

10-1-1987

# International Law and the Latin American Political Refugee Crisis

Dr. Keith W. Yundt

Follow this and additional works at: <http://repository.law.miami.edu/umialr>



Part of the [International Law Commons](#)

---

## Recommended Citation

Dr. Keith W. Yundt, *International Law and the Latin American Political Refugee Crisis*, 19 U. Miami Inter-Am. L. Rev. 137 (1987)  
Available at: <http://repository.law.miami.edu/umialr/vol19/iss1/5>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# INTERNATIONAL LAW AND THE LATIN AMERICAN POLITICAL REFUGEE CRISIS

DR. KEITH W. YUNDT\*

In 1977, the mass exodus of asylees from the Nicaraguan civil war made markedly clear the inadequate protection of refugees in Latin America. Since this event, violence has become generalized in Nicaragua, El Salvador, and, until early 1986, Guatemala. Mass movement of persons seeking asylum has been one consequence of this violence.

This mass exodus of refugees apparently has altered the perceptions of some Latin American states regarding asylum. Latin American states have joined the Organization of American States (OAS) and the United Nations High Commissioner for Refugees (UNHCR) in suggesting changes to the traditional inter-American practice of asylum. These suggestions concern the modification of both the existing inter-American asylum conventions and the inter-American human rights system. This article discusses the possibility of transforming inter-American asylum practices on two dimensions — the contractual and the evolutionary. Specific actions directed toward either dimension could transform current inter-American asylum practices so as to transfer concern from individual asylees to concern for the mass exodus of refugees.

The contractual dimension concerns specific revisions to and amendment of inter-American asylum conventions. The evolutionary dimension considers the possibility of using the inter-American human rights system and human rights law as a more immediate complement to the global refugees regime. First, however, it is necessary to consider a brief overview of key elements of the global refugees regime.

## THE GLOBAL REFUGEES REGIME

In the early 1950's, the international community agreed to minimum standards for refugees. These standards are stated in a

---

\* Lecturer, Southwest Texas State University, San Marcos, Texas; Ph.D., M.A., Kent State University; B.A., Pennsylvania State University.

Convention,<sup>1</sup> reiterated in a Protocol,<sup>2</sup> and protected by an Office of the United Nations system (the High Commissioner for Refugees). Additionally, there are numerous international instruments that may help protect refugees. The U.N. Charter<sup>3</sup> and the Universal Declaration of Human Rights<sup>4</sup> place certain general obligations on member states, and certain provisions of the International Covenant on Civil and Political Rights<sup>5</sup> are applicable to refugees.<sup>6</sup> These components are identified by international jurists as composing a global refugees regime.

Two major dimensions define the global refugees regime. The contractarian dimension was expressed in the 1951 Refugees Convention<sup>7</sup> and the 1967 Protocol.<sup>8</sup> These global instruments establish definitions, minimum standards, and mechanisms of implementation for all individuals governed by their provisions. The institutional dimension is expressed through the authorizing statute of the UNHCR and through subsequent expansion of prerogatives either through necessity or General Assembly sanction.

The fundamental principle of legal protection is expressed in Article 33 of the 1951 convention: non-refoulement.<sup>9</sup> This principle prohibits a state from sending persons back to countries where they may face persecution. The global regime does not establish an affirmative right for persons seeking refuge to enter the territories of states which are parties to this regime. However, the principle of non-refoulement operates indirectly to grant a right of entry if the only choice which a state which is a party to this regime has is admission or forced return (refoulement).

Non-refoulement is a basic right of the global refugees regime.

---

1. Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Convention]. The Convention was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held at Geneva from July 2 to July 25, 1951, and entered into force on April 22, 1954.

2. Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter Protocol]. The Protocol entered into force on October 4, 1967.

3. United Nations Charter, June 26, 1945, 59 Stat. 1031, T.S. No. 993.

4. *Done* Dec. 10, 1948, G.A. Res. 217, U.N. Doc. A/810.

5. *Opened* for signature Dec. 16, 1966, G.A. Res. 2200, 21 GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316.

6. UNHCR, HANDBOOK FOR EMERGENCIES, PART ONE: FIELD OPERATIONS 11-12 (Dec. 1982) [hereinafter referred to as HANDBOOK].

7. *See* Convention, *supra* note 1.

8. *See* Protocol, *supra* note 2.

9. *See* Convention, *supra* note 1.

It is established in absolute terms and bears no expressed relation to rights enjoyed by other groups. Pursuant to Article 33, refugees may be expelled if determined a security risk to the host state or if convicted of a "particularly serious crime." However, no conditions or guidelines for determining a security risk or "particularly serious crime" are contained in the 1951 instrument. Past state practice of expulsion of refugees has been justified on grounds of *ordre public*. This term is both broad and vague, corresponding in general to the term public policy. Expulsion of refugees on grounds of *ordre public* is permitted by Article 32 of the 1951 global convention, but legal scholars have been unable to determine the intended scope or meaning of the term.<sup>10</sup>

The institutional dimension of the global refugees regime is expressed by the Statute and Office of the United Nations High Commissioner for Refugees.<sup>11</sup> UNHCR is responsible, *inter alia*, for providing international legal protection to refugees in states party to the global instruments. Legal protection is also afforded for refugees in states not party to the global instruments pursuant to the statute. Refugees protected only by the UNHCR Statute, so-called Mandate refugees, do not have the benefit of the legal system established by the 1951 convention. Since the High Commissioner's Protection responsibilities have been bestowed by the General Assembly, however, international protection activities of the UNHCR are not dependent upon government request. The right to initiate activities reflects international recognition of UNHCR responsibilities as entirely non-political and humanitarian in nature.<sup>12</sup>

The global refugees regime provided an adequate framework for determination of refugee status on an individual basis. However, with the increase in incidents of mass exodus of persons seeking asylum since the late 1970's, the global regime has encountered increasing strain. Faced with a mass influx of asylum seekers, states grew increasingly reluctant to grant admission and confer

---

10. Grahl-Madsen, *Expulsion of Refugees*, 33 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET 41-50 (1963).

11. Adopted by the General Assembly on Dec. 24, 1950 as an annex to G.A. Res. 428, 5 U.N. GAOR, Supp. (No. 20) 46, U.N. Doc. A/1775 (1950).

12. OAS, A STUDY COMPARING UNITED NATIONS INTERNATIONAL INSTRUMENTS AND INTER-AMERICAN INSTRUMENTS ON ASYLUM, REFUGEES AND DISPLACED PERSONS 21-22, 124-30, OAS Doc. Ser.D/5.2 (Sept. 20, 1984) [hereinafter COMPARATIVE STUDY]; HANDBOOK, *supra* note 6, at 10; Grahl-Madsen, *Identifying the World's Refugee*, 467 ANNALS 11 (1983); THE GLOBAL REFUGEE PROBLEM: U.S. AND WORLD RESPONSE 14 (G. Loescher & J. Scanlon eds. 1983).

refugee status. Consequently, the UNHCR Executive Committee established an Expert Group in 1979, charged with formulating new minimum standards for mass influx situations. October 1981, the Thirty-Second Session of the Executive Committee adopted the conclusions as UNHCR policy.<sup>13</sup>

For situations of mass influx of asylum seekers, states, at a minimum, are to grant temporary asylum. Failure to grant temporary asylum, (i.e., not accept a mass influx of refugees), would undermine the principle of non-refoulement. Temporary asylum allows the receiving state to admit refugees without granting asylum. In granting asylum a state could be understood as providing a durable, and permanent, solution, requiring the acceptance of permanent responsibility for persons of the mass influx. Additional minimum standards of granting asylum require: 1) non-discrimination; 2) access of temporary asylees to the legal system of the country of refuge; 3) location of refugee camps at a "reasonable distance" from the frontier of the country of origin; 4) promotion of voluntary repatriation; and 5) unrestricted UNHCR access to asylum seekers to ensure international legal protection.<sup>14</sup>

Under the global regime, voluntary repatriation of refugees is the preferred solution. Voluntary repatriation requires the removal of conditions in the refugees' home state which gave rise to persecution, and the free assent by refugees to return. Under the global regime, UNHCR has established procedures by which the voluntary nature of a decision to return can be ascertained on a case by case basis. These procedures are impractical to apply, however, to mass influx situations where groups of refugees seek repatriation. To meet the increased demands of group repatriation, UNHCR has become involved in negotiating and monitoring repatriation agreements with home states.

In explaining this new role for UNHCR, the Executive Committee has concluded that

---

13. UNHCR, Report on the 32nd Session of the Executive Committee of the High Commissioner's Programme, U.N. Doc. A/AC.96/601 (1981).

14. UNHCR, Report on the 30th Session of the Executive Committee of the High Commissioner's Programme 18, U.N. Doc. A/AC.96/572 (Oct. 19, 1979); UNHCR, Report on the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx 5-6,12,14, U.N. Doc. ES/SCP/10/add. 1 (July 17, 1981); HANDBOOK, *supra* note 6, at 10-11; G. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 6, 127-39 (1983); REFUGEES, Oct. 1985, at 5 (Refugees magazine is published monthly by the Office of the United Nations High Commissioner for Refugees.).

The High Commissioner must be regarded as entitled to insist on his legitimate concern over the outcome of any return that he has assisted . . . he should be given direct and unhindered access to returnees so that he is in a Position to monitor fulfillment of the amnesties, guarantees, or assurances on the basis of which the refugees have returned. This should be considered as inherent in his Mandate.<sup>15</sup>

Although a global refugees regime is in existence, the Latin American states had earlier codified principles of territorial and diplomatic asylum. The question thus arises of the compatibility of the concept of asylum as defined by the Latin American states with the principles of the global regime. The remainder of this paper compares the central elements of the global refugees regime with inter-American rules on territorial asylum. This comparison will make it possible to identify areas of agreement and to suggest means to reconcile any areas of incompatibility.

#### INTER-AMERICAN ASYLUM PRINCIPLES

In Latin America, as in general international law, doctrine and positive law distinguish two categories of asylum: territorial asylum, and refuge and diplomatic, or political, asylum. The most recent inter-American asylum instruments, the 1954 Caracas Diplomatic and Territorial Asylum Conventions<sup>16</sup> continued this distinction. For purposes of comparison and application to present-day events, we need to be concerned only with the Territorial Asylum Convention.<sup>17</sup>

There is no uniformity in terminology between the global refugees regime and inter-American asylum principles. In general, the inter-American system uses the terms asylum and refuge synonymously to refer to the admission and protection of individuals.

---

15. REFUGEES, Dec. 1985, at 17-18.

16. See Convention on Diplomatic Asylum, Mar. 28, 1954, OAS T.S. No. 34, at 82; Convention on Territorial Asylum, Mar. 28, 1954, OAS T.S. No. 34, at 89 [hereinafter Caracas Convention].

17. H. GROS ESPIELL, AMERICAN INTERNATIONAL LAW ON TERRITORIAL ASYLUM AND EXTRADITION AS IT RELATES TO THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO REFUGEES 2-3, 24 U.N. Doc. HCR/120/24/81/Rev. 1 (1981) [hereinafter GROS ESPIELL]; COMPARATIVE STUDY, *supra* note 12, at 39-40. The study by Señor Gros Espiell was first presented at the 1981 colloquium on refugees in Central America, held in Mexico City. A revised English draft prepared later for UNHCR is used here. The OAS study is the only publicly available document of joint UNHCR/OAS efforts to address the legal and protection problems of refugees in Central America.

However, under the global regime, admission and legal protection are distinct legal concepts. Asylum as used by the global regime refers only to physical admission to a state. Protection does not automatically accompany asylum; it is dependent upon the determination of refugee status pursuant to the criteria contained in the global 1951 Convention.

A second difference in terminology is that no inter-American instrument defines asylee. The asylum state determines who qualifies as an asylee by interpreting provisions of relevant inter-American instruments. The global 1951 Convention, defines a refugee as

anyone owing to a well found fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside his country of origin, and is unable, or due to fear of persecution, unwilling to return.

Extradition is the cornerstone of the protection of asylees in the inter-American system. All inter-American instruments on asylum contain certain clauses that prohibit extradition of the asylee for political crimes and related common crimes. One exception to this prohibition is the Attentat clause.<sup>18</sup> By granting unilateral determination of the character of a political offense to asylum states, the principle of non-refoulement is recognized.<sup>19</sup> On the other hand, neither the global 1951 Convention<sup>20</sup> nor the 1977 General Assembly Draft Convention on Territorial Asylum<sup>21</sup> have clauses prohibiting extradition.

As illustrated in chart two, no American state is a party to all the relevant inter-American Asylum Conventions. Accordingly, it is difficult to determine which rule applies in a specific case. This inconsistency demonstrates the deficiencies in the inter-American system where territorial asylum is concerned.<sup>22</sup>

The OAS Subsecretariat for Legal Affairs identified the universal properties of asylum as urgency, the threat of danger, and

---

18. GROS ESPIELL, *supra* note 17, at 6; COMPARATIVE STUDY, *supra* note 12, at 83. The Attentat clause provides that the murder of the head of a foreign government or a member of his family is not to be considered a political crime. See L. HENKIN, R. PUGH, O. SCHACHTER & H. SMITH, *INTERNATIONAL LAW* 476 (1980).

19. COMPARATIVE STUDY, *supra* note 12, at 7-8, 42-43; OAS Convención Interamericana sobre Extradición, Serie sobre Tratados #60 Ser. K/36.1 (1981).

20. See Convention, *supra* note 1.

21. See generally Weis, *The Draft U.N. Convention on Territorial Asylum*, 50 *BRIT. Y.B. INT'L L.* 151 (1979).

22. GROS ESPIELL, *supra* note 17, at 11-15.

the principle of non-refoulement and non-expulsion. Despite these universal properties, there are substantive differences between the inter-American asylum principles and the global refugees regime. Within the UN system, territorial asylum is recognized only by means of a legally non-binding General Assembly declaration. There is no legally binding document that governs asylum separately and independently. Consequently, the 1951 and 1967 global instruments are the two documents usually associated with asylum. This association stems from the recognition by these instruments of the principles of non-refoulement and non-expulsion as characteristic of and essential to protection of the asylee. Also, the global regime uses the terms refuge and asylum interchangeably.<sup>23</sup>

In Latin America, although territorial asylum is governed by a number of inter-American instruments, the nature and application of territorial asylum under these instruments differ. The American Declaration of Human Rights (1948)<sup>24</sup> and the American Convention on Human Rights (1969)<sup>25</sup> both recognize asylum as a human right. Yet the 1954 Caracas Territorial Asylum Convention<sup>26</sup> recognizes asylum as a right of the state and not the individual. The right of asylum as contained in the American Convention may be upheld by petition to the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights. No similar mechanisms exist for provisions of the 1954 Convention. In the global refugees regime, asylum is regarded as a human right. However, there are no mechanisms for protection that can be applied in the event of a violation of this right. In the inter-American system, territorial asylum and refuge are absolutely synonymous, but not identical, with the concept of the refugee in the 1951 and 1967 global instruments. Furthermore, the scope of the two regimes differ. The inter-American system does not grant asylum for non-political offenses. The global regime expressly excludes some other types of crimes which have no parallels in the inter-American system, such as: crimes against humanity; crimes against peace; war crimes; and the perpetuation of acts contrary to the purposes and principles of the United Nations.<sup>27</sup>

---

23. COMPARATIVE STUDY, *supra* note 12, at 77-78.

24. American Declaration of Rights and Duties of Man, May 2, 1948, OAS Official Records, OEA/Ser.L/V/II 50 doc. 6 (1980).

25. American Convention on Human Rights, Nov. 22, 1969, OAS T.S. No. 36, OAS Official Records, OEA/Ser.L/V/II 50, doc. 6 (1968).

26. See Caracas Convention, *supra* note 16.

27. *Id.* at 80-81; Gros ESPIELL, *supra* note 17, at 8-10.

Inter-American instruments on asylum are based exclusively on political grounds. For example, no inter-American Convention cites "well-founded fear of persecution," the determining criterion of the global regime, as possible grounds for granting asylum. Moreover, the inter-American notion of asylee is based on an objective persecution which, when materialized, causes the individual being persecuted to seek and receive asylum. Under the global regime, mere "fear of persecution" is sufficient to enjoy international legal protection.<sup>28</sup>

In the existing inter-American Conventions, territorial asylum is applicable in cases of political offenses or common crimes related to or connected with political offenses. However, it is not clear whether asylum is applicable in the cases of victims of political persecution or persons who are pursued for common crimes but for political reasons. Furthermore, under inter-American Asylum conventions, there is no complete parallel between the cases in which territorial asylum can be granted and the grounds which do not permit extradition. Finally, it is also unclear whether persons pursued for either political offenses or political motives, or both, can be recognized as asylees despite the absence of an offense, or if it is only persons pursued for political offenses and related common crimes who can be so regarded. In the former case, where no offense exists, even though persecution is politically motivated, there would be no grounds for territorial asylum. Under the global regime being a political refugee does not exclude *a priori* and in principle the right of a state to request extradition for the commission of common crimes or offenses that give rise to extradition.<sup>29</sup>

The fact that a person has been accepted as a territorial asylee does not automatically make him a refugee for the purposes of the global regime. Conversely, classification as a political refugee according to the global refugees regime does not mean that he is *ipso jure* to be regarded as a territorial asylee (*asilado*). Still, in practice, with the decline of individual recourse to the system of territorial asylum, the major issues related to refugees in Latin America are dealt with and resolved through application of the global refugees regime and especially through the activities of the UNHCR.<sup>30</sup>

An effort should be made to ensure that the common objective

---

28. COMPARATIVE STUDY, *supra* note 12, at 79-80.

29. GROS ESPIELL, *supra* note 17, at 25-26, 28.

30. *Id.* at 28; COMPARATIVE STUDY, *supra* note 12, at 1.

of the global and inter-American regimes makes it possible to implement a coherent and systematic policy designed to protect individuals against persecution for any political reason or motive, regardless of the commission of an offense. This is of the utmost importance because the majority of persons in Central America seek territorial asylum or refuge without committing a political offense and without being persecuted.<sup>31</sup>

Under the inter-American system, asylees have the right not to be surrendered by the authorities of a territorial state to those of another state, except in compliance with the rules governing extradition. Asylees also have the right of freedom of expression and assembly or association, except in cases of specific restrictions resulting from applicable conventions. Furthermore, as a matter of principle, asylees should enjoy all the other rights of individuals, irrespective of whether the individual concerned is a national, citizen, alien or resident. Finally, the 1889<sup>32</sup> and 1939<sup>33</sup> asylum treaties specifically state that the grant of refuge does not entail an obligation to shelter the asylee indefinitely.<sup>34</sup>

Asylees have the duty not to commit acts that might endanger the public peace in the state of refuge and not to engage in systematic propaganda urging the use of force or violence against another state. The territorial state has the duty to prevent asylees from committing within its territory acts that might endanger the public peace of the asylee's home state. Arrangements are made for surveillance or internment of the asylees in question.<sup>35</sup>

The principle of non-refoulement is expressly upheld by the inter-American system, even though the system does not define it consistently. The 1889, 1939 and 1954 asylum instruments do not create any non-refoulement obligation for the state of refuge and consequently do not give the asylee any guarantees that he will not be expelled from the state of refuge. However, the American Convention on Human Rights broadly recognizes the principle of non-refoulement; it applies to aliens in the territory of a state and not only to those enjoying the status of asylee.

The 1954 Territorial Asylum Convention makes a distinction between non-refoulement and expulsion. Article 3 provides "[N]o

---

31. GROS ESPIELL, *supra* note 17, at 28-29.

32. Treaty on International Penal Law, Jan. 23, 1889, OAS T.S. No. 34 at 1.

33. Treaty on Political Asylum and Refuge, Aug. 4, 1939, OAS T.S. No. 34, at 66.

34. *Id.* at 30; COMPARATIVE STUDY, *supra* note 12, at 43.

35. GROS ESPIELL, *supra* note 17, at 30; COMPARATIVE STUDY, *supra* note 12, at 44.

State is under the obligation to surrender to another State or to expel from its territory persons persecuted for political reasons or offenses." This injunction on expulsion is phrased in negative terms; the state is under no obligation, whereas the global 1951 Refugees Convention positively prohibits non-refoulement. Under the global 1951 Refugees Convention, the obligation includes the refusal to surrender or expel when another state demands expulsion or surrender. However, no provision is made for cases where the state of refuge decides to expel. Thus, should the state of refuge decide to expel an asylee, there is no guarantee that expulsion will be carried out in accordance with due process of law as established by Article 32 of the 1951 Refugees Convention.<sup>36</sup>

A distinction between non-refoulement and expulsion is also evident in Article 22 of the American Convention which, in general, corresponds to Article 32(2) of the global 1951 Refugees Convention. Thus, expulsion is allowed only pursuant to due process of law.<sup>37</sup> The OAS Legal Subsecretariat concluded that the formulation of the principle of non-refoulement is neither standard nor absolute in the inter-American system, except in the case of Article 22(8) of the American Convention. Moreover, inter-American instruments on territorial asylum do not explicitly include non-rejection at the frontier as part of the concept of non-refoulement. In contrast, the global refugees regime incorporates a broad exception to non-refoulement through the *ordre public* clause of Article 32 of the 1951 Refugees Convention. There is no exception of this kind, nor has any reservation been made to this effect in the inter-American system.<sup>38</sup>

As to the relationship between non-refoulement and non-extradition, the principle of non-refoulement in the inter-American system is fully guaranteed in the case of extradition with absolute respect for asylum and unilateral determination of the character of the offense by the state of refuge. This is fully reinforced by Article 6 of the 1981 Convention on Extradition, which states that "[N]o Provision of this Convention may be interpreted as a limitation on the right to asylum when its exercise is appropriate."<sup>39</sup>

While the OAS has taken up the issue of refugees and their mass influx, beginning with the mass exodus of Cubans in 1980, no

---

36. COMPARATIVE STUDY, *supra* note 12, at 87-89.

37. *Id.* at 89.

38. *Id.* at 94-95.

39. *Id.*

substantive results analogous to the global refugees regime have been achieved. Accordingly, no minimum standards have been established nor has there been any explicit reference to legal norms of protection applicable in such cases. It should be noted, however, that Article 22(8) of the American Convention, which establishes the principle of non-refoulement, prohibits the collective expulsion of aliens.<sup>40</sup>

The current inter-American system has serious shortcomings, especially with regard to the situation of mass exodus. These shortcomings undermine the importance of the traditional institution of asylum. Legal problems arise largely from the failure of Central American states to adhere to the instruments of the global refugees regime. Yet this lack of adherence is sufficient to show that these instruments embody a right that is not unanimously accepted by all Central American states. The General Secretariat of the OAS has no competence to implement the 1954 Territorial Asylum Convention. Moreover, while the IACHR is to oversee the implementation of the American Convention (since this refers to human rights in general), there is no system for specific implementation of the rights of asylees and refugees. Furthermore, the inter-American system has no mechanisms for considering the situation of refugees after they have been granted asylum.<sup>41</sup> Under the inter-American system, the territorial state applies the definition of asylee contained in the relevant instrument, whereas UNHCR supervises the application of the definition of refugee of the global refugees regime. There is no equivalent institutional body for the inter-American system and the entire operation of the American system of territorial asylum is weakened by this fact.<sup>42</sup>

Specific economic, social and civil rights enjoyed by refugees are listed in the global 1951 Refugees Convention. The inter-American system, on the other hand, views territorial asylum as essentially a phenomenon of concern to an individual without providing for extensive social protection. Therefore, it does not regulate matters pertaining to employment, economic livelihood, social settlement and cultural problems of territorial asylees.<sup>43</sup> In fact, Article 6 of the 1954 Territorial Asylum Convention states, *inter alia*, that no state is under the obligation to establish any distinction in its

---

40. *Id.* at 119-23.

41. GROS ESPIELL, *supra* note 17, at 35-36.

42. *Id.* at 33-34.

43. *Id.* at 30-31.

legislation, regulations, or administrative acts applicable to aliens, solely because of the fact that they are political asylees or refugees. Hence, protection is not required to be uniform. This places the asylees at a definite juridical disadvantage, and is inconsistent with the requirements imposed upon domestic legislation by the global Refugees Convention.

Generally, the Latin American states use the principle of *jus soli* to determine personal status. Article 12 of the global 1951 Refugees Convention states that the question of personal status is governed by the law of the place of residence, as this provides conditions more favorable to the refugee. Inter-American instruments on asylum contain no provisions pertinent to this subject. Thus, the matter of a refugee's personal status can pose certain difficulties in Latin America. Domestic laws are not uniform; the laws of domicile prevail in some, while the law of nationality is applied in others. There is at least some discrepancy with Article 12 of the global 1951 Refugees Convention.<sup>44</sup> While the inter-American asylum conventions do not specifically identify all the rights enjoyed by asylees, a framework of guarantees can be constructed from other relevant instruments to which some Latin American states are parties. The right to security and integrity of one's person is guaranteed by Article 1 of the American Declaration and Articles 5(1)(2) and 7(1) of the American Convention. Also, a considerable number of Latin American states have incorporated such guarantees in their constitutions. Protection of such right to security and integrity is virtually uniform at the global and inter-American levels.<sup>45</sup> The right to equality before the law is guaranteed by the American Declaration (Article 2) and the American Convention (Article 24).<sup>46</sup> This principle is also upheld in most Latin American constitutions and laws. Nevertheless, some Latin American states uphold this principle only in relation to nationals. Insofar as aliens are concerned, the principle of equality before the law is not absolute, despite the wording of the American Declaration.

Several inter-American instruments specifically deal with the status of aliens. Article 5 of the 1928 Convention on the Status of Aliens provides "to all foreigners domiciled or in transit . . . all

---

44. COMPARATIVE STUDY, *supra* note 12, at 131-33. *Jus soli*, or law of the soil, confers nationality according to country of birth. See G. VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 198-200 (1986).

45. *Id.* at 101-03.

46. See *supra* notes 24, 25.

individual guarantees extended to nationals and enjoyment of essential civil rights without detriment."<sup>47</sup> Refugees and asylees fall under the category of foreigners. The Bustamante Code of 1928 also provides foreigners with national treatment with regard to civil rights and individual guarantees,<sup>48</sup> and Article 9 of the 1933 American Convention of the Rights and Duties of States provides for national treatment under law.<sup>49</sup> Thus, essentially this right is equivalent to Articles 8 (exemption from exceptional measures) and 31 (non-discrimination) of the global 1951 Refugees Convention. The right to protection against arbitrary arrest is guaranteed by the American Declaration (Article 25) and American Convention (Article 7(3)(7)). In less detail, it is addressed by Article 16 (access to courts) of the global 1951 Refugees Convention.<sup>50</sup> The right to due process of law is guaranteed by Article 26 of the American Declaration and Article 8 of the American Convention, but it is not specifically stated in the global refugees regime. However, it can be inferred from the text of Article 16 of the global 1951 Refugees Convention.

The inter-American system, including the OAS, has not adopted a convention involving a commitment to economic, social and cultural rights which are listed in Article 17-24 of the global 1951 Refugees Convention. To strengthen this area the OAS General Secretariat prepared a draft Additional Protocol to the American Convention on Human Rights, defining social, economic and cultural rights. This draft was submitted to the General Assembly of the OAS, approved, and forwarded to member states, the IACHR and the Inter-American Court.<sup>51</sup> Member states and interested organs and agencies of the OAS were invited to make specific proposals about the rights and international mechanisms included in this Protocol. The IACHR reviewed a series of international instruments dealing with similar rights: the Universal Declaration; the Covenant on Economic, Social and Cultural Rights; and the OAS Charter. It then compared the basic set of rights found in

---

47. Convention Fixing the Rules to be Observed for the Granting of Asylum, Feb. 20, 1928, 123 L.N.T.S. 323.

48. Bustamante Code of Private International Law, Feb. 20, 1928, OAS T.S. No. 34 at 31.

49. Convention on Political Asylum, Dec. 26, 1933, OAS T.S. No. 34, at 27.

50. *Id.* at 104-10.

51. *Id.* at 114-19, OAS CAOR 657 (XXI-O/83); OAS, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1985-1986, 21-22, 195-200, OAS, Doc. Ser.1/V/II.68 doc.8/rev.1, 26 (Sept. 1986) [hereinafter IACHR 1985-1986].

these instruments to those contained in the draft Protocol especially the right to work, to education, to health and to institutions or groups of persons regarded as requiring special consideration.<sup>52</sup> Its findings were submitted to the General Assembly for consideration as part of the 1986 Regular Session.

Protection of the family is included in the American Declaration (Article 6) and the draft Protocol of 1986 (hereinafter 1986 Draft) (Article 10). Similarly, protection of children, the elderly and the disabled are included in Articles 7 and 18-20, respectively, of the same instruments. In general, the 1986 Draft and other relevant inter-American instruments provide guarantees consistent with Recommendation B of the global 1951 Refugees Convention.<sup>53</sup>

The right to work was considered together with the rights of fair remuneration, leisure time, hygienic conditions, unemployment insurance, union organization, collective bargaining, and the right to strike. Closely connected with the right to work is the right to social security. The right to work and related rights are covered by Articles 14-15 of the American Declaration, Articles 31(g) and 43(b-c) of the OAS Charter, and Articles 6-9 of the 1986 Draft. Social security is recognized in the American Declaration (Article 16) and the 1986 Draft (Article 10). Taken collectively, the rights of these and related instruments provide protection and guarantees essentially equivalent to those of Articles 15 (right of association), 17 (wage-earning employment), and 24 (labor legislation and social security) of the global 1951 Refugees Convention.<sup>54</sup>

It is debatable whether or not the inter-American framework is sufficiently flexible (it is not sufficiently detailed) to incorporate Articles 18 (self-employment) and 19 (liberal professions) of the global 1951 Refugees Convention. The wording of the 1986 Draft lays stress on workers and wage-earners. No mention is made of self-employment or recognition of diplomas or professional certificates. Moreover, the wording of Articles 18 and 19 of the global 1951 Refugees Convention is such that the inter-American framework would incorporate only Article 17 of the global 1951 Refugees Convention.

---

52. OAS, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1984-1985, 172-74, OAS Doc. Ser. L/V/II.66 doc.10/rev.1, [hereinafter IACHR 1984-1985]; IACHR 1984-1986, *supra* note 51, at 195-200, (Oct. 1985).

53. IACHR 1985-1986, *supra* note 51, at 207-09; U.N., HUMAN RIGHTS, at 5, U.N. Doc. ST/HR/1/Rev.1, 1978 [hereinafter UN].

54. *Compare* IACHR 1985-1986, *supra* note 51, at 203-05 with UN, *supra* note 53, at 5.

The right to health and the right to food and decent housing are considered in the American Declaration (Article 11), the OAS Charter (Article 31(i-k)) and the 1986 Draft (Articles 12-13). It is not clear whether, collectively, these would incorporate the guarantees of Article 21 (housing) of the global 1951 Refugees Convention, which requires a minimum standard of national treatment regarding public allocation of housing. However, the American Declaration refers to housing as one criterion of a decent standard of living or as a requisite for preservation of health. Conceivably, a refugee or asylee could secure or be allocated decent housing or a healthful residence, yet still be subject to discrimination, i.e., less than national treatment, during the allocation process.

The right to education should be accompanied by the right to participate in the cultural life of the country and the right to enjoy the results of artistic or intellectual creation. These rights are addressed by the American Declaration (Articles 12-13), the OAS Charter (Article 47) and the 1986 Draft (Articles 14-16). Collectively, these guarantees are equivalent to the protections required by Articles 14 (artistic rights and industrial property) and 22 (public education) of the global 1951 Refugees Convention.<sup>55</sup>

At the 1984 and 1985 Regular Sessions of the OAS, the General Assembly took note of the comments and suggestions made by the IACHR. Further, it urged that member states accept IACHR's proposals to have member states' constitutions and provisions of domestic law conform to provisions of the American Convention. The 1986 Draft was forwarded for Assembly consideration during its 16th (1986) Regular Session. If approved, the draft would then be opened for signature and its provisions incorporated under the American Convention. At the close of 1986, there was no indication that any Latin American state had taken action to implement either the IACHR or OAS General Assembly suggestions.<sup>56</sup>

---

55. Compare IACHR 1985-1986, *supra* note 51, at 205-07, with UN, *supra* note 53, at 5-6.

56. See IACHR 1985-1986, *supra* note 51, at 195-98.

## CHART ONE

## PARTIES TO THE AMERICAN CONVENTION ON HUMAN RIGHTS

	Ratified American Convention	Recognizes IACHR competency	Recognizes Court jurisdiction
Argentina	yes	yes	yes
Bolivia	yes	no	no
Brazil	no	no	no
Chile	no	no	no
Colombia	yes	yes	yes
Costa Rica	yes	yes	yes
Cuba	no	no	no
Dominican Republic	yes	no	no
Ecuador	yes	yes	yes
El Salvador	yes	no	no
Guatemala	yes	no	no
Honduras	yes	no	yes
Mexico	yes	no	no
Nicaragua	yes	no	no
Panama	yes	no	no
Paraguay	no	no	no
Peru	yes	yes	yes
Uruguay	yes	yes	yes
Venezuela	yes	yes	yes

## CHART TWO

## RATIFICATION OF INTER-AMERICAN ASYLUM CONVENTIONS

TREATIES	STATES PARTY
Treaty on International Penal Law, Montevideo, 1889	Argentina, Bolivia, Paraguay, Peru, Uruguay. Peru has denounced the Treaty.
Bolivar Extradition Agreement, 1911	Bolivia, Colombia, Ecuador, Peru, Venezuela.
Havana Asylum Convention, 1928	Brazil, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay.
Bustamante Code of Private International Law, 1928	Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Peru, Venezuela.
Montevideo Asylum Convention, 1933	Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru.
Montevideo Extradition Convention, 1933	Argentina, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama.
Montevideo Asylum Convention, 1939	Paraguay, Uruguay.
Caracas Territorial Asylum Convention, 1954	Argentina, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Mexico, Panama, Paraguay, Uruguay, Venezuela.
Caracas Diplomatic Asylum Convention, 1954	Brazil, Costa Rica, Ecuador, El Salvador, Mexico, Panama, Paraguay, Peru, Uruguay, Venezuela.

**CHART THREE**  
**STATES PARTY TO THE GLOBAL REFUGEES REGIME**

	1951 Convention	1967 Protocol
Argentina	yes	yes
Bolivia	yes	yes
Brazil	yes (1)	yes (1)
Chile	yes	yes
Colombia	yes (1)	yes
Costa Rica	yes	yes
Cuba	no	no
Dominican Republic	yes	yes
Ecuador	no	yes
El Salvador	no	yes
Guatemala	yes	yes
Honduras	no	no
Mexico	no	no
Nicaragua	yes	yes
Panama	yes	yes
Paraguay	yes (1)	yes (1)
Peru	yes (1)	no
Uruguay	yes	yes
Venezuela	no	yes

(1) indicates geographic restriction applies.