

**PRINCIPLES AND CRITERIA FOR THE PROTECTION  
OF AND ASSISTANCE TO CENTRAL AMERICAN REFUGEES,  
RETURNEES AND DISPLACED PERSONS IN LATIN AMERICA**

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**Preface**

1. This document was prepared by the Group of Experts for the International Conference on Central American Refugees pursuant to specific objective {a) in paragraph 3 of the San Salvador Communiqué on Central American Refugees of 9 September 1988. According to this objective the conference is to ‘assess the progress achieved in respect of the principles underlying the protection of and assistance to refugees and their voluntary repatriation with a view to encouraging their dissemination and application’.

2. In order to facilitate the work of the Conference in relation to the above-named objective, the Group has sought to identify the basic set of principles and criteria by which States are guided in their treatment of refugees, among which solutions to the problems of refugees may also be found. The Group has also referred extensively to the sources of the various principles and criteria, indicating by means of footnotes the documents in which they are contained. These are mainly treaties or conventions of international or regional scope, resolutions or decisions of international inter-governmental conferences or documents prepared by experts and organizations, to mention only a few examples. In the context of an assessment, these notes are of particular importance, as the character of these principles and criteria of international law varies according to the source from which they derive.

3. Account was taken of the comments on the first version of the document that were made by the Governments concerned which participated in the second meeting of the Preparatory Committee held in Antigua, Guatemala. It will, however, be noted that some of these document at comments have not been dealt with in the present document. These include references to the need further to clarify the scope of the definition of the term “refugee” contained in the Cartagena Declaration and the guarantees and rights of returnees, as well as the desirability of assessing the manner in which countries apply, internally, international rules relating to refugees. The Group believes that these comments merit special attention which cannot be devoted to them in the framework of this study.

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4. It will be noted that the document refers not only to principles and criteria for the protection of and assistance to refugees, but also to principles and criteria relating to the returnees and displaced persons, since the International Conference will also be concerned with solving the problems of these categories of persons. Even though considerable progress has been made in recent years in respect of these additional categories, much still remains to be done. In particular, the Group shares the view, reflected in some of the comments of Governments, that it is necessary to reach a clearer and more specific understanding of the concept of 'displaced person.'

5. The Group of Experts presents this document in the hope that it may be useful for the purposes of consultation and guidance. It hopes that the contents of the document may provide material for the dissemination action referred to in its final chapter.

## 1. Introduction

6. The States which decided to convoke the Conference on the Central American Refugees have identified as one of its specific objectives to 'assess the progress achieved in respect of the principles underlying the protection of and assistance to refugees and their voluntary repatriation, with a view to encouraging their dissemination and application'.<sup>1</sup> These very principles are contained in the Cartagena Declaration on Refugees<sup>2</sup> and have been further complemented through the practice of the States concerned and of international organizations. Taken together, they not only give guidance to States for the treatment of refugees but also constitute a framework within which solutions to the problems of refugees can be identified. It is the purpose of the present document to describe this framework through the evolution of applicable legal norms and practices in order to permit its evaluation. In this manner, it is hoped that the document will be used for the purposes of consultation and orientation.

7. The development and diversification of conflicts in a number of Central American States in the late 1970s have led to the forced displacement of large segments of populations. As of that moment, the region witnessed a massive displacement of persons who, because of the violence, abandoned their homes and in many instances their countries of origin<sup>3</sup>. Hundreds of thousands of people fled to neighbouring countries in search of protection and assistance and some travelled onwards to other States. This unprecedented phenomenon of displacement of Central Americans constituted a serious challenge, primarily to the Central American States themselves, including Belize and Mexico.

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<sup>1</sup> San Salvador Communiqué on the Central American Refugees of 9 September 1988, U.N. doc. A/AC.96/XXXIX/CRP.2.

<sup>2</sup> The Cartagena Declaration on Refugees, hereinafter referred to as Cartagena Declaration, published as pamphlet by UNHCR; also contained in *La Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios*, Universidad Nacional de Colombia, pp. 332 et seq.; part III, containing conclusions, is also reproduced in Annual Report of InterAmerican Commission on Human Rights 1984-1985, OEA/Ser.L/V/II.66, doc. 10, rev. 1, pp. 190-193.

<sup>3</sup> Annual Report of the Inter-American Commission on Human Rights of 1980-81: OEA/Ser.L/V/II.54, doc. 9, p. 127; 1981-82: OEA/Ser.L/V/II.57, doc. 6, rev. 1, pp. 134 et seq.; 1982-83: OEA/Ser.L/V/II/ X/63, doc. 10, pp. 136, and 146; and 1984-85: OEA/Ser.L/V/II.66, doc. 10, rev. 1, pp. 177 et seq.

8. Whether displaced externally as refugees, or internally, the persons concerned had mostly been forced to abandon their houses at a moment's notice and flee through areas of conflict. Consequently, their needs in terms of protection and assistance were acute. At the same time, their entry into and presence in neighbouring States had profound effects upon those societies particularly in the social, economic and political spheres. Although the refugees were assisted by the international community, the receiving States found their resources being stretched to meet the demands for subsistence of the additional populations.

9. Responding to the demands created by this unprecedented situation, the countries concerned initiated a process of identification and implementation of humanitarian measures for the protection and assistance of the refugees. This process was advanced further with the holding of a Colloquium<sup>4</sup> in Cartagena, Colombia in November 1984, where the Cartagena Declaration on Refugees,<sup>5</sup> which contains a set of principles and criteria for the protection of and assistance to refugees, was adopted.

10. Latin American States have, of course, a long tradition of providing humanitarian treatment to persons seeking protection and asylum. A century ago, the Treaty of International Penal Law<sup>6</sup> was signed in Montevideo on 23 January 1889 on the occasion of the first South American Congress on Private International Law. It contains the first provision on asylum in international treaty law, with a stipulation (Article 16) to the effect that 'asylum for persons persecuted for political crimes is inviolable'. Since then a number of additional treaties have been concluded in the region which deal with issues relating to the right to asylum.

11. These initiatives of Latin American States to regulate asylum matters at the international level were eventually followed by the adoption by States in 1951 of the United Nations Convention relating to the Status of Refugees<sup>7</sup> which, together with the 1967 Protocol relating to the Status of Refugees,<sup>8</sup> constitute the only universal instruments on refugee protection. There are to date 105 State parties to one or both of these international instruments, 16 of which are Latin American States.

12. Whether regional or universal, all these instruments have as common denominator that of being geared primarily to the needs of individuals for protection. Although they remain of fundamental importance for refugee protection worldwide, the large-scale displacement of victims of armed conflicts or similar events points to the need to develop complementary norms for their protection and assistance.

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<sup>4</sup> *International Protection of Refugees in Central America, Mexico and Panama: Juridical and Humanitarian Problems.*

<sup>5</sup> Op. cit., above, note 2.

<sup>6</sup> OAS Official Records, OEA/Ser.X/1. Treaty Series 34.

<sup>7</sup> 189 UNTS 137 (No. 2545), hereinafter referred to as the 1951 Refugee Convention.

<sup>8</sup> 606 UNTS 267 (No. 8791), hereinafter referred to as the 1967 Protocol; this instrument extends the definition contained in the 1951 Convention to include persons who had sought refuge as a result of events which had occurred after 1 January 1951.

13. The phenomenon of masses of people crossing international boundaries in search of protection was first witnessed on the African continent during the decolonization period. It led to the adoption by African States in 1969 of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>9</sup> This Convention represents the first effort by States to complement the universal refugee instruments with provisions for the protection and assistance of refugees in a particular region and, in that sense, serves as inspiration for the Cartagena Declaration. In particular, this Convention extends the refugee definition in the African context to include also a person who, 'owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of the country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.'<sup>10</sup>

14. A similar evolution in Central America led to the adoption of the Cartagena Declaration. Although not a legally binding instrument for States, it is nevertheless of fundamental importance as it reflects consensus on particular principles and criteria and has guided States in their treatment of refugees for the last five years. In fact, the Declaration revitalizes the tradition of asylum in Latin America while aiming at consolidating a regional custom for the treatment of refugees, returnees and displaced persons.<sup>11</sup> In addition, it has acquired added prestige through different pronouncements of recognition and support by the United Nations General Assembly,<sup>12</sup> the General Assembly of the Organization of American States,<sup>13</sup> the Inter-American Commission on Human Rights,<sup>14</sup> the Andean Parliament<sup>15</sup> the European Parliament,<sup>16</sup> and the Executive Committee of the Programme of the United Nations High Commissioner for Refugees.<sup>17</sup>

15. The Central American refugee problem, whether viewed from the point of view of the individuals and their need for protection and assistance, or the receiving State, is inextricably linked to both the history of and the current situation in the region. Indeed, political, social and economic developments influence the phenomenon of displacement and vice versa. Similarly, the legal norms for the treatment of the refugees are inter-related with and dependent on social and economic realities. Massive flows of refugees might not only affect the domestic order and

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<sup>9</sup> 1001 UNTS 45 (No. 14691), hereinafter referred to as the OAU Convention.

<sup>10</sup> Ibid., article 1(2); this Convention also contains other complementary provisions, notably in the areas of asylum and voluntary repatriation.

<sup>11</sup> *Report of the Advisory Group on Possible Solutions to the Problems of the Central American Refugees*, (Geneva, 25-27 May 1987), p. 2, para. 4.2.

<sup>12</sup> UNGA res. 42/110, A/42/808.

<sup>13</sup> OAS res. AG/Res. 891 (XVII-87), AG/doc. 2370/88.

<sup>14</sup> *Annual Report of the Inter-American Commission on Human Rights 1984-85*: OEA/Ser.L/V/II.66, doc. 10, rev. 1, pp. 177 et seq.

<sup>15</sup> Decision No. 173/VI of 16 Mar. 1987.

<sup>16</sup> Council of Europe, Parliamentary Assembly 1987, Report on Migration Flows concerning Latin America, para. 18 C(ii): CE A/doi. 5718.R.

<sup>17</sup> UNHCR Executive Committee Conclusion No. 37 (XXXVI) on Central American Refugees and the Cartagena Declaration.

stability of receiving States, but may also have an impact on the political and social stability and development of entire regions, and thus endanger international peace and security.<sup>18</sup>

16. The solution to the problems of displacement constitutes therefore an important component of the peace process in the region, something which peace efforts in the region have always taken into account.<sup>19</sup> Hence, the Procedure for the Establishment of a Firm and Lasting Peace in Central America - Esquipulas II - dedicates one chapter to the need to protect and assist refugees and displaced persons as well as to their voluntary repatriation.<sup>20</sup>

## 2. Applicable legal norms and practice

17. Under international law, treaties constitute the principal sources of obligations which are binding upon the States which have adhered to them in accordance with their constitutional procedures. At the universal level, the 1951 Refugee Convention<sup>21</sup> and its 1967 Protocol<sup>22</sup> apply particularly to refugees. In addition, the principles and rules concerning the basic human rights of the individual benefit refugees and returnees, as well as displaced persons since these apply to all individuals on the territory of a State. Thus it is important in the refugee protection field to highlight the International Covenant on Civil and Political Rights,<sup>23</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>24</sup> Similarly, international humanitarian law relating to armed conflicts provides important guidance for the protection of refugees, returnees and displaced persons when these are located in areas of international or non-international armed conflicts. The relevant instruments include the four Geneva Conventions of 1949<sup>25</sup> and the two Additional Protocols of 1977.<sup>26</sup>

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<sup>18</sup> UNGA res. 36/148; *International Co-operation to Avert New Flows of Refugees, Note by the UN Secretary General*: UN doc. A/41/324, para. 4.

<sup>19</sup> See, for example, the *Contadora Act on Peace and Co-operation in Central America*, hereinafter referred to as *Comadora Act*, and its chapter dealing with refugees which is reproduced in *La Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios*, Universidad Nacional de Colombia, pp. 333 et seq., part II, as well as the Acapulco Commitment for Peace, Development and Democracy.

<sup>20</sup> Procedure for the Establishment of a Firm and Lasting Peace in Central America, signed at Guatemala City, 7 Aug. 1987: UN doc. A/42/521-5/19085, Annex, para. 8.

<sup>21</sup> See above, note 7.

<sup>22</sup> See above, note 8.

<sup>23</sup> Hereinafter referred to as the 1966 Covenant on Civil and Political Rights; Annex to UNGA res. 2200A (XXI), 16 Dec. 1966.

<sup>24</sup> Hereinafter referred to as the 1966 Covenant on Economic and Social Rights; Annex to UNGA res. 2200A (XXI), 16 Dec. 1966.

<sup>25</sup> 75 UNTS 31, 85, 135, 287.

<sup>26</sup> 1125 UNTS 12 (No. 17512); 1125 UNTS 609 (No. 17513).

18. At the regional level, a large number of treaties are of direct importance to refugees, returnees and displaced persons. These include, first of all, the American Convention on Human Rights<sup>27</sup> the so-called Pact of San Jose, and the Treaty on International Penal Law signed in Montevideo on 22 January 1889,<sup>28</sup> the Convention on Asylum signed in Havana on 20 February 1928,<sup>29</sup> the Convention on Political Asylum signed in Montevideo on 26 December 1933,<sup>30</sup> the Treaty on Asylum and Political Refuge signed in Montevideo on 4 August 1939,<sup>31</sup> the Treaty on International Penal Law signed in Montevideo on 19 March 1940,<sup>32</sup> the Convention on Territorial Asylum<sup>33</sup> and the Convention on Diplomatic Asylum,<sup>34</sup> both signed in Caracas on 28 March 1954 and the Inter-American Convention on Extradition signed in Caracas on 25 February 1981.<sup>35</sup>

19. While international treaties constitute the principal source of international law, many other bases exist which provide guidance to States and international organizations for identifying and interpreting legal principles and criteria. In the refugee context, and still at the universal level, these include the United Nations Universal Declaration of Human Rights,<sup>36</sup> the Statute of the Office of the United Nations High Commissioner for Refugees (UNHCR),<sup>37</sup> the United Nations Declaration on Territorial Asylum<sup>38</sup> and the General Assembly Resolution on Assistance to Refugees, Returnees and Displaced Persons from Central America<sup>39</sup> to mention but some of the more salient examples. Furthermore, there exist similarly relevant resolutions of the United Nations General Assembly, the Economic and Social Council (ECOSOC) and decisions as well as conclusions of the Executive Committee (EXCOM) of the High Commissioner's Programme.

20. In Latin America, the American Declaration on the Rights and Duties of Man,<sup>40</sup> resolutions of the Organization of American States, reports of the Inter-American Commission on Human Rights and judgements and advisory opinions of the Inter-American Court of Human Rights<sup>41</sup>

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<sup>27</sup> OAS Official Records, OEA/Ser.K/XVI/1.1.

<sup>28</sup> See above, note 6.

<sup>29</sup> OAS Official Records, OEA/Ser.X/1. Treaty Series 34.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> UNGA res. 217 A(III), 10 Dec. 1948.

<sup>37</sup> Annex to UNGA res. 428(V), 14 Dec. 1950.

<sup>38</sup> UNGA res. 2312(XXII), 14 Dec. 1967.

<sup>39</sup> UNGA res. 42/110

<sup>40</sup> Reproduced in Brownlie, I., ed., *Basic Documents on Human Rights* (2nd ed., 1981), 381-387.

<sup>41</sup> See for example Inter-American Court on Human Rights, Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6), American Convention on Human Rights), Advisory Opinion OC-8/ 87, 30 Jan. 1987; Series A, No. 8.

provide an additional set of principles and criteria on matters relating to human rights and refugees protection. For example, successive resolutions of the OAS General Assembly have dealt with the issue of refugees, returnees and displaced persons<sup>42</sup> as did, amongst others, the 1984-85 Annual Report of the Inter-American Commission on Human Rights.<sup>43</sup>

21. Moreover, the practice of the States in the region confirms many of the principles and criteria applied for the protection of and assistance to refugees, returnees and displaced persons. This is particularly true in the area of the voluntary return of refugees where several initiatives have been taken. Some of these have been formalized through especially constituted so-called tri-partite commissions, comprising representatives from the countries of origin and asylum and UNHCR. In another instance, the mechanism is bilateral with UNHCR participation in an advisory capacity. On the other hand, constitutional provisions, national laws and administrative regulations other respective States confirm the efforts to provide protection and assistance to refugees, returnees and displaced persons.<sup>44</sup>

### **3. The refugee instruments and internal application**

22. In accordance with international law, every treaty in force is binding upon the parties to it and must be performed in good faith,<sup>45</sup> and a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.<sup>46</sup> In addition, the principle that international legal norms, including refugee law, which are contained in universal and regional treaties, are directly applicable in national legal systems and part of the internal law is acknowledged as a general rule in Latin America. This principle is expressly reflected in the constitutions of the great majority of the countries most directly affected by the Central American refugees.<sup>47</sup>

23. The universal character and importance of the 1951 Refugee Convention and its Protocol and the need for further States to adhere to these instruments has repeatedly been recognized.<sup>48</sup>

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<sup>42</sup> OAS General Assembly resolutions AG/RES.774 (XV - 0/85), AG/Res. 838 (XVI-0/86), AG/Res. 891 (XVII -0/87); see also the 1988 resolution contained in document OEA/Ser. P AG/ doc. 2370/88.

<sup>43</sup> OEA/Ser.L/V/II.66, doc. 10, rev. 1, pp. 190-193.

<sup>44</sup> Only the constitutions, national laws and regulations of Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Mexico are referred to.

<sup>45</sup> Art. 26, 1969 Vienna Convention on the Law of Treaties.

<sup>46</sup> *Ibid.*, art. 27.

<sup>47</sup> Constitution of Costa Rica, art. 7; Constitution of Guatemala, art. 46; Constitution of Honduras, art. 16; Constitution of Mexico, art. 133; Constitution of El Salvador, art. 144.

<sup>48</sup> Statute of the Office of UNHCR, Chapter II, para. 8(a); Memorandum of the Secretary General to the *Ad Hoc* Committee on Statelessness and Related Problems of Refugees and Stateless Persons, 3 Jan. 1950: UN doc. E/AC.32/2, p. 2; UNGA resolutions 428 (V), 1959 (XVIII), 2294(XXII), 2594 (XXIV), 2650(XXV), 32/67, 33/26, 34/60, 37/195, 38/121, 39/140, 40/118, 41/124, 42/109; UNHCR Executive Committee Conclusions No. 4 (XXVIII) on International Instruments; No. 8 (XXVIII) on Determination of Refugee Status; No. 11 (XXIX) on International Protection; No. 14 (XXX) on International Protection; No. 16 (XXXI) on International Protection; No. 21 (XXXII) on International Protection; No. 25 (XXXIII) on International Protection; No. 29 (XXXIV) on International Protection; No. 33 (XXXV) on International Protection; No. 36 (XXXVI) on International Protection; No. 41 (XXXVII) on International Protection; No.

Similarly, the importance of establishing procedures for the determination of refugee status under the international instruments, has also been reiterated.<sup>49</sup> The call for accession to universal and regional treaties extends beyond the 1951 Refugee Convention and its 1967 Protocol and includes also the main human rights instruments which have a direct bearing upon the protection and assistance to refugees, returnees and displaced persons.<sup>50</sup> These principles and criteria have been recognized and reaffirmed in the Cartagena Declaration.<sup>51</sup>

## **4. The concept of refugee**

### **4.1 Universal definition**

24. The universal refugee definition is contained in Article 1 A(2) of the 1951 Refugee Convention, which includes as refugees persons who have a 'well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion'.<sup>52</sup> Detailed guidance as to how to interpret this definition is contained in the Handbook on Procedures and Criteria for Determining Refugee Status issued by UNHCR at the request of States.<sup>53</sup>

### **4.2 Regional definition**

25. Recognizing the particular characteristics of the flow of displaced persons in the region, the Cartagena Declaration extends the notion of refugee to include, apart from those covered by the universal refugee concept, also other externally displaced persons who are in need of protection and assistance. Consequently, the Declaration also considers as refugees persons 'who have fled their country because their lives, security or liberty have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order'.<sup>54</sup>

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42 (XXXVII) on Accession to International Instruments and their Implementation; No. 43 (XXXV II), Geneva Declaration on the 1951 Refugee Convention and the 1967 Protocol; No. 46 (XXXVIII) on International Protection; No. 50 (XXXIX) on International Protection; UNHCR, *Note on Accession to International Instruments and the Detention of Refugees and Asylum-seekers*: UNHCR doc. EC/SCP/44, 19 Aug. 1986, pp. 1-6.

<sup>49</sup> UNHCR Executive Committee Conclusions No. 8 (XXVIII) on Determination of Refugee Status; No. 28 (XXXIII) on Follow-up on Earlier Conclusions of the Sub-Committee of the Whole on International Protection on the Determination of Refugee Status, inter alia, with Reference to the Role of UNHCR in National Refugee Status Determination Procedures.

<sup>50</sup> OAS General Assembly res. AG/Res. 110(III-0/73).

<sup>51</sup> Cartagena Declaration, part III. 1 and 2.

<sup>52</sup> See above, note 7.

<sup>53</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, UNHCR doc. HCR/IP/4/Eng., Geneva, 1979.

<sup>54</sup> *Cartagena Declaration*, part III.3. Cf. Memorandum of Understanding between the Government of Honduras and UNHCR Regulating the Treatment of Refugees, hereinafter, Memorandum of Understanding between Honduras and UNHCR, art. 2 (1).



26. The regional refugee concept contained in the Cartagena Declaration calls for examining the objective situation in the country of origin and the particular situation of the individual or group of persons who seek protection and assistance as refugees. This definition calls for the affected persons to fulfill two characteristics: on the one hand, that a threat to the life, security or liberty is in existence and, on the other hand, that this threat results from one of the five grounds listed in the text. These grounds were purposely written in a broad and encompassing manner to ensure that persons who are clearly in need of international protection can also be protected and assisted as refugees.

### **4.3 Protected rights**

27. The Cartagena Declaration takes the individual's need for international protection and, in particular, the need to protect the physical integrity of the person as the starting point for developing the refugee definition; it is the right to life, security and liberty of a person including the right not to be subjected to arbitrary arrest or detention<sup>55</sup> or to torture<sup>56</sup> as defined in international law which are the protected rights. Consequently, the first of the two characteristics of the Cartagena Declaration's extended refugee definition is met when in a particular instant there is a threat to any one of these rights.

### **4.4 Humanitarian law grounds**

28. Four of the five grounds included in the Cartagena Declaration's regional refugee concept, i.e. generalized violence, foreign aggression, internal conflicts and other circumstances which have seriously disturbed public order, reflect the fact that the conflicts faced by several of the Central American States are at the origin of much of the external displacement which has taken place in the region. These four grounds should better be understood in light of international humanitarian law provisions relating to armed conflicts which categorizes several situations involving different levels of violence.

29. First of all, international armed conflicts covered by the Geneva Conventions and Protocol I involve all cases of declared war or of any other armed conflict which may arise between two or more parties, even if the state of war is not recognized by one of them.<sup>57</sup> An armed conflict

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<sup>55</sup> Arts. 3 and 9, 1948 Universal Declaration of Human Rights; arts. I and XXV, 1948 American Declaration on the Rights and Duties of Man; arts. 6, 9, 10 and 11, 1966 Covenant on Civil and Political Rights; arts. 4, 7, 1969 American Convention on Human Rights.

<sup>56</sup> Report of the Inter-American Commission on Human Rights, 1986-87, p.304, art.5, 1969 American Convention on Human Rights.

<sup>57</sup> Common art. 2 to the Geneva Conventions of 1949. Article 1.4 of Protocol I also includes as international armed conflicts those armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination, as contained in the Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

includes any difference arising between two States which leads to the intervention of members of the armed forces of one or both of the States.<sup>58</sup>

30. Secondly, Article 3 common to the Geneva Conventions of 1949, and Additional Protocol II, deal with non-international armed conflicts. Additional Protocol II, without modifying the existing conditions and applications of Common Article 3, defines these as all armed conflicts, which are not covered by Article I of Additional Protocol I and 'which take place in the territory of "State party" between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.<sup>59</sup>

31. A third situation involves violence not of a nature to constitute an armed conflict. This includes situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.<sup>60</sup>

32. Turning to the four humanitarian law grounds enumerated in the Cartagena Declaration, it is clear that 'generalized violence' involves armed conflicts as defined in international humanitarian law, whether it takes place in an international or non-international conflict. To be generalized, the violence must be regular, general and sustained. In other words, internal disturbances and tensions, as defined in Additional Protocol II but excluded from its field of application, do not amount to generalized violence.<sup>61</sup> As regards 'foreign aggression', the United Nations General Assembly has defined this concept<sup>62</sup> as including the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner

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<sup>58</sup> ICRC, *Commentary on the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC Geneva, 1958, p. 20.

<sup>59</sup> Additional Protocol II to the Geneva Conventions, art. 1.1.

<sup>60</sup> Ibid. art. 1.2. The ICRC Commentary to Protocol II, ICRC Geneva, 1987, p. 1355, describes internal disturbances as 'situations in which there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order. The high number of victims has made necessary the application of a minimum of humanitarian rules'. Internal tensions include 'in particular, situations of serious tension (political, religious, racial, social, economic, etc.), but also the sequels of armed conflict or of internal disturbances. Such situations have one or more of the following characteristics, if not all at the same time: large scale arrests; a large number of 'political' prisoners; the probable existence of ill-treatment or inhumane conditions of detention; the suspension of fundamental judicial guarantees, either as part of the promulgation of a state of emergency or simply as a matter of fact; allegations of disappearances. In short, as stated above, there are internal disturbances, without being an armed conflict, when the State uses armed force to maintain order; there are internal tensions, without being internal disturbances, when force is used as a preventive measure to maintain respect for law and order.'

<sup>61</sup> Ibid.

<sup>62</sup> UNGA res. 3314(XXIX), 14 Dec. 1974.

inconsistent with the Charter of the United Nations, as set out in this definition.<sup>63</sup> ‘Internal conflicts’ can be taken to correspond to non-international armed conflicts covered by Article 3, common to the Geneva Conventions and Additional Protocol II.

33. Finally, ‘other circumstances which have seriously disturbed public order’, must be man-made and cannot constitute natural disasters. They may, however, amount to no more than situations of internal disturbance and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature<sup>64</sup>, as long as they seriously disturb public order.<sup>65</sup>

#### **4.5 Human rights ground**

34. The fifth ground included in the Cartagena Declaration refers to massive violations of human rights. This ground can be considered fulfilled when violations are carried out on a large scale and affect the human rights and fundamental freedoms as defined in the Universal Declaration of Human Rights and other relevant instruments. In particular, the denial of civil, political, economic, social and cultural rights in a gross and consistent pattern<sup>66</sup> can be considered to constitute massive violations of human rights which include those which are subject to Resolution 1503.<sup>67</sup>

#### **4.6 Civilian character of the refugee concept**

35. The refugee concept contained in the Cartagena Declaration, like other definitions, is predicated on the assumption that the persons concerned are civilians. Refugees, both in the ordinary and legal sense, means persons not taking part in the hostilities. To be a refugee, it is a *sine qua non* that the persons concerned are civilians. In other words, combatants, whether

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<sup>63</sup> Ibid. annex. Article 3 enumerates the following acts, regardless of a declaration of war, as qualifying as aggression: ‘the invasion or attack by the armed forces of a State of the territory of another State, military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof; bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State; the blockade of the ports or coasts of a State by the armed forces of another State; an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State; the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; the sending by or on behalf of a State of armed bands, groups, irregular or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.’

<sup>64</sup> See above, note 60.

<sup>65</sup> For more extensive discussion on the concept of public order, see also the *travaux préparatoires* of the 1951 Refugee Convention: UN doc.A/CONF.2/SR.14, pp. 18 et seq.

<sup>66</sup> *International Cooperation to Avert New Flows of Refugees, Note by the UN Secretary General*: UN doc. A/41/324, para. 35.

<sup>67</sup> ECOSOC res. 1503 (XLVIII) establishes a special procedure for instances which reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.

members of regular armies or irregular forces, are not refugees.<sup>68</sup> Other persons, such as former combatants, may however be considered as refugees should they fulfill the criteria of the definition.

#### 4.7 Special categories

36. A particular group of persons who may need international protection as refugees consists of draft evaders and deserters from mandatory military service. Normally, such persons do not qualify for refugee status in accordance with the 1951 Refugee Convention.<sup>69</sup> Nevertheless, they may qualify as refugees if they can show that the performance of military service would require them to participate in military action contrary to their genuine political, religious or moral convictions or to valid reasons of conscience,<sup>70</sup> or where the type of military action with which they do not wish to be associated is condemned by the international community as contrary to basic rules of human conduct.<sup>71</sup> This exception may, however, normally not be invoked when the country in question exempts such persons from mandatory military service or offers them an alternative activity.<sup>72</sup>

37. Persons who leave their country or their place of habitual residence for personal reasons, either to work or to improve their living conditions, known as economic migrants,<sup>73</sup> do not generally fulfill the criteria for refugee status. According to the definition of the Cartagena Declaration, adverse economic conditions are not normally of a nature to constitute a threat to the life, security and liberty of the individual. On the other hand, economic measures affecting a person's livelihood may, in a particular instance, be of such severity as to amount to persecution if they are motivated by political, racial, or religious aims or intentions directed against a particular group in which case the affected persons may well be refugees.<sup>74</sup>

38. Economic migrants should not be confused with victims of natural disasters. These victims do not qualify as refugees, unless special circumstances arise which are closely linked to the refugee definition.

39. Externally displaced persons constitute a fourth special category which is composed of individuals who are outside their country and have no legal status or documents authorizing them to stay. In general, they have been obliged to leave their country for reasons that are not clearly

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<sup>68</sup> See also OAU Convention, preambular para. 4; UNHCR Executive Committee Conclusion No.48 (XXXVIII) on Military and Armed Attacks on Refugee Camps and Settlements; Declaration by the Attorney General of Costa Rica on 5 June 1985.

<sup>69</sup> See above, note 53, para. 168.

<sup>70</sup> Ibid., para. 170.

<sup>71</sup> Ibid., para. 171.

<sup>72</sup> Ibid., para. 173.

<sup>73</sup> Cf. definition of 'economic migrant' contained in report of meeting in Guatemala of Advisory Group on possible Solutions to Central American Refugee Problems, Annex 1.

<sup>74</sup> See above, note 53, paras 62-64.

defined, among which reasons of an economic nature are mixed with the non-immediate consequences of conflicts and widespread violence.<sup>75</sup>

40. Finally, special mention should be made of those persons who, while meeting the criteria of the refugee concept, have not been identified and therefore not been formally granted refugee status. Such individuals are considered as refugees given the declaratory and *non constitutive* nature of the decision to grant refugee status.<sup>76</sup> These persons find themselves in a particularly precarious situation and deserve special attention by the international community.

#### **4.8 Persons not deserving international protection as refugees**

41. Persons who have committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime outside the country of refuge prior to admission or who are guilty of acts contrary to the purposes and principles of the United Nations<sup>77</sup> fall into this category and are therefore denied refugee status.<sup>78</sup> These dispositions are of particular importance when considering claims to refugee status by former combatants. In case they have committed atrocious acts or other grave violations of human rights, their request for refugee status will be denied.<sup>79</sup> As regards mercenaries,<sup>80</sup> they are also denied refugee status since their activities are ‘contrary to fundamental principles of international law’, as determined by the United Nations General Assembly.<sup>81</sup>

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<sup>75</sup> Cf. definition of ‘externally displaced persons’ contained in report of meeting in Guatemala of Advisory Group on Possible Solutions to Central American Refugee Problems, Annex 1.

<sup>76</sup> See above, note 11, para. 4.6 and 4.7; see also para. 47 below.

<sup>77</sup> Art. 1 F, 1951 Refugee Convention; Statute of the Office of the United Nations High Commissioner for Refugees, Chapter II, para. 7(d); see also art. I(5), 1969 OAU Convention.

<sup>78</sup> Ibid.

<sup>79</sup> See above, note 53, paras. 175-180.

<sup>80</sup> Defined as ‘a person who is especially recruited locally or abroad in order to fight in an armed conflict, does in fact take a direct part in the hostilities, is motivated to take part in the hostilities essentially by the desire of private gain and, in fact, is promised by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party, is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict, is not a member of the armed forces of a party to the conflict and has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.’ See art. 1, Second Revised Consolidated Negotiations Basis of a Convention Against the Recruitment, Use, Financing and Training of Mercenaries, Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries: UN doc. Supp. No. 43(A/43/43). See also Additional Protocol I to the Geneva Convention of 1949, art. 47.

<sup>81</sup> UNGA res. Res. 43/107. See also the Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation, *Report on the Question of the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-Determination*, submitted by the Special Rapporteur: UN doc. E/CN.4/1988/14.

## 5. Asylum and protection standards

### 5.1 The nature of the grant of asylum

42. It is a universally-accepted principle that the grant of asylum as well as the recognition of refugee status have a peaceful, non-political and exclusively humanitarian nature. No aspect of these acts shall be interpreted as unfriendly towards the country of origin of the refugees. These same principles are reflected in several instruments and legal material, including the Cartagena Declaration.<sup>82</sup>

43. These principles are complemented by the criteria which call upon States to do everything within their power to prevent a refugee problem from becoming a source of tension between States.<sup>83</sup> Some instruments go further and call upon States to prohibit refugees from performing acts contrary to the public peace.<sup>84</sup>

44. It follows from the above principles that the work of the Office: of the United Nations High Commissioner for Refugees shall be of an entirely non-political character and that it shall be humanitarian and social.<sup>85</sup> Similarly, these principles dictate that the treatment of refugees and the search for solutions to their problems should take place on a purely humanitarian and non-political basis.<sup>86</sup>

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<sup>82</sup> United Nations Declaration on Territorial Asylum, contained in UNGA res. 2312 (XXIII), 10 Dec. 1967, preambular para. 4 and art. 1.1; 1969 OAU Convention, art. 11.2; UNHCR Executive Committee Conclusion No. 48 (XXXVII) on Military and Armed Attacks on Refugee Camps and Settlements; Cartagena Declaration, part III. 4, Cf. Constitution of Costa Rica, art. 31, General Law on Migration and Aliens (Costa Rica), art. 36; Constitution of El Salvador, art. 5; Law on Migrations (El Salvador), art. 8; Regulations relating to the Law on Migration (El Salvador), art. 27; Constitution of Guatemala art. 27; Law on Migration and Aliens (Guatemala), arts. 22 and 23; Constitution of Honduras, art. 101; Law on Population and Migratory Policy (Honduras), art. 73(4); Memorandum of Understanding between Honduras and UNHCR, preambular paras. 1, 2 and 5; Constitution of Nicaragua, art. 42; Law on Immigration (Nicaragua), art. 34; Constitution of Mexico, art. 15; General Law on Population (Mexico), art. 42, Regulation relating to the General Law on Population (Mexico), art. 101.

<sup>83</sup> 1951 Refugee Convention, preambular para. 5; art. III (1), 1969 OAU Convention.

<sup>84</sup> Art 2(5), 1928 Havana Convention on Asylum, 20 Feb. 1928; See also art. 11, 1939 Montevideo Treaty on Asylum and Political Refuge, 4 Aug. 1939 - to prevent refugees from committing within its territory acts which may endanger the public peace of the country of origin; art. 4, 1967 United Nations Declaration on Territorial Asylum - not to permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations; art. III (2), 1969 OAU Convention - to prohibit refugees from attacking member States of the OAU, by any activity likely to cause tension between member States, and in particular by the use of arms, through the press, or by radio; art. 8, 1954 Caracas Convention on Territorial Asylum, 28 Mar. 1954 - to restrict the freedom of assembly or association of refugees when such assembly or association has as its purpose to foment the use of force or violence against the country of origin.

<sup>85</sup> Statute of the Office of the United Nations High Commissioner for Refugees, Chapter I, para. 2.

<sup>86</sup> See above, note 1, para. 2.

## 5.2. The principle of *non-refoulement*

45. The principle of *non-refoulement* constitutes the cornerstone of the international system for the protection of refugees and is the most fundamental of refugee rights. It signifies being protected from expulsion or return in any manner whatsoever to the frontiers of territories where the refugee's life or freedom would be threatened.<sup>87</sup> This principle, which is fully recognized in the Cartagena Declaration, extends beyond expulsion and return and also applies to measures such as rejection at the frontier.<sup>88</sup> Moreover, it applies not only to persons who have a well-founded fear of persecution in the sense of the 1951 Refugee Convention, but also to those who fall under the regional refugee concept contained in the Cartagena Declaration.<sup>89</sup>

46. The American Convention on Human Rights is of particular importance in the region for protecting refugees from refoulement. Going beyond the traditional statement of the *non-refoulement* principle, it holds that 'in no case may an alien be, deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions'.<sup>90</sup>

47. The application of the principle of *non-refoulement* is independent of any formal determination of refugee status by a State or all international organization<sup>91</sup> and is considered by many as a peremptory rule of international law,<sup>92</sup> In other words, *non-refoulement* as a fundamental principle of refugee protection is applicable as soon as certain objective conditions

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<sup>87</sup> Art. 33, 1951 Refugee Convention; art. 22(8), 1969 American Convention on Human Rights; art II (3), 1969 OAU Convention; art. 3(1), 1967 United Nations Declaration on Territorial Asylum; UNGA resolutions 32/67, 33/26, 34/60, 35/41, 36/125, 37/195, 38/121, 39/140, 40/118, 41/124, 42/109; UNHCR Executive Committee Conclusions No. 6 (XXVIII) on Non-Refoulement, No. 17 (XXXI) on Problems of Extradition Affecting Refugees; No. 19 (XXXI) on Temporary Refuge; No. 22 (XXXII) on Protection of Asylum-Seekers in Situations of Large-Scale Influx; No.25 (XXXIII) on International Protection; Constitution of Costa Rica, art. 31; Law on Migration and Aliens (Guatemala), art. 26; Constitution of Honduras, art. 101; Constitution of Nicaragua, art. 42; Law on Aliens (Nicaragua), art. 31. Cf. Constitution of Mexico, art. 15; Memorandum of Understanding between Honduras and UNHCR, art. 2(2).

<sup>88</sup> *Cartagena Declaration*; part III.5; see also art. II (3), 1969 OAU Convention; art. 3(1), 1967 United Nations Declaration on Territorial Asylum; UNHCR Executive Committee Conclusions No. 6 (XXVIII) on Non-Refoulement; No.21 (XXXII) on International Protection; No. 22 (XXXII) on Protection of Asylum-Seekers in Situations of Large-Scale Influx; Regulations on Migration of 1947 (Guatemala), art. 21; Law on Migration (Nicaragua), art. 31. Cf. Regulation relating to General Law on Population (Mexico), art. 101 (1).

<sup>89</sup> *Cartagena Declaration*, part III.3 and 5; art. II (5), 1969 OAU Convention; UNHCR Executive Committee Conclusion No. 22 (XXXII) on the Protection of Asylum-Seekers in Situations of Large Scale Influx.

<sup>90</sup> Art. 22(8), 1969 American Convention on Human Rights.

<sup>91</sup> *Report of the United Nations High Commissioner for Refugees*; UNGAOR, Fortieth Session, Supp. No. 12 (A/40/12), paras. 22-23; *Report of the Twenty-eighth Session of the High Commissioner's Programme*, para. 53(4) (c): UN doc. A/AC.96/549 (1977).

<sup>92</sup> UNHCR Executive Committee Conclusion No. 25 (XXXII) on International Protection; UNHCR, *Note on International Protection*: UN doc. A/AC.96/713, para. 3.

occur. Thus, also those persons who, while meeting the criteria of the refugee concept, have not been identified and therefore not formally granted refugee status, are also protected by the *non-refoulement* principle.

### 5.3 Minimum standards of treatment for refugees

48. The 1951 Refugee Convention and its 1967 Protocol provide standards of treatment for refugees as defined in these instruments, which are recommended for application also to other categories of refugees.<sup>93</sup> Moreover, there is a broader and direct relationship between the observance of human rights standards and protection problems.<sup>94</sup> States should therefore ensure that their treatment of refugees conforms to existing international law and humanitarian principles and practice.<sup>95</sup>

49. It is a fundamental principle of international law that the principles and rules concerning basic human rights of the individual, are obligations owed by States to the international community at large.<sup>96</sup> These are rights from which no derogation is permitted, even in times of exceptional circumstances. They benefit everyone as a result of which also refugees, returnees and displaced persons should benefit from such non-derogatory human rights as the right to protection from the arbitrary deprivation of life,<sup>97</sup> and against torture or cruel or inhuman treatment or punishment,<sup>98</sup>

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<sup>93</sup> Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, recommendation E.

<sup>94</sup> UNHCR Executive Committee Conclusion No. 50 (XXXIX) on International Protection, para. (b); see also 1951 Refugee Convention, preambular para. 1; 1969 OAU Convention, preambular para. 6.

<sup>95</sup> UNHCR Executive Committee Conclusion No. 50 (XXXIX) on International Protection, para. (c). Minimum humanitarian standards are also contained in art. 3 common to the Geneva Conventions of 1949, which states that persons taking no active part in the hostilities 'shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples'.

<sup>96</sup> United States Diplomatic and Consular Staff in Tehran, Request for the Indication of Provisional Measures, I.C.J. Rep., 1979, p. 7. Cf. UNGA resolutions 31/86 (XXXI), 32/66 (XXXII), 33/51 (XXXIII), 34/45 (XXXIV), 35/132 (XXXV), 36/58 (XXXVI), 37/191 (XXXVI), 38/116 (XXXVIII) and 36/136 (XXXIX).

<sup>97</sup> Art. 3, 1948 Universal Declaration of Human Rights; art. 1, 1948 American Declaration of the Rights and Duties of Man; art. 6, 1966 Covenant on Civil and Political Rights; art. 4, 1969 American Convention on Human Rights.

<sup>98</sup> Art. 3, 1948 Universal Declaration of Human Rights; arts. 25, 26, 1948 American Declaration of the Rights and Duties of Man; arts. 7, 10(1), 1966 Covenant on Civil and Political Rights; art. 5(2), 1969 American Convention on Human Rights; art. 2, 1984 UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.



the rights not to be subjected to slavery or servitude,<sup>99</sup> or to retroactive criminal penalties,<sup>100</sup> the rights to recognition as a person before the law<sup>101</sup> and to freedom of thought, conscience and religion<sup>102</sup> and the right to be protected from discrimination.<sup>103</sup> Additional non-derogatory rights are included in the American Convention on Human Rights such as protection of the family, the rights of the child, the right to a nationality, political rights and the right to judicial guarantees.<sup>104</sup>

50. The Cartagena Declaration underlines the importance of the countries in the region establishing minimum standards of treatment for refugees, on the basis of the provisions of the 1951 Refugee Convention and its 1967 Protocol and of the American Convention on Human Rights.<sup>105</sup> It calls on the States parties to this latter instrument to apply it in dealing with *asilados* and refugees who are in their territories.<sup>106</sup> Furthermore, it recognizes the validity of the Conclusions of the Executive Committee of the High Commissioner's Programme, and in particular its Conclusion No. 22 on the Protection of Asylum Seekers in Situations of Large Scale Influx.<sup>107</sup> Complementing the non-derogatory human rights, these Conclusions identify, inter alia, a set of minimum basic standards which should benefit refugees and asylum-seekers.

51. Amongst these minimum basic standards, the Conclusion identifies the principle that refugees should enjoy the fundamental civil rights internationally recognized, in particular those set out in the Universal Declaration of Human Rights.<sup>108</sup> It also points out that they should not be discriminated against on the grounds of race, religion, political opinion, nationality, country of origin or physical incapacity,<sup>109</sup> and should not be penalized or exposed to any unfavorable

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<sup>99</sup> Art. 4, 1948 Universal Declaration of Human Rights; art. 34, 1948 American Declaration of the Rights and Duties of Man; art. 8, 1966 Covenant on Civil and Political Rights; art. 6, 1969 American Convention on Human Rights.

<sup>100</sup> Art. 11(2), 1948 Universal Declaration of Human Rights; art. 15, 1966 Covenant on Civil and Political Rights; art. 9, 1969 American Convention on Human Rights.

<sup>101</sup> Art. 6, 1948 Universal Declaration of Human Rights; art. 17, 1948 American Declaration of the Rights and Duties of Man; art. 16, 1966 Covenant on Civil and Political Rights; art. 3, 1969 American Convention on Human Rights.

<sup>102</sup> Art. 18, 1948 universal Declaration of Human Rights; art. 3, 1948 American Declaration of the Rights and Duties of Man art. 18, 1966 Covenant on Civil and Political Rights; art. 12, 1969 American Convention on Human Rights.

<sup>103</sup> Arts. 2, 7, 1948 Universal Declaration of Human Rights; art. 11, 1948; American Declaration of the Rights and Duties of Man: arts. 2, 3, 26, 1966 Covenant on Civil and Political Rights; arts. 2, 3, 1966 Covenant on Economic and Social Rights: art. 1, 1969 American Convention on Human Rights

<sup>104</sup> Arts. 17, 20, 23, 1969 American Convention on Human Rights

<sup>105</sup> Cartagena Declaration. part III.8.

<sup>106</sup> *Ibid.*, Part III.10.

<sup>107</sup> *Ibid.*, Part III.8.

<sup>108</sup> UNHCR Executive Committee Conclusion No, 22 (XXXII) on the Protection of Asylum-Seekers in Situations of Large-Scale Influx, chapter II, para. B 2(b).

<sup>109</sup> *Ibid.*, chapter 11, para. B 2(c); arts,2, 7, 1948 Universal Declaration of Human Rights; art. 11, 1948 American Declaration on the Rights and Duties of Man; arts. 2(1), 3, 26, 1966 Covenant on Civil and

treatment solely on the ground that their presence in the country is considered unlawful.<sup>110</sup> Furthermore, they should not be subjected to restrictions on their movements other than those which are necessary in the interest of public health and public order.<sup>111</sup>

52. Recognizing that the family deserves special protection in international law, the Conclusion furthermore holds that the family unit should be respected and refugees and asylum-seekers should benefit from the fundamental principle of family reunification,<sup>112</sup> Furthermore, they have a right to register births, deaths and marriages<sup>113</sup> and adequate provisions should be made for the protection of minors and unaccompanied children.<sup>114</sup>

#### 5.4 Refugee camps

53. It follows from the principle that the grant of asylum is a peaceful, non-political and exclusively humanitarian act and that refugees by definition are civilians, that refugee camps or settlements also have an exclusively civilian and humanitarian character.<sup>115</sup> As a consequence they should also have a civilian administration. Such camps and settlements do not enjoy any status of extra-territoriality but are part of the territory of States and refugees living there, like others, have a duty to conform to the laws and regulations of the country of asylum, including lawful measures taken for the maintenance of public order.<sup>116</sup> Thus, refugees have a duty to

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Political Rights; arts. 2(2), (3), 3, 1966 Covenant on Economic and Social Rights; art. 1, 1969 American Convention on Human Rights; art. 3, 1951 Refugee Convention.

<sup>110</sup> UNHCR Executive Committee Conclusion No. 22 (XXXII) on the Protection of Asylum-Seekers in Situations of Large-Scale Influx, chapter 11, para. B 2(a); art. 31, 1951 Refugee Convention.

<sup>111</sup> Ibid

<sup>112</sup> *Cartagena Declaration*, part III. 13; art. 16 (3), 1948 Universal Declaration of Human Rights; art. 6, 1948 American Declaration on the Rights and Duties of Man; art. 23 (1), 1966 Covenant on Civil and Political Rights; art. 10, 1966 Covenant on Economic and Social Rights; art. 17, 1969 American Convention on Human Rights; the Helsinki Final Act; *Report of the Ad Hoc Committee on Stateless Persons*, UN doc. E/AC/32/5 (E/1618), 40; Recommendation B, Final Act of the 1951 United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: UN doc. A/CONF.2/108; 1959 United Nations Declaration of the Rights of the Child, principle 6; UNHCR Executive Committee Conclusions No.9 (XXVIII) on Family Reunion; No.15 (XXX) on Refugees Without an Asylum Country; No. 22 (XXXII) on the Protection of Asylum-Seekers in Situations of Large-Scale Influx, Chapter II, para. B 2 (h); No. 24 (XXXII) on Family Reunification; arts. 25-27, 49 and 82, Fourth Geneva Convention 1949; arts. 74, 75 and 78, Additional Protocol I to the Geneva Conventions; art. 4, Additional Protocol II to the Geneva Conventions.

<sup>113</sup> UNHCR Executive Committee Conclusion No. 22 (XXXII) on the Protection of Asylum- Seekers in Situations of Large- Scale Influx, Chapter II, para. B 2(m); *Report of the Advisory Group on Possible Solutions to Central American Refugee Problems*, (Geneva, 25-27 May 1987), p. 5, para. 6.4.

<sup>114</sup> UNHCR Executive Committee Conclusion No. 22 (XXXII) on the Protection of Asylum- Seekers in Situations of Large- Scale Influx, Chapter II, para. B 2 (j); and No. 47 (XXXVIII) on Refugee Children.

<sup>115</sup> UNHCR Executive Committee Conclusion No. 48 (XXXVIII) on Military and Armed Attacks on Refugee Camps and Settlements.

<sup>116</sup> Art. 2, 1951 Refugee Convention; UNHCR Executive Committee Conclusion No. 48 (XXXVIII) on Military and Armed Attacks on Refugee Camps and Settlements; General Law on Migration and Aliens (Costa Rica), art. 121; Law on Migration and Aliens (Guatemala), art. 25. Compare Constitution of

abstain from any activity likely to detract from the exclusively civilian and humanitarian character of the camps and settlements.<sup>117</sup> Such activities do, however, not comprise the exercise for peaceful purposes of fundamental human rights, such as the right to freedom of thought, expression, association and assembly.<sup>118</sup>

54. In order to safeguard the human rights and the protection of refugees, their camps or settlements should, whenever possible, be set up at a reasonable distance from the border with the country of origin.<sup>119</sup> States should also refrain from attacking such camps and settlements; acts which should be condemned as they are against the principles of international law and, therefore, cannot be justified.<sup>120</sup>

55. Refugee camps are by their very nature temporary in character. The establishment of makeshift or closed camps is sometimes unavoidable; at the beginning of a massive influx of refugees, as they make it easier to provide effective emergency assistance and ensure the protection of refugees during the initial stage. Nevertheless, such camps may, in time, have a series of harmful effects, such as: restrictions on freedom, internal control leading to human rights abuses, mental health problems, internal violence and disturbances of public order, artificial means of support and dependency on external aid. Furthermore, such camps lead to an urbanization of rural refugees resulting in difficulties in becoming integrated, whether in the context of voluntary repatriation, local integration or resettlement.<sup>121</sup> As a result, it is necessary eventually to gradually open closed camps<sup>122</sup> or relocate the refugees so that they can become part of another more appropriate scheme.<sup>123</sup>

## **6. Durable solutions**

### **6.1 Voluntary repatriation**

56. Voluntary repatriation is the preferred solution to the problems of refugees since it achieves the ultimate goal of international protection, namely the re-establishment of refugees in a community, in this case their own.<sup>124</sup> It is a purely humanitarian and non-political act<sup>125</sup> which

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Honduras, art. 30; General Law on Population (Mexico), art. 42(V); Law on Nationality and Naturalization (Mexico), art. 32.

<sup>117</sup> See above, note 115.

<sup>118</sup> Arts. 7, 8, 1954 Caracas Convention on Territorial Asylum.

<sup>119</sup> UNHCR Executive Committee Conclusions No. 22 (XXXII) on Protection of Asylum - Seekers in Situations of Large-Scale Influx, Chapter II, paras. B 2(g); No. 48 (XXXVIII); on Military and Armed Attacks on Refugee Camps and Settlements; *Cartagena Declaration*, part III.6; art. 9, 1954 Caracas Convention of Territorial Asylum; art. II. 6, OAU Convention.

<sup>120</sup> See also UNGA resolutions 40/118, 41/124, 42/109.

<sup>121</sup> Report of the Advisory Group (above, note 113), paras. 6.1 and 6.2.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.* See also *Cartagena Declaration*, part III.6

<sup>124</sup> UNGA resolutions 30/71, 31/35, 32/67, 33/26, 34/60, 35/41, 36/125, 37/195, 38/121, 39/140, 40/118, 41/124, 42/109, UNHCR Executive Committee Conclusions No. 18(XXXI) on voluntary Repatriation; No.

gives substance to the right of refugees, and others, to return voluntarily to their country of origin, and re-avail themselves of its protection. Their right to voluntary repatriation is fully recognized in the region in both law and in practice.<sup>126</sup> Similarly, refugees have a right to be protected in a manner that they can effectively exercise their right to return voluntarily to their country.<sup>127</sup>

57. They have also the right to receive objective and complete information on the prevailing situation in their country of origin so as to be able to take a fully informed decision.<sup>128</sup> One manner in which this right may be exercised is through the arrangement of visits of groups of refugees to their country of origin to allow them to inform themselves on the spot of the current situation there.<sup>129</sup>

58. Voluntary repatriation may be facilitated and provided through various forms of repatriation mechanisms, sometimes formally constituted as tri-partite commissions involving representatives from the refugees' country of origin, the country of asylum and UNHCR.<sup>130</sup> Such mechanisms can

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40(XXXVI) on Voluntary Repatriation; UNHCR, Notes on *International Protection*: UN doc. A/AC.96/680 (1987), UN doc. A/AC.96/700 (1988), UN doc. A/AC.96/713 (1989). Communiqués from the seven meetings held in 1986-1988 of the Tripartite Commission on Voluntary Repatriation composed of El Salvador; Honduras and UNHCR, hereafter referred to as the Communiqué of El Salvador, Honduras and UNHCR. Voluntary Repatriation Support Programme COMAR/CEAR of 17 February 1987, hereinafter referred to as the COMAR/CEAR Voluntary Repatriation Programme; Declaration by the Government of Nicaragua on the Voluntary Repatriation of Nicaraguans of December 1987, hereinafter referred to as the Declaration of Nicaragua on Voluntary Repatriation; Declaration by the Government of Costa Rica on Voluntary Repatriation of Nicaraguans of December 1987, hereinafter referred to as the Declaration of Costa Rica on Voluntary Repatriation.

<sup>125</sup> Sec OAS General Assembly resolutions AG/RES.838 (XVI-0/86); OEA/Ser. P. AG/doc.2370/88.

<sup>126</sup> Art. 13(2), 1948 Universal Declaration of Human Rights; art. 8. 1948 American Declaration on the Rights and Duties of Man; art. 12(4), 1966; Covenant on Civil and Political Rights Covenant; art. 22(5), 1969 American Convention on Human Rights; art. 5(d)(ii), 1965 International Convention on the Elimination of All Forms of Racial Discrimination; Analysis of the current trends and developments regarding the right to leave any country, including one's own, and to return to one's own country, and some other rights or consideration arising therefrom, *Final Report* prepared by the Special Rapporteur, UN doc. E/CN.4/Sub.2/1988/35; Draft Declaration on Freedom and Non-Discrimination in respect of the right of everyone to leave any country, including his own, and to return to his country: UN doc. E/CN.4/Sub.2/1988/35. Add.1; OAS res. AG/Res.89/(XVII-0/87); Constitution of El Salvador, art. 5; Constitution of Guatemala, art. 26; Constitution of Nicaragua, art. 31. Communiqués of El Salvador, Honduras and UNHCR. COMAR/CEAR Voluntary Repatriation Programme; Declaration of Nicaragua on Voluntary Repatriation; Declaration of Costa Rica on Voluntary Repatriation.

<sup>127</sup> *Report of the Advisory Group* (above, note 113), para. 7.3(e); UNHCR Executive Committee Conclusion No. 18 (XXXI) on Voluntary Repatriation.

<sup>128</sup> *Report of the Advisory Group* (above, note 113), para. 7.3(d); UNHCR Executive Committee Conclusion No. 18 (XXXI) on Voluntary Repatriation; COMAR/CEAR Voluntary Repatriation Programme; Declaration of Nicaragua on Voluntary Repatriation; Declaration of Costa Rica on Voluntary Repatriation.

<sup>129</sup> *Report of the Advisory Group* (above, note 113), para 7.9; UNHCR Executive Committee Conclusion No. 18 (XXXI) on Voluntary Repatriation.

<sup>130</sup> *Report of the Advisory Group* (above, note 113), para. 7.1; UNHCR Executive Committee Conclusion No. 18 (XXXI) on Voluntary Repatriation; No. 40 (XXXVI) on Voluntary Repatriation; UNHCR, *Note on*

concern themselves with both the joint planning and implementation of a repatriation programme while providing an effective means of securing consultations between the main parties concerned.<sup>131</sup> It is of fundamental importance that all aspects of a repatriation movement be clarified with all the parties concerned, including the returning refugees, prior to any movement.<sup>132</sup>

59. A foremost principle of refugee protection in the context of voluntary repatriation is the one which proclaims that the repatriation of refugees must take place at the individually and freely-expressed wish of the refugees themselves.<sup>133</sup> Voluntary repatriation must take place under conditions of safety and dignity, preferably to the refugees' place of origin or previous residence in their country if they so wish.<sup>134</sup> This core element in refugee protection flows from the fundamental human rights of security and liberty and from the right to freedom of movement and free choice of residence.<sup>135</sup> In the regional context in which a great majority of the refugees are of peasant origin, it is particularly important that they can return to their previous economic activities and recuperate their former land and possessions.<sup>136</sup>

60. Returnees should also benefit, at the time of their return, from adequate guarantees of non-discrimination and full respect for their human rights under the same conditions to those of their compatriots.<sup>137</sup> Under no circumstances should they be disadvantaged or penalized for having sought asylum and protection as refugees in another country.

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*International Protection:* UN doc. A/AC.96/680 (1987); UN doc A/AC.96/700 (1988); OAS res. AG/Res.891 (XVII-0/87) and in 1988, OEA/Ser. P, AG/doc. 2370/88. COMAR/CEAR Voluntary Repatriation Programme; Declaration by Nicaragua on Voluntary Repatriation; Declaration of Costa Rica on Voluntary Repatriation.

<sup>131</sup> UNHCR Executive Committee Conclusion No. 40 (XXXVI) on Voluntary Repatriation; Communiqués of El Salvador, Honduras and UNHCR.

<sup>132</sup> Statement by the High Commissioner on 30 August 1988.

<sup>133</sup> UNGA res. 40/118; UNHCR Executive Committee Conclusion No. 18 (XXX) on Voluntary Repatriation; No. 40 (XXXVI) on Voluntary Repatriation; Communiqués of El Salvador, Honduras and UNHCR; COMAR/CEAR Voluntary Repatriation Programme; Declaration of Nicaragua on Voluntary Repatriation; Declaration of Costa Rica on Voluntary Repatriation.

<sup>134</sup> UNHCR Executive Committee Conclusion No. 18 (XXX) on Voluntary Repatriation; No. 40(XXXVI) on Voluntary Repatriation; UNHCR, *Note on International Protection*, UN doc. A/AC.96/680 (1987), paras. 23-25; A/AC.96/694 (1988), paras. 47-61; A/AC.96/713 (1989), paras. 37-45; *Report of Advisory Group on Possible Solutions to Central American Refugee Problems*, (Geneva, 25-27 May 1987), para.7.3(f) and (g); COMAR/CEAR Voluntary Repatriation Programme; Declaration of Nicaragua on Voluntary Repatriation.

<sup>135</sup> See above, note 55.

<sup>136</sup> COMAR/CEAR Voluntary Repatriation Programme.

<sup>137</sup> *Report of the Advisory Group* (above, note 134), 11. para 7.3(g); see also UNHCR Executive Committee Conclusion No. 18 (XXXI) on Voluntary Repatriation. COMAR/CEAR Voluntary Repatriation Programme, Declaration of Nicaragua on Voluntary Repatriation.

61. Both former countries of asylum<sup>138</sup> and UNHCR as the agent of the international community, have a recognized interest in the development of the return.<sup>139</sup> In that respect they have a right to be informed of the results of any voluntary repatriation operation.<sup>140</sup> For this reason, the High Commissioner's Office should follow closely the situation of the returnees not only during the return movement but also subsequent thereto.<sup>141</sup> Such action is of an exclusively humanitarian nature in order to witness the fulfilment of the agreements which formed the basis for the return. It does not imply special privileges or immunities for the returnees and is carried out in close consultation with the State concerned which provides direct access to the returnees to the High Commissioner's staff.<sup>142</sup>

62. In order to facilitate the reintegration process and also ensure that the returnees can effectively benefit from the protection of the national authorities, it is important that they be provided with the same identity documents as their compatriots.<sup>143</sup> The registration of refugees who have been born abroad should also be regularized to ensure that they obtain their nationality and provision should be made so that they get full and formal credit for studies undertaken while abroad.<sup>144</sup> Whenever the circumstances permit, the documentation and registration process should be carried out prior to the actual return.<sup>145</sup>

63. The success of a voluntary repatriation programme will very often depend upon adequate assistance being made available to the returnees. Such assistance should include transportation and assistance during the movement back to their country of origin as well as assistance upon return during the reintegration process.<sup>146</sup> The latter type of assistance should be compatible with development plans and projects of the community to which the refugees are returning.<sup>147</sup> Such assistance programmes could usefully benefit the community as a whole, including displaced persons,<sup>148</sup> and might also help to improve conditions generally in the places of return and thus stimulate future repatriation movements.<sup>149</sup>

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<sup>138</sup> *Report of the Advisory Group* (above, note 134), para 7.6.

<sup>139</sup> *Report of the Advisory Group* (above, note 134). See also UNHCR Executive Committee Conclusions No. 18 (XXX) on Voluntary Repatriation and No. 40 (XXXVI) on Voluntary Repatriation.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> *Report of the Advisory Group* (above, note 134), para 7.6-7; UNHCR Executive Committee Conclusion No. 40 (XXXVI) on Voluntary Repatriation.

<sup>143</sup> *Report of the Advisory Group* (above, note 134), para 7.8.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

<sup>146</sup> *Report of the Advisory Group* (above, note 134), para 7.10; UNGA res. 41/124, COMAR/CEAR Voluntary Repatriation Programme.

<sup>147</sup> *Report of the Advisory Group* (above, note 134), para. 7.11.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

## 6.2 Local integration

64. It is of fundamental importance for refugees to be able to enjoy their economic, social and cultural rights so that they may lead a productive and dignified life without, for that reason, being privileged vis-à-vis national groups. To this end, the 1951 Refugee Convention stipulates that contracting States shall, for example, in the context of wage-earning employment, accord to refugees lawfully staying in their territory 'the most favourable treatment accorded to nationals of a foreign country in the same circumstances'.<sup>150</sup> In this regard, the Cartagena Declaration recommends that countries in the region study the possibility of integrating the refugees into the productive life of the country by allocating the resources made available by the international community to UNHCR for the creation or generation of employment.<sup>151</sup> Such activities have been initiated in several of the countries concerned, benefiting both rural and urban refugees.<sup>152</sup>

65. In particular, countries in the region have designed projects which provide for integration in the rural sector as well as for the creation of employment opportunities for urban refugees, while attempting to ensure that national workers are not therefore displaced<sup>153</sup> and that the cultural identity of the ethnic groups which may be found amongst the refugee populations is maintained. These projects should be harmonized with local, national and regional development plans as a guarantee of viability and so as to contribute to the welfare of the refugees themselves and the community which is receiving them. In this context, it is also recommended that nationals are included amongst the participants and direct beneficiaries of the projects.<sup>154</sup> At the same time, it is important that States consider assimilating the rights of refugees with regard to wage-earning employment to those of nationals, to ensure that successful employment insertion schemes do not fail because of restrictive national laws and regulations.<sup>155</sup>

## 6.3 Resettlement

66. Resettlement of Central American refugees has not constituted a durable solution on par with voluntary repatriation, but has been reserved for particular cases involving persons who, for protection or family reunification reasons, need to be resettled elsewhere. In view of the situation prevailing in some of the refugee camps, and in line with practices established elsewhere,<sup>156</sup> the need has been felt to offer resettlement in third countries to some of the refugees. There is therefore a recognized need to identify other countries which might receive Central American refugees.<sup>157</sup> Such resettlement should, of course, only take place on a voluntary basis.<sup>158</sup>

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<sup>150</sup> Art. 17(1), 1951 Refugee Convention, cf. Law on Migration (El Salvador), art. 21.

<sup>151</sup> Cartagena Declaration, part III.11.

<sup>152</sup> *Report of the Advisory Group* (above, note 134), Chapter III.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*

<sup>155</sup> Cf. art. 17(3), 1951 Refugee Convention.

<sup>156</sup> See also UNGA resolution 42/110, 7 Dec. 1987.

<sup>157</sup> Cartagena Declaration, part II.1

<sup>158</sup> See above, note 1.

## 7. Displaced persons

67. The problem of displaced persons has long been a serious concern of the countries in the region and the need for extending both protection and assistance to them has repeatedly been stressed.<sup>159</sup> Although there is no generally accepted definition, displaced persons have been considered as those who have been obliged to abandon their homes or usual economic activities, while remaining within their countries, because their lives, security or liberty have been threatened by widespread violence or prevailing conflict.<sup>160</sup> Their need for protection and assistance is at times as great, if not greater, than that of the refugees who have left the country.

68. Displaced persons have a right to be protected by their national authorities and, in particular, to benefit from fundamental human rights such as the right to life, security and liberty, freedom from torture, etc.<sup>161</sup> Furthermore, in situations involving armed conflicts they benefit from the minimum standards contained in common Article 3 of the four Geneva Conventions since they are persons taking no active part in hostilities.<sup>162</sup>

69. The primary responsibility for aiding displaced persons falls on the State, since these persons are citizens of the State and are also situated within its territory. The possibilities of the States in the region to meet the needs of the displaced persons are, however, severely hampered as their resources are limited and assistance from the international community has not been directed to this category of the population. It is for this reason that the States who decided to convene the international conference included displaced persons as a category in need of special attention by the international community.<sup>163</sup>

## 8. Non-governmental organizations

70. Non-governmental organizations, both international and national, generally play an important role in the assistance to refugees, returnees and displaced persons. In particular, they co-ordinate and implement a wide variety of assistance programmes and projects.

71. The role of these organizations, which is based on humanitarian principles and on national and international solidarity, has repeatedly been recognized by the international community.<sup>164</sup>

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<sup>159</sup> Ibid.; *Cartagena Declaration*, part III.9; *Report of meeting in Geneva of Advisory Group on Possible Solutions to Central American Refugee Problems*, chapter II.4; and *Report of the Advisory Group on Possible Solutions to Central American Refugee Problems*, Preparatory Meeting for the International Conference on Central American Refugees, Guatemala City, 27-28 Apr. 1988, Chapter VI; *Press Communiqué of San Salvador on Central American Refugees*, para. V; UNGA res. 42/110, 7 Dec. 1987.

<sup>160</sup> Definition of 'displaced persons' included in Annex I of the *Report of the Advisory Group on Possible Solutions to Central American Refugee Problems*, Preparatory Meeting for the International Conference on Central American Refugees, Guatemala City, 27-28 April 1988.

<sup>161</sup> See also para. 48 above.

<sup>162</sup> See above, note 95.

<sup>163</sup> See above, notes 1 and 20.

<sup>164</sup> UNGA resolutions 2789 (XXVI), 2956 (XXVII), 3143 (XXVIII), 33/26, 38/121, 40/118, 41/124, 42/109, 42/110; OAS General Assembly res., AG/Res.774(XV-0/85), AG/Res. 838(XV-0/86); UNHCR



Similarly, it has underlined the need for continued and increased co-operation between concerned Governments, UNHCR and other bodies of the United Nations system and non-governmental organizations.<sup>165</sup> Finally, there is a clear need for close co-ordination between UNHCR and non-governmental organizations of their different activities in accordance with directives provided by the concerned Governments.<sup>166</sup>

## 9. Human rights mechanisms

72. There is a direct and multiple relationship between the observance of human rights standards, refugee movements and problems of protection.<sup>167</sup> Gross violations of human rights give rise to refugee movements, sometimes on a massive scale, and may impede the attainment of durable solutions to their problems. At the same time, human rights principles and practices provide standards to States and international organizations for their treatment of refugees, returnees and displaced persons.<sup>168</sup>

73. It is this reality, which in Latin America has led to a call for better use to be made of the competent organisms of the inter-American system and, in particular, of the Inter-American Commission on Human Rights, with a view to complementing the international protection of refugees in the region.<sup>169</sup> This also requires closer cooperation between the Office of the United Nations High Commissioner for Refugees on the one hand, and on the other hand, the Organization of American States,<sup>170</sup> the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights and the Inter-American Institute of Human Rights.

## 10. Dissemination

74. The last ten years have seen a growing public awareness of the problem of Central American refugees, returnees and displaced persons. In large sectors in the region there is a clear interest and necessity to know in more detail the principles and criteria which make up the legal framework within which adequate solutions are being sought. For this reason, both the Cartagena Declaration and the Preparatory Committee of the International Conference on the Central

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Executive Committee Conclusion No. 21 (XXII) on International Protection; No. 29 (XXXIV) on International Protection; No. 41 (XXXVII) on International Protection; No. 46 (XXXVIII) on International Protection; No. 50 (XXXIX) on International Protection.

<sup>165</sup> UNGA resolutions 31/35, 3271 (XXIX), 3454 (XXX), 34/60, 38/121, 40/118, 41/124, 42/109, 42/110; OAS General Assembly res. in 1988, OEA/Ser.P, AG/doc. 2370/88, *Cartagena Declaration*, part III. 14.

<sup>166</sup> *Cartagena Declaration*, part III. 14.

<sup>167</sup> See above, notes 94, 95. See also UNHCR, *Note on International Protection*: UN doc. A/AC.96/713 (1989), paras. 1-8.

<sup>168</sup> See also para. 48 above.

<sup>169</sup> *Cartagena Declaration*, part III. 15.

<sup>170</sup> OAS General Assembly resolutions AG/Res. 739 (XIV-0/84), 749(XV-0/85), 774(XV-0/ 85), 838(XVI-0/86),891 (XVII-0/87); and OAS resolutions of 1988, OEA/Scr.P, AG/doc.2370/88; resolution of the OAS Permanent Council, CP/Res. 3777(510/82); *Cartagena Declaration*, part III. 15 and 16.

American Refugees through its San Salvador Communiqué identified the need to promote the dissemination, and consequent compliance, of the relevant principles and criteria.<sup>171</sup> This task requires the support of the governments concerned, UNHCR, non-governmental organizations and the other members of the International Community.

## **Annex**

### **1. Comments of the Government of Costa Rica**

1. A point to be noted first of all is the importance of this type of document for reference purposes. It contains important information on various international instruments relating to refugees, such as United Nations resolutions, international conventions on asylum, etc. The document also provides a legal and historical analysis of refugee protection in Latin America and a legal assessment of the situation of refugees in Central America.

2. The following comments on the document may nevertheless be made:

The application of the Geneva Convention and the recommendations proposed at the Cartagena Colloquium with regard to the determination of refugee status give rise to certain doubts. The Geneva Convention is obviously restricted in its scope and is not applicable in the case of massive flows of refugees. The Cartagena Colloquium has broadened the notion of refugee but it did not deal with other cases, such as that of externally displaced persons, cases whose direct cause is the economic situation but whose indirect cause is a political situation which, according to the Cartagena Declaration, may give rise to recognition of refugee status. An effort should therefore be made at the Conference to clarify and define more precisely when a refugee situation corresponds to the Convention's traditional definition, when it corresponds to the 'Cartagena' notion and when it is one of the other non-typical situations where depending on the broadness of the Government's view the person concerned may or may not be deemed a refugee.

3. The document outlines the elements that are included in the definition as factors or grounds for the grant or recognition of refugee status and it explains them clearly. However, it does not distinguish these from the situation of other categories of persons who leave their country for reasons that are different from, but are nevertheless linked with, the above-mentioned grounds. While not direct causes, they are factors which foster the condition of socio-economic despair. This is the case of the socio-economic refugees who have to abandon their country because the political situation described in the Cartagena Declaration prevents them from working or producing or, worse still, prevents their survival. The document should explain whether this aspect comes under the heading 'human rights ground', where reference is made to '. . . a consistent pattern of gross denial of civil, political, economic, social and cultural rights . . .'. This aspect, too, should be clarified.

4. The document indicates the precedence of international law over internal law, stating: '. . . every treaty in force is binding on the parties to it and must be performed in good faith, and a

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<sup>171</sup> See above, note 1; *Cartagena Declaration*, part III.17.

party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. It should be noted, however, that the document makes no reference to the case of constitutional provisions which, in certain of their aspects, conflict with the Convention. It should in fact be pointed out that the jurisprudence often does not apply with full rigour the principle of the precedence of international law over ordinary internal law. This is a particularly serious matter in countries such as Costa Rica where the courts have great autonomy and independence and where the remedy does not exist of claiming the unconstitutionality of a law because it violates an international treaty. Although this is a technical point, it is most important that it should be examined since whether a treaty will have full effect in the internal legal system will depend on it.

5. As for the requirement that a person must be a civilian to be a refugee--a point made clear in the Cartagena and other definitions, this principle has been adopted by Costa Rica and was the subject of a pronouncement by the Attorney General's Office on 5 June 1985.

6. A subject closely linked with the question of camps for temporary refugees is that of finding durable solutions to refugee problems. We share the view expressed in the document that a period longer than is necessary spent in such camps produces very harmful effects both for the refugees and for the country of asylum. It should be noted, however, that durable solutions aimed at repatriation or resettlement in third countries result in a situation of insecurity and instability for the refugee programmes. If, therefore, neither of these options is sound or viable, the logical course is to place emphasis on integration of the refugees in the community of asylum and to compensate the receiving country so that the impact of the refugees on the population will not be so harmful as to affect the country's social stability, 'with unfavourable consequences for both the refugees and the local population. In this connection, the document looks at refugees independently of the host country and, in particular, the host country which has limited resources. The correct approach must necessarily take account of the country's asylum own socially-marginalized or vulnerable position. For the government concerned and the international organizations to apply international norms to the detriment of vulnerable local populations would be an irresponsible act with highly dangerous consequences that might prove disastrous.

7. In this connection it is pointed out that repatriation must provide guarantees and rights for the returnees. The Conference should establish principles leading to a declaration and, at a later stage, a convention on returnees. This should include a substantive part relating to the local bodies which receive the returning refugees and it should provide for suitable procedures and fundamental guarantees, as well as control measures designed to avoid irreparable situations. In this process there must be a willingness of both States and international aid agencies to act together. From the legal standpoint, too, there must be an agreement between the country of asylum, the country of origin of the returnees and the international community.

## **Conclusion**

8. While the document is to be commended for the features mentioned earlier: a substantial fund of information, an appropriate historical and legal analysis of the refugee problem and a call for information to be made available on a systematic basis, it does not make any effort to identify the legal principles and institutions for dealing with refugee problems at the level of internal law. The text is obviously entirely satisfactory from the standpoint of international refugee law, but there also exists an internal standpoint from which refugee law must be viewed. This involves all domestic legislation on such matters as asylum, migration, labour, commerce and health that is applicable to refugees. This document naturally does not aim to provide a comparative study of

the domestic law of each country but it ignores the fact that the application of international law requires the enactment of complementary legislation, the appropriateness and viability of which may be open to question but the need for which cannot be denied. Apart from the proposed specific refugee legislation, harmonized with and complementing the international legislation on this subject, there already exists a whole internal system of law arising from the regulations and guidelines that are needed for putting the international law into effect. Refugee law had its origin in international law, although the causes of refugee movements are often internal. It is clear, however, that the application of refugee law calls for the development of a complementary law, having several dimensions: as a value, as a practical reality and as a normative factor. In this context, the main legal challenge for Central America is perhaps to develop a refugee law-both international and domestic, both regional and local-which does not conflict with international refugee law but rather complements and enriches it.

[signed] Guillermo Flores Gamboa  
Director-General  
DIGEPARE

## **2. Comments of the Government of El Salvador**

1. In the interest of consistent interpretation of the international instruments concerning the protection of and assistance to refugees, returnees and displaced persons, it appears desirable, not only to promote knowledge of these instruments but also to throw more light on, and seek solutions to, refugee problems, because it is precisely these international instruments, combined with national legislation, that define the basic rights of refugees, and the scope of their protection.
2. Refugee law applicable to persons, States and international governmental organizations, incorporating essential principles and norms, is already of considerable scope.
3. The 1951 Convention relating to the Status of Refugees and the 1967 Protocol are applicable to the situation of refugees and have served as the basis for combining the elements which they contain with the introduction of new elements applicable to the specific circumstances of the Latin American region and of Central America in particular, where the refugee problem is most acute and large mass flows have taken place.
4. In order to deal with the situations occurring in Central America and on the basis of a broader concept of refugee protection, the Cartagena Declaration was adopted in 1984. This instrument incorporates not only the basic principles of international protection, such as asylum and *non-refoulement* but also elements applicable to the socio-political context of the Central American region.
5. Thus, efforts are already being made to develop a more effective system for the protection of refugees by combining the basic international instruments with Latin American law, with the aim of further developing refugee law in Latin America.
6. As far as the international instruments relating to refugees are concerned, El Salvador is a party to the 1951 Convention relating to the Status of Refugees and to the 1967 Protocol, as well as to the American conventions on asylum.

7. El Salvador was present at the Cartagena Colloquium in 1984 and, as a country of origin of refugee movements, expressed, through its delegation, its confidence in the progressive development of machinery and practical means for solving refugee problems, and therefore its support for international instruments relating to the protection of refugees. It also placed emphasis on observance of the principle of *non-refoulement*, the institution of asylum and the security and physical integrity of refugees, as well as on the need to ensure the practical effectiveness of solutions to refugee problems in Central America, such as voluntary repatriation and integration of refugees.

8. In the 'Procedure for the establishment of a firm and lasting peace in Central America' (Esquipulas II), the Central American countries undertook to seek solutions to the problem of refugees and displaced persons, recognizing that this formed part of the overall efforts to be made in order to achieve peace.

9. Since 1986, El Salvador has been pursuing a policy that is aimed at finding an appropriate, honourable and comprehensive solution to this problem. In April 1986, a 'Tripartite Commission for the Voluntary Repatriation of Salvadorian Refugees in Honduras', composed of representatives of the Governments of El Salvador and Honduras and of the United Nations High Commissioner for Refugees (UNHCR), was set up to consider methods and machinery for repatriation.

10. The Guatemala Agreement (Esquipulas II) gave further impetus to the application of solutions to refugee problems at the national level and encouraged the establishment, despite problems and constraints of machinery and measures for offering practical alternatives to meet the needs of refugees, as well as taking other important action on their behalf.

11. The setting up of responsible national bodies such as the Salvadorian Commission for Refugees and Displaced Persons has furthered the efforts that are being made to develop appropriate machinery and find viable solutions for the problem of Salvadorian refugees, such as voluntary repatriation or integration.

12. The voluntary repatriation process was started in October 1987 and continued in 1988. It has enabled several thousand of Salvadorians who were in Honduran territory to return to their home country.

13. The situation of displaced persons also calls for urgent attention. The Government of El Salvador has been carrying out a policy of assisting displaced population groups through public and private inter-agency co-ordination of programmes aimed at meeting their most urgent and specific needs, so that they may become integrated in the country's economy and society.

14. In 1986, with the 'National Plan of Aid to Displaced Persons', the Government of El Salvador reoriented its policy in favour of displaced persons and concentrated on the implementation of programmes in the following areas: (1) identification and registration of displaced persons; (2) social welfare; (3) literacy and health; (4) work training; (5) employment and production; (6) settlement; (7) food distribution; (8) administration.

15. These are the objectives aimed at by the National Commission for Aid to Displaced Persons (CONADES).

16. The situation of the Central American refugees is the result of the current political, economic and social conditions in the region. In this connection the Cartagena Declaration makes reference to factors connected with the situation in Central America that need to be taken into account in order to meet humanitarian needs and it proposes a more direct approach in dealing with questions of humanitarian law, asylum and protection.

17. Among the particular or special categories of persons who may need international protection are those whose well-founded fear entitles them to refugee status.

18. Regarding asylum and standards of protection, it is emphasized that, in the search for solutions, there should be co-operation based on the principles of solidarity and humanitarian feeling. There must be observance, not only of the rules concerning treatment of refugees in accordance with the international law in force and humanitarian principles and practices but also of rules of a socio-economic nature, including the right to education and health.

19. Camps in which there are refugees must be used for civilian and humanitarian refugee purposes. They must therefore not be used for the purpose of political or ideological activities and the introduction of elements or activities conflicting with the civilian and humanitarian character of a refugee camp must not be allowed.

20. It is pointed out that, in those cases where refugees are displaced or relocated, this must be done in a planned fashion so as to ensure the safety of the refugees and give them a better opportunity for survival.

21. Adopting one of the durable solutions proposed, El Salvador has arranged, on a voluntary, gradual and planned basis, the repatriation of Salvadorian refugees who were on Honduran territory, allowing them to resettle in their various places of origin, enabling them to obtain papers and furnishing them with assistance, through development plans and programmes established for their benefit.

22. The case of internally displaced persons requires special attention if the main problems of these persons are to be solved. In this connection a call should be made for the aid that is necessary in order to provide them with relief and improve their living conditions. Aid provided by the international community is vital for meeting the specific needs of internally displaced persons.

23. The international organizations, both governmental and non-governmental, through their activities to protect and assist refugees, returnees and displaced persons, obviously constitute the framework of the main humanitarian efforts in this area.

24. The Office of the United Nations High Commissioner for Refugees (UNHCR) should receive effective and continuing co-operation in the performance of its valuable role and there should be joint support for new approaches to relations with that body. Greater international co-operation is needed to enable UNHCR to develop its services for refugees.

25. Consideration should be given to the special needs of the most vulnerable group among refugees and displaced persons, namely the women and children. Protection efforts should include special programmes to deal with the special needs of these categories of persons.

26. In order to increase the effectiveness of activities for the benefit of women and children, efforts should be made by UNHCR to recruit more female officers.

27. In order to increase support for activities in favour of refugees and displaced persons and to publicise them more effectively at the world level, it will be necessary to ensure the implementation and dissemination of the latest United Nations resolution and programme on assistance to refugees, returnees and displaced persons and of the resolution on Central American refugees and regional efforts for the solution of their problems that was adopted by the OAS General Assembly at its eighteenth session, held in San Salvador in November 1988.

### **3. Comments of the Government of Mexico**

1. Considering the importance of the work developed by the Group of Experts and Jurists who undertook the investigation and analysis of the national and international documentation required for the preparation of the document under review, it is indispensable that its official presentation contains the names of the three experts who were convoked by UNHCR. It would also be convenient that the document itself identifies the foundations and agreements which gave rise to the convocation of the Group of Experts such as the San Salvador Communiqué of September 1988.

2. As a recommendation of general character, it would be necessary for the document to be re-arranged so that its contents would be in the following order.

- Principles emanating from provisions of international agreements, treaties and multilateral conventions.
- Principles, norms and criteria derived from other international instruments adopted at international and/or regional intergovernmental meetings (declarations, resolutions etc.).
- Criteria or decisions included in other international documents adopted in or issued by international forums (non-governmental and/or governmental), such as seminars, colloquiums and meetings of experts.

3. Lastly, the paragraph which corresponds to chapter 10 on Dissemination would have to be the subject of a decision by the Conference. Additionally, it is important to underline that the principles and criteria developed in the document do not constitute, in their totality, the legal framework in which adequate solutions can be identified to the problems of refugees, returnees and displaced persons. The document is an excellent basis for consultation and guidance and of great significance for the protection of and assistance to the groups of persons referred to above. Only with this purpose in mind should it be extensively disseminated, for which reason it would better be understood if the words 'for subsequent application' could be eliminated.

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