájera and Feline Freier (n 38) 38; Law N° 9.474 of 22 July 1997, s 12.

<sup>92</sup> Cintra de Oliveira Tavares and Vinicius Pureza Cabral (n 90); Leomil (n 6) 12-13.

<sup>93</sup> Liliana Lyra Jubilit and João Carlos Jarochinski Silva, 'Group recognition of Venezuelans in Brazil: An Adequate New Model' (Forced Migration Review, November 2020) <<https://www.fmreview.org/recognising-refugees/jubilit-jarochinskisilva>> accessed 18 November 2024; 'ACNUR felicita a Brasil por reconocer la condición de refugiado a las personas venezolanas con base en la Declaración de Cartagena' (n 86).

<sup>94</sup> Babar Boloch, 'UNHCR Welcomes Brazil's Decision to Recognize Thousands of Venezuelans as Refugees' (UNHCR, 6 December 2019) <<https://www.unhcr.org/us/news/briefing-notes/unhcr-welcomes-brazils-decision-recognize-thousands-venezuelans-refugees>> accessed 18 November 2024.

<sup>95</sup> *ibid.*

<sup>96</sup> Leomil (n 6) 14.

<sup>97</sup> *CONARE* (n 8).

<sup>98</sup> Leiza Brumat and Andrew Geddes, 'Refugee Recognition in Brazil under Bolsonaro: The Domestic Impact of International Norms and Standards' (2023) 44 *Third World Quarterly* 484, 486; *CONARE* (n 8); Cartagena Declaration (n 47) Sec III, art 3; Law N° 9.474 of 22 July 1997, s 1.

<sup>99</sup> *ibid.*

<sup>100</sup> *ibid.*

<sup>101</sup> *ibid.*

<sup>102</sup> *ibid.*

### (3) Mexico's Asylum Regime and Response to the Venezuelan Crisis

In 1990, Mexico became the first country to incorporate the Cartagena Declaration into its national legislation without any modifications and did so a full decade before ratifying the 1951 Convention or the 1967 Protocol.<sup>103</sup> In 2011, Mexico passed the '*Ley sobre refugiados, protección complementaria y asilo político*' ('Law on refugees, complementary protection and political asylum'), which incorporated both the 1951 Convention and Cartagena Declaration grounds of refugeehood, found in Article 13.<sup>104</sup>

The Mexican Government has demonstrated a high level of commitment to adjudicating and granting asylum. With the 1951 Convention and Cartagena Declaration, there are ten total bases upon which one could claim asylum in Mexico, whereas most states possess only five. Furthermore, by adopting the bases for refugeehood established in the Cartagena Declaration, before the 1951 and 1967 formulations, the Mexican Government displayed a high level of commitment to regional cooperation and an expansive understanding of persecution. The executive branch also developed associated administrative regulations and interpretive guidelines to assist in carrying out this law in 2012 — one of the only Latin American countries to do so.<sup>105</sup> Mexico's commitment to asylum is further evidenced by the fact that 1.1 million refugees resided in Mexico in 2022, while only 538,331 resided in the more populous country of Brazil.<sup>106</sup>

The trier of fact for asylum applications in Mexico is *COMAR*, the Mexican Commission for Refugee Assistance, established in 1980 by Presidential Decree.<sup>107</sup> *COMAR* generally first analyses an asylum claim using criteria from the 1951 Convention, and if a claim fails to align with these bases, it proceeds by using the Cartagena Declaration's grounds.<sup>108</sup> Mexico introduced a simplified RSD procedure for cases with highly similar claims and circumstances.<sup>109</sup>

In recent years, Venezuelans have been the primary beneficiaries of Mexican asylum law.<sup>110</sup> Between 2013 and 2023, *COMAR* approved over 96% (23,016 total) of asylum applications made by Venezuelans,

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<sup>103</sup> Schmidtke and Gutiérrez Escobedo (n 2); *COMAR* (n 8); Sánchez Nájera and Feline Freier (n 38) 40; '2. Convention Relating to the Status of Refugees' (n 45); '5. Protocol Relating to the Status of Refugees' (n 45).

<sup>104</sup> Dolores Mayo Lara, 'Legislación en materia de refugiados: consideraciones internacionales y en México' (2023) 4 *LATAM Revista Latinoamericana de Ciencias Sociales y Humanidades* 5192; Sánchez Nájera and Feline Freier (n 38) 40; Schmidtke and Gutiérrez Escobedo (n 2); *Law on Refugees, Complementary Protection and Political Asylum 2022*, s 13 (*Ley sobre refugiados, protección complementaria y asilo político*) (Mex).

<sup>105</sup> Reed-Hurtado (n 38) 160.

<sup>106</sup> UNHCR, Mexico (UNHCR) <<https://reporting.unhcr.org/operational/operations/mexico?year=2022>> accessed 18 November 2024; Brazil (UNHCR) <<https://reporting.unhcr.org/operational/operations/brazil?year=2022>> accessed 18 November 2024.

<sup>107</sup> Comisión Mexicana de ayuda a refugiados (*COMAR*), 'Presencia de los Refugiados Guatemaltecos en México' (*COMAR*) <<https://www.diputados.gob.mx/comisiones/pofroy/reunwash/COMAR.htm>> accessed 18 November 2024; Sánchez Nájera and Feline Freier (n 38) 38.

<sup>108</sup> Schmidtke and Gutiérrez Escobedo (n 2).

<sup>109</sup> *ibid.*

<sup>110</sup> *COMAR* (n 8); Socorro Arzaluz and Gabriela Zamora, 'El refugio y el procedimiento de solicitud de la condición de refugiado en México' (2021) *Transdisciplinar* 33, 35.

compared to 76% of Hondurans (45,228 total) and 66% of Salvadorans (14,392).<sup>111</sup> These three nations comprise the bulk of asylum claims made in Mexico over the past decade.<sup>112</sup> Grants of asylum to Venezuelans included both those made under Mexico's incorporation of the 1951 Convention and the Cartagena Declaration.<sup>113</sup> Over 14,000 Venezuelans have received asylum in Mexico through the grounds devised in the Cartagena Declaration and its use skyrocketed between 2013 and 2016.<sup>114</sup> In 2013, only 3.49% of applicants received asylum based on the Cartagena Declaration's criteria and by 2016, this figure had risen to 89.5%.<sup>115</sup>

Mexico's legal treatment of Venezuelan refugees bears several similarities to the Brazilian response. Most notably, both countries primarily rely on expansive wording originating from the Cartagena Declaration to grant asylum to Venezuelans instead of the 1951 Convention.<sup>116</sup> Additionally, Venezuelans seem to be the primary beneficiaries of asylum under the Cartagena Declaration in both Brazil and Mexico.<sup>117</sup> Lastly, both nations report granting nearly 100% of claims by Venezuelans who apply for asylum via the 'massive human rights violations' provision, or its national equivalent.<sup>118</sup>

Asylum seekers in Mexico have also made claims using other Declaration grounds. Although 90.3% of successful claims fell under the 'massive human rights violations' category, 5.9% of grants fell under the internal conflict ground and 2.7% fell under the generalised violence ground.<sup>119</sup> Individuals who obtained asylum on these other bases came from Colombia, the Ivory Coast, Nigeria, and Ukraine, not Venezuela.<sup>120</sup> Therefore, although *COMAR* has granted asylum under three out of five of the grounds under the Cartagena Declaration, the vast majority of grants fell under the 'massive human rights violations.' Yet, considering that few countries have utilised regional refugeehood formulations in practice, grant rates of 5.9% and 2.7% on these bases are noteworthy.

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<sup>111</sup> *COMAR* (n 8).

<sup>112</sup> Sánchez Nájera and Feline Freier (n 38) 43; *COMAR* (n 8).

<sup>113</sup> Sánchez Nájera and Feline Freier (n 38) 38, 43; Schmidtke and Gutiérrez Escobedo (n 2); *COMAR* (n 8); Law on Refugees, Complementary Protection and Political Asylum 2022, s 13.

<sup>114</sup> Schmidtke and Gutiérrez Escobedo (n 2).

<sup>115</sup> Ibero, 'Declaración de Cartagena en México' (Ibero and Observatorio de Protección Internacional, September 2018) <<https://asiloenmexico.ibero.mx/informes/declaracion-de-cartagena-en-mexico/>> accessed 18 November 2024.

<sup>116</sup> *CONARE* (n 8); *COMAR* (n 8); Sánchez Nájera and Feline Freier (n 38).

<sup>117</sup> *CONARE* (n 8); Schmidtke and Gutiérrez Escobedo (n 2); Sánchez Nájera and Feline Freier (n 38) 44-45.

<sup>118</sup> 'Declaración de Cartagena en México' (n 115) 13; Sánchez Nájera and Feline Freier (n 38) 44; *CONARE* (n 8).

<sup>119</sup> 'Declaración de Cartagena en México' (n 115) 13; Sánchez Nájera and Feline Freier (n 38) 44-45.

<sup>120</sup> *ibid.*

## D. EXPLAINING STATES' WILLINGNESS TO APPLY THE CARTAGENA DECLARATION

There is no singular answer as to why Brazil or Mexico voluntarily chose to use the Cartagena Declaration's bases of refugeehood instead of the 1951 Convention in response to mass flight from Venezuela. Potential explanations include the decisions of individuals engaged in making refugee status determinations, financial and institutional influence of the UNHCR, positive nationality-based discrimination, and international politics. Furthermore, while some factors were likely at play in both countries, there also appear to be specific motivations only applicable in Brazil or Mexico.

### (1) Individual State Officials Making Determinations

One critical factor to consider when examining why states choose to utilise broader bases for refugeehood is that asylum is not granted *en masse* at the executive or legislative level. While thousands of people have received asylum under broader Cartagena-based language, these processes are circumscribed by the resources of state agencies and determinations by individual decision-makers.<sup>121</sup> Researchers have found that an individual asylum officer's subjective perceptions, political calculations, and personal views influence their decision on how to apply the Cartagena Declaration to a particular case, if it is applied at all.<sup>122</sup> This is particularly relevant given that the 1951 Convention's grounds are typically applied before the Cartagena Declaration in Brazilian and Mexican RSD proceedings, and a claim's failure to meet standards under the former may negatively impact how a decision-maker views its success under the latter.<sup>123</sup>

An Argentinian asylum officer spoke to the power individual decision-makers hold in some asylum systems, saying “[w]e 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 out, according to where [you] believe it fits.”<sup>124</sup> Thus, even for countries that have implemented the Cartagena Declaration into national legislation like Brazil and Mexico, the broader bases for asylum can nevertheless be narrowed in practice by individuals. Additionally, multiple researchers have found that decision-makers often lack certainty as to what criteria an applicant or group of applicants must meet to receive protection under enumerated grounds laid out in

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<sup>121</sup> Cintra de Oliveira Tavares and Pureza Cabral (n 90); 121; Reed-Hurtado (n 38) 162.

<sup>122</sup> Sánchez Nájera and Feline Freier (n 38) 48.

<sup>123</sup> Sánchez Nájera and Feline Freier (n 38) 38; Law N° 9.474 of 22 July 1997, s 12; Schmidtke and Gutiérrez Escobedo (n 2).

<sup>124</sup> Reed-Hurtado (n 38) 164.

the Cartagena Declaration.<sup>125</sup> However, the impact of potential biases of individual decision-makers is less strong in the case of Venezuelans in Brazil, as *CONARE* specifically created an accelerated RSD procedure for this group, enabling asylum to be granted to thousands at a time.<sup>126</sup>

## (2) UNHCR Influence

The United Nations High Commissioner for Refugees (UNHCR) is an influential force pushing Latin American governments to apply the Cartagena Declaration to Venezuelans. The UN agency possesses persuasive influence in international politics and has shaped states' responses to refugee crises, particularly in the case of Brazil where it helped draft the 1997 Refugee Act and regularly participates in *CONARE* meetings.<sup>127</sup> In 2010, the UNHCR announced its approval of the Mexican Law on refugees, complementary protection, and political asylum after it was formally passed by the Senate.<sup>128</sup>

The UNHCR first encouraged countries to apply the Cartagena Declaration's grounds for refugeehood to Venezuelans in March 2018, and pushed for this expanded wording to be used as a basis for accelerated asylum processing.<sup>129</sup> In May 2019, the UNHCR stated that it considered the majority of Venezuelans to be 'in need of international protection under the criteria contained in the Cartagena Declaration on the basis of threats to their lives, security or freedom resulting from the events that are currently seriously disturbing public order in Venezuela.'<sup>130</sup> Interestingly, Venezuelans have obtained asylum through the 'massive violations of human rights' provision, not the 'other circumstances which have seriously disturbed public order' provision. The UNHCR also encouraged countries to apply the Declaration to Venezuelan nationals through group-based procedures in December 2019.<sup>131</sup>

Brazil was both internationally praised and financially rewarded for heeding the UNHCR's recommendations. The UNHCR publicly lauded Brazil's decision to accept thousands of Venezuelan

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<sup>125</sup> Sánchez Nájera and Feline Freier (n 38) 48.

<sup>126</sup> Lyra Jubilut and Jarochinski Silva (n 93); Boloch (n 94).

<sup>127</sup> Guy S Goodwin-Gill, 'The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law' (2020) 69 *International and Comparative Law Quarterly* 1; Leomil (n 6) 15.

<sup>128</sup> UNHCR, 'ACNUR expresa satisfacción ante aprobación de Ley sobre Refugiados en México' (UNHCR, 10 December 2010) <<https://www.acnur.org/noticias/historias/acnur-expresa-satisfaccion-ante-aprobacion-de-ley-sobre-refugiados-en-mexico>> accessed 18 November 2024.

<sup>129</sup> UNHCR, 'Guidance Note on the Outflow of Venezuelans' (UNHCR, March 2018) <<https://www.refworld.org/docid/5a9ff3cc4.html>> accessed 18 November 2024.

<sup>130</sup> UNHCR, 'Guidance Note on International Protection Considerations for Venezuelans – Update I' (UNHCR, May 2019) <<https://www.refworld.org/docid/5cd1950f4.html>> accessed 18 November 2024; Sánchez Nájera and Feline Freier (n 38) 46.

<sup>131</sup> Cécile Blouin and others, 'The Spirit of Cartagena? Applying the Extended Refugee Definition to Venezuelans in Latin America' (Forced Migration Review, February 2020) <<https://www.fmreview.org/cities/blouin-berganza-freier>> accessed 18 November 2024.

asylum seekers under the Cartagena Declaration, with the regional UNHCR office proclaiming the 1997 refugee law as ‘one of the most advanced’ of its kind in 2022.<sup>132</sup> The UNHCR’s regional funding platform also allocated an additional \$82.2 million to Brazil between 2019 and 2020 for its acceptance of thousands of Venezuelan refugees.<sup>133</sup> Therefore, the organisational and financial influence of the UNHCR likely played a leading role in Brazil’s response to the humanitarian crisis in Venezuela. In recent years, the UNHCR does not appear to be as publicly involved with the Mexican government regarding Venezuelan refugee claims.<sup>134</sup>

### **(3) Nationality-based Discrimination**

One of the most apparent trends gleaned from the application of the Cartagena Declaration in Brazil and Mexico is that it has almost been exclusively applied to Venezuelan nationals. Despite the UNHCR publicly stating that the Cartagena Declaration could be applied to other groups, like those fleeing gang violence, Brazil and Mexico have sparingly provided asylum to other nationalities under provisions formulated by the Cartagena Declaration, even for other Latin Americans.<sup>135</sup> Central American countries, namely El Salvador, Honduras, and Nicaragua, experience widespread violence and instability but nationals from Central America have not been offered the same level of protection as Venezuelans.<sup>136</sup>

A study of Venezuelan, Honduran, and Salvadoran asylum seekers in Mexico revealed that 68% of Hondurans and 76% of Salvadorans reported direct threats to their lives, while only 52% of Venezuelans reported experiencing such persecution.<sup>137</sup> However, 38% of Venezuelans cited economic concerns as their main motivation for leaving the country, while only 3% of Hondurans and 0% of Salvadorans cited economic factors motivating their decision to flee.<sup>138</sup> As stated earlier, in Mexico, Honduran and Salvadoran asylum seekers had average grant rates of 76% and 66% respectively, while Venezuelans had a grant rate of 96%.<sup>139</sup> Thus, while more Central Americans in this study reported fleeing dangerous situations than

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<sup>132</sup> André de Carvalho Ramos and others, ‘70 Anos da Convenção relativa ao Estatuto dos Refugiados - (1951-2021)’ (UNHCR, 2022) <<https://www.acnur.org/portugues/wp-content/uploads/2021/12/70-anos-projeto-WEB.pdf>> accessed 18 November 2024; Tinker and Madrid Sartoretto (n 20) 127-128.

<sup>133</sup> Leomil (n 6) 16.

<sup>134</sup> Eduardo Arboleda, ‘El ACNUR, las migraciones internacionales y el derecho de asilo y refugio’ (1994) 44 *Revista Mexicana de Política Exterior* 144.

<sup>135</sup> Blouin and others (n 131); Sánchez Nájera and Feline Freier (n 38) 40, 48.

<sup>136</sup> Sánchez Nájera and Feline Freier (n 38) 45.

<sup>137</sup> *ibid.*

<sup>138</sup> *ibid.*

<sup>139</sup> COMAR (n 8).

Venezuelans, such factors did not lead to higher grants of asylum. These numbers suggest that nationality is more determinative of receiving asylum in Mexico than claims of persecution.

Scholars have posited multiple theories as to why Venezuelans as a national group are broadly favoured in asylum proceedings, while Salvadorans and Hondurans enjoy less success.<sup>140</sup> One possibility is that Venezuelans constitute a recent group seeking protection abroad, as most Venezuelans only started fleeing in the past few years.<sup>141</sup> Venezuelans thus may not yet have exhausted their welcome in host countries.<sup>142</sup> Another possibility is that Venezuelans are associated with ‘more favourable socio-racial characteristics’ than Central Americans.<sup>143</sup> Thus, despite the geographic proximity and shared cultural heritage between Mexico, Honduras, and El Salvador, Venezuelans may be seen as more ‘deserving’ or ‘worthy’ of asylum by some Mexican decision-makers. In Brazil, it is harder to elucidate nationality-based outcomes because Venezuela borders the country, and few Central Americans have applied for asylum there.<sup>144</sup>

#### (4) International Relations and Politics

However, what is likely the most decisive factor in the Brazilian and Mexican government’s decision to grant asylum *en masse* to Venezuelans are international political considerations. Granting asylum to thousands of another country’s nationals is a bold political statement—a state is implying that they are potentially willing to provide a permanent path to residency based on the perceived failure of another state to sufficiently protect its own people.<sup>145</sup> By granting asylum to at least 61,000 people owing to a finding of a ‘massive violation of human rights’, the Brazilian and Mexican governments are sending a message that they view the Venezuelan government as an enabler of or contributor to systemic human rights crises.<sup>146</sup> While such political considerations were not intended to be a factor in adjudicating asylum claims in 1984, it seems to be an unavoidable reality.<sup>147</sup>

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<sup>140</sup> *ibid.*

<sup>141</sup> Sánchez Nájera and Feline Freier (n 38) 48.

<sup>142</sup> Luciana Gandini and others, “Aprender a ser migrante: Bondades y tensiones que enfrenta la comunidad venezolana en México”, in Luciana Gandini and others (eds), *Crisis y migración de población venezolana: Entre la desprotección y la seguridad jurídica en Latinoamérica* (Universidad Nacional Autónoma de México 2019).

<sup>143</sup> Sánchez Nájera and Feline Freier (n 38) 48.

<sup>144</sup> CONARE (n 8).

<sup>145</sup> Fiona Adamson and Gerasimos Tsourapas, ‘Migration as Diplomacy in World Politics’ (2018) 19 *International Studies Perspectives* 1.

<sup>146</sup> Isabel Berganza Setién and others, ‘El elemento situacional de violación masiva de derechos humanos de la definición ampliada de Cartagena : hacia una aplicación en el caso venezolano’ (2020) 47 *Revista Chilena de Derecho* 385; Reed-Hurtado (n 38) 164; Leomil (n 6) 14.

<sup>147</sup> Reed-Hurtado (n 38) 164.

The leadership of the Brazilian and Mexican governments therefore presumably granted asylum to thousands of foreign nationals to signal its condemnation of the Venezuelan socialist government, either to win political points domestically and/or to align themselves with other foreign governments that oppose the Venezuelan state. Both scenarios are equally likely regarding the Brazilian government. Relations between Venezuela and Brazil were poor after President Maduro came to power and sank to an all-time low when right-wing President Jair Bolsonaro took office in 2019.<sup>148</sup>

The Bolsonaro administration publicly called Maduro a dictator, questioned the stability of the country's rule of law, and sought to delegitimize the Venezuelan government in international arenas.<sup>149</sup> The administration also selected agency leaders for *CONARE* who would not be concerned about further harming relations between Brazil and Venezuela.<sup>150</sup> Most notably, Brazil's mass acceptance of Venezuelan refugees directly coincided with President Bolsonaro's rise to power in 2019. In 2018, Brazil accepted three Venezuelan refugees and in 2019 this number jumped to 20,696.<sup>151</sup> Therefore, the Bolsonaro administration inferably sought to score political points at home and align itself with the Trump administration, which was also highly critical of the Venezuelan government.<sup>152</sup>

Academics have argued that former Mexican President Enrique Peña Nieto enabled the mass grant of asylum to Venezuelans to send a critical message to the Maduro government and align himself with U.S. interests.<sup>153</sup> However, while the Mexican Government and its recent leaders have been periodically critical of President Maduro and the Venezuelan government, there is far less public political animosity between Mexico and Venezuela compared to Brazil and Venezuela.<sup>154</sup> Additionally, unlike Brazil's rapid increase in accepting refugees in 2019 coinciding with the start of President Bolsonaro's term, Mexico has consistently accepted Venezuelan refugees during centrist Peña Nieto's administration and the more left-wing López Obrador administration.<sup>155</sup> In other words, once Mexico's more liberal President came to power in 2018, the number of accepted Venezuelan asylum seekers did not drastically decrease as a signal of Mexico's alignment with the left-wing Venezuelan government. Ultimately, given the unprecedented number of asylum claims granted under the Cartagena Declaration by Brazil and Mexico, these governments were likely driven primarily by political self-interest, rather than an altruistic desire to help the Venezuelan people.<sup>156</sup>

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<sup>148</sup> Leomil (n 6) 12.

<sup>149</sup> *ibid.*

<sup>150</sup> *ibid.* 13.

<sup>151</sup> *CONARE* (n 8).

<sup>152</sup> Leomil (n 6) 14.

<sup>153</sup> Sánchez Nájera and Feline Freier (n 38) 48.

<sup>154</sup> Genaro Lozano, 'How to Understand Mexico's Lonely Stance on Venezuela' (*Americas Quarterly*, 13 February 2019) <<https://www.americasquarterly.org/article/how-to-understand-mexicos-lonely-stance-on-venezuela/>> accessed 18 November 2024.

<sup>155</sup> *COMAR* (n 8).

<sup>156</sup> Leomil (n 6) 14; Adamson and Tsourapas (n 145) 1.

## E. APPLYING THE CARTAGENA DECLARATION TO OTHER HUMANITARIAN CRISES

Before precedent or guidance can be extrapolated from the applications of the Cartagena Declaration's bases for refugeehood, two considerations must be kept in mind. First, it is crucial to remember that administrative bodies like *CONARE* and *COMAR* enjoy fluctuating amounts of resources and independence over time.<sup>157</sup> Brazil and Mexico have been led by multiple Presidents and administrations since the Venezuelan economy collapsed. Therefore, a state's decision to apply a broader understanding of refugeehood will largely be determined by the administration leading a country. Secondly, even though over 60,000 people received asylum through language originating from the Cartagena Declaration, this does not automatically create legal precedent.<sup>158</sup> Between the varied legislation across Latin American countries, individual decision-making authority, and political considerations, there is no requirement that Brazil, Mexico, or any other country utilise the Cartagena Declaration's grounds in the future.<sup>159</sup> However, despite these caveats, valuable inferences can be drawn by advocates hoping to apply the broader formulation to other circumstances.

The 'massive human rights violations' provision under the Cartagena Declaration is thus far from the only successful vehicle for employing more expansive bases of refugeehood anywhere in the world. Other innovative grounds for asylum originating in the Global South, like occupation, are not yet actionable. Regarding other bases for asylum found in the Cartagena Declaration, the lack of application of 'foreign aggression' as grounds for asylum in the past forty years is not surprising in the Latin American context. However, although not legally defined, the ground 'circumstances which have seriously disturbed public order' also seem to coincide with the Venezuelan context given widespread instability and the inaccessibility of food and medicine. This begs the question as to whether advocates can push for asylum on this ground, as well as for other individuals and communities in similarly situated circumstances.

Looking ahead, there are three likely conditions that must be satisfied before wider application of the Cartagena Declaration can be considered. First, countries need to incorporate all grounds in the Declaration into national legislation. Cuba, Panama, the Dominican Republic, and Venezuela have not introduced the Cartagena Declaration into national legislation at all.<sup>160</sup> Secondly, advocates should lobby the UNHCR and its regional offices to explicitly state that governments should apply the Cartagena Declaration because of a serious human rights situation. The UNHCR was a persuasive player in pushing

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<sup>157</sup> Reed-Hurtado (n 38) 162.

<sup>158</sup> *ibid*; Sánchez Nájera and Feline Freier (n 38) 48.

<sup>159</sup> Luisa Feline Freier and Cristián Doña-Reveco, 'Introduction: Latin American Political and Policy Responses to Venezuelan Displacement' (2022) 60 *International Migration* 9; Reed-Hurtado (n 38) 162.

<sup>160</sup> Blouin and others (n 131).

Brazil to use the Cartagena Declaration in response to the Venezuela crisis.<sup>161</sup> Finally, national governments need a strong reason to grant asylum outside of the traditional 1951 Convention's bases, and as the case of Brazil and Mexico demonstrate, this reason will almost certainly be political and not purely altruistic. Therefore, advocates should pay attention to and take advantage of geopolitical strife if a certain administration would be receptive to granting individuals relief from persecution to send a political message.

Furthermore, regarding international relations, it is presumably less politically costly for a state to grant asylum based on systemic human rights violations than on a deterioration of public order. Granting asylum is an implicit recognition by one nation that another country cannot adequately protect its own people.<sup>162</sup> The disruption of public order implies that such deteriorative effects are felt at all levels of society, whereas massive human rights violations could still be directed against a select group. Thus, while relations between states could deteriorate because of mass asylum grants based on a finding of massive human rights violations, such deterioration would potentially be less severe than recognizing that another country lacks widespread public order. Consequently, the most crucial step advocates can take when seeking to use a regional document to help more claimants gain asylum is to think politically and act strategically.

There is no guarantee that a situation like that of Venezuela, Brazil, and Mexico will ever be replicated in the future. Nevertheless, given that Brazil and Mexico responded in similar ways to the Venezuelan crisis, it does not seem improbable that these states could respond similarly in the future. This could subsequently encourage other countries in Latin America to follow suit and begin the creation of regional customary law. Of course, in Africa, states would need to take unprecedented steps to facilitate the OAU Convention's use in practice. Although these regional conceptualisations have existed for decades, the Cartagena Declaration was not extensively used in practice even ten years ago. Therefore, it is conceivable that the invocation of the Cartagena Declaration in Latin America could continue to proliferate and inspire other nations in the Global South to follow suit.

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<sup>161</sup> 'ACNUR felicita a Brasil por reconocer la condición de refugiado a las personas venezolanas con base en la Declaración de Cartagena' (n 86).

<sup>162</sup> Reed-Hurtado (n 38) 164; Leomil (n 6) 14.

## F. CONCLUSION

As the last century has shown, the legal grounds for refugeehood are far from fixed. They demonstrably continue to evolve to account for new bases of persecution and human rights imperatives. While the 1969 OAU Convention and the 1984 Cartagena Declaration have not gained as much global traction as the 1951 Convention, their broadened encapsulations of refugeehood offer substantial aspirational value. These regional formulations not only entail broader bases upon which to pursue asylum but were designed in response to harm emanating from historical experiences not accounted for in the 1951 Convention.<sup>163</sup> The persecution of thousands of individuals, notably from countries in the Global South, cannot always be directly connected to race, religion, nationality, membership in a particular social group, or political opinion. Such individuals may not be eligible for relief based on Western, post-World War II conceptions of persecution. Yet, these people could obtain legal relief for fleeing harms associated with foreign occupation and internal conflicts if the option is available.

Furthermore, although these regional documents have been applied sparingly, their application in Brazil and Mexico nevertheless provides a template for advocates to replicate in the future. The supposed 100% success rate of the 61,000 Venezuelan asylees who received protection in Brazil and Mexico account for 0.2% of Venezuela's total 2014 population—which should not be discounted.<sup>164</sup> While exact replication of this success to other communities or populations is unlikely, advocates should nevertheless look to the factors that influenced the successful application of the Cartagena Declaration for Venezuelans and attempt to apply them in their own jurisdictions. Advocates should not discount the power that the UNHCR and international politics can wield in major crises.

Law is not stagnant. It slowly but surely evolves, building upon mistakes of the past. The OAU Convention and the Cartagena Declaration have already laid theoretical foundations for the legal advancement of the 1951 Convention. Advocates and receptive governments should utilise the recent momentum of the Cartagena Declaration's application to begin modernising asylum law and firmly establish more bases for protection in the twenty-first century.

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<sup>163</sup> Fischel de Andrade (n 29).

<sup>164</sup> 'Declaración de Cartagena en México' (n 115) 13; Sánchez Nájera and Feline Freier (n 38) 44; CONARE (n 8); 'Population, Total - Venezuela, RB' (n 83).