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The application of the Cartagena Declaration on Refugees to Venezuelans in Brazil: An analysis of the decision-making process by the National Committee for Refugees

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Abstract

Although the outflow of Venezuelan nationals represents one of the greatest challenges which has affected South America so far, the Brazilian National Committee for Refugees (CONARE) took over 3 years to decide whether or not to apply the Cartagena Declaration, progressively demonstrating unwillingness to provide international protection to Venezuelans and developing migratory routes

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as alternatives. As the main decision-making court in Brazil for asylum claims, this study looks at the route followed by CONARE to come to a decision and its possible consequences for asylum seekers. Although CONARE did apply the Cartagena Declaration in asylum claims made by Venezuelans, it was regarded as subsidiary to the 1951 Convention. Consequently, the committee decided not to apply a *prima facie* recognition, and demonstrated deep concern to asylum seekers' criminal background. This investigation uses primary sources, such as official documents and field memories, and secondary sources, such as reports by other researchers and organizations.

Keywords

Cartagena Declaration, Refugees, Forced Displacement, Brazil, Venezuela.

La Aplicación de la Declaración de Cartagena sobre Refugiados para los Venezolanos en Brasil: un análisis del proceso de la toma de decisiones por el Comité Nacional para los Refugiados

Resumen

Aunque la migración de venezolanos constituye uno de los más grandes desafíos que ha enfrentado Suramérica, el Comité Nacional para los Refugiados (CONARE) de Brasil tardó más de tres años para decidir si aplicaba o no la *Declaración de Cartagena*, con lo que mostró su continua reticencia a proporcionar protección internacional a los venezolanos migrantes, al mismo tiempo que se desarrollaron vías migratorias alternativas. CONARE es el principal tribunal que decide solicitudes de asilo en Brasil. Este artículo investiga la trayectoria seguida por su proceso decisorio y sus posibles consecuencias para los solicitantes de asilo. Aunque CONARE aplicó al final la *Declaración de Cartagena* a los casos de solicitantes de asilo venezolanos, la consideró subsidiaria a la *Convención de 1951*, con lo que decidió no aplicar el reconocimiento *prima facie* y mostró una intensa preocupación por los antecedentes penales de los solicitantes de asilo. Este estudio usa fuentes primarias, como documentos oficiales y diarios de campo, y fuentes secundarias, como informes de otros investigadores y otras organizaciones.

Palabras clave

Declaración de Cartagena, Refugiados, Desplazamiento Forzado, Brasil, Venezuela.

INTRODUCTION

A major focus has been placed on the Americas given the numerous crises occurring in the region concerning the protection of immigrants and refugees. According to the United Nations High Commissioner for Refugees (UNHCR or UN Refugee Agency),[1] it is estimated that Latin America and the Caribbean hold a total of 11.720.790 individuals who are of special concern

1 UNHCR. *Global Trends: forced displacement in 2018*, https://www.unhcr.org/globaltrends2018/#.

for the agency, such as refugees, returnees, internally displaced persons (IDPs), stateless people, and asylum seekers, among others. Accordingly, protection concerns are, of course, paramount for the region. However, North, Central and South America are still subject to severe protection gaps.

Some of it relates to how the United States of America (US) has been separating families or forcing asylum-seekers to wait for rulings on their claims in foreign territory.[2] It is also partly due to how Mexico has been reinforcing its porous southern border with extra security after pressures from its northern neighbor. As a result, detentions and deportations have increased, and some policies have changed, such as African immigrants' prior possibility to cross the country and seek asylum in the US. This can no longer be done. Free mobility throughout Mexico only allows these individuals to cross through the southern border, which influenced recent demonstrations in the border city of Tapachula.[3]

Central America is still undergoing a major security crisis, forcing people to flee, affecting all the Americas and the Caribbean. Moving south, the implementation of the Colombian peace deals with the armed group FARC-EP have significantly lagged and several former commanders who had pledged to disarm have recently released a video in which they state that they have rearmed, which may, in turn, amount to further conflicts and massive forced displacement.[4] Outflows of Venezuelans are still ongoing, and, according to the UNHCR, it is estimated that 5,000 Venezuelans leave their country every day.[5] The same data shows that, by the end of 2018, more than three million people had been forcibly displaced from Venezuela for many reasons, such as violence, food and medicine shortages, and their incapacity to support themselves and their families. For their part, the receiving countries in the region, face great challenges to provide protection and integrate migrants in their welfare systems.

This article will focus on the displacement of Venezuelans emphasizing one case study: their inflows in Brazil and the country's protection response. More specifically, we want to look at the journey taken by the Brazilian National Committee for Refugees (CONARE) to decide whether or not to apply the 1984 Cartagena Declaration on Refugees (Cartagena Declaration) to their claims. We call it a journey due to the protracted time taken to make a decision, the various political shifts, and the role played by the Brazilian civil society. The first part of the article will focus on demonstrating the complexities of the Brazilian asylum system and why CONARE works as the main court in the country that deals with asylum. For now, we can say that there is a political agenda that prevents asylum claims to be further reformed by upper tribunals. As the sole adjudicator, it is all the more important to observe whether CONARE has been applying international legal standards with regards to asylum, and in this case, to asylum claims made by Venezuelans.

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2 This is part of a project called "Migrant Protection Protocols", informally known as "Remain in Mexico", as found on the Department of Homeland Security's website as of January 2019.

3 Alberto Pradilla, "La orden del INM que explica por qué cientos de migrantes africanos protestan em Tapachula, Chiapas", *Animal Político*, August 24, 2019, https://www.animalpolitico.com/2019/08/orden-inm-que-explica-por-que-migrantes-africanos-protestan/.

4 Megan Janetsky, "How to keep the Colombian Peace Deal Alive", *Foreign Policy*, September 8, 2019, https://foreignpolicy.com/2019/09/08/how-to-keep-the-colombian-peace-deal-alive-farc-duque-uribe-colombia/.

5 UNHCR, *Global Trends: forced displacement in 2018*.

The second part of the article focuses on CONARE's aforementioned journey to eventually decide that the Cartagena Declaration should be applied to claims made by Venezuelan asylum seekers. The third and final piece will specifically look at CONARE's decision, and critically analyze its possible outcomes and the challenges Brazil still faces with regards to the protection of asylum seekers in general, and Venezuelans specifically. This study is a result of a two-year-long project developed in and sponsored by the Casa de Rui Barbosa Foundation, in which we had close contact with many important social actors of the Brazilian refugee/migration legal and political agendas. It thus draws information from field memories, although it does not constitute an ethnography, and its main qualitative sources are official documents (primary sources) and studies and reports written by peers (secondary sources).

1. CONARE AS THE MAJOR RULING COURT ON ASYLUM CLAIMS IN BRAZIL: WHY DOES THE JUDICIAL SYSTEM KEEP QUIET?

Brazil's judicial system is made up of a complex web of procedures, with different possibilities of appeals, which can eventually lead up to the analysis of the Federal Supreme Court (STF, by its acronym in Portuguese). Matters concerning asylum, however, have seldom reached the high courts, even though Brazil now has over 161,057[6,7] asylum seekers still waiting for a decision on their claims. According to Côrrea and Magalhães, even though STF did establish the possibility for asylum to be materially analyzed,[8] the Superior Court of Justice (STJ), which is situated hierarchically below STF, has, in general, ruled that the Judiciary cannot change asylum assessments made by CONARE. The authors analyzed the only 13 rulings concerning asylum since STJ was founded, in 1990, and only two of them applied constitutional and international standards of Refugee Law. They also found most of the judiciary reviews were made after 2010, which they concluded was due to the precedent established by STF and because the number of asylum applications increased significantly.[9]

Although Moraes[10] did find cases in trial courts which changed the core of CONARE's asylum assessment due to its illegality, judicial appeal is, to this day, an exceptional occurrence, as will be outlined below, with unpredictable outcomes, given the scarcity of precedents.[11]

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6 Data provided by CONARE, regarding the number of claims made until 02nd January 2019.

7 CONARE, "Refúgio em números: 4ª edição", accessed September 1st, 2019, https://www.acnur.org/portugues/wp-content/uploads/2019/07/Refugio-em-nu%CC%81meros_versa%CC%83o-23-de-julho-002.pdf.

8 Italy v. Cesare Battisti, Extradição 1.085 (STF 2010).

9 Gabriella Côrrea and Breno Magalhães, "The Judicialization of Refuge in the STJ: Deference to the Executive Branch and Interpretative Incoherence," *Revista da Faculdade de Direito da UFPR*, nº 64(1), (2019): 158-162, http://dx.doi.org/10.5380/rfdufpr.v64i1.64908.

10 Thaís Moraes, "O Papel do Judiciário na Proteção aos Refugiados," *Revista da Faculdade de Direito da UFRGS*, nº 32, (2014): 170-173, https://doi.org/10.22456/0104-6594.70461.

11 Even though the number of judicial reviews is proportionally low in comparison to the number of asylum cases, it does not mean it is inexistent. As Cardoso and Schubert (2014) demonstrate, Federal Regional Courts have analyzed several asylum decisions, but there is still no consensus among magistrates regarding the possibility to materially assess the bulk of the asylum cases, or whether the right to seek and be granted asylum is considered a right or a discretionary act of the State.

In fact, there have been many informal debates among staff of organizations that provide legal support to refugees, public defenders and refugee lawyers about the pros and cons of judicial reviews of asylum claims. It seems, however that no consensus has been reached. In fact, previous research findings may enhance doubts about how positive judicial reviews really are for the refugee population. Justices are not properly trained in Refugee and Migratory Law,[12] the Brazilian Bar Association does not concern itself with such subject and has almost never developed projects concerning the refugee population. Indeed, the current political conservative landscape in Brazil may negatively influence judicial rulings due to scaremongering opinions related to immigration and refugees.

Nonetheless, judicial appeals do provide a chance to challenge illegal decision-making by CONARE, it binds its seven members to legal accountability regarding their decisions, and it may even improve the quality of decision-making in the long run. It could also mean international standards on Refugee and Human Rights Law will have to be applied, since it is an obligation for justices to consider, for instance, Advisory Opinions and Judgements by the Inter-American Court of Human Rights (IA Court HR). Moreover, the possibility to question CONARE's decision in the Judiciary is important for the due process of law, as it provides asylum seekers with the right to contradict decisions they disagree with.

In the current Brazilian system, a judicial review would be particularly relevant considering the amount of time it takes for an administrative appeal to be judged.[13] In practice, when an asylum claim is judged negatively, and the asylum seeker must or wants to appeal, his or her lawyer knows there is almost no chance for the decision to really be reassessed. It is noteworthy that CONARE is a committee composed of seven members, and its president is the National Secretary of Justice, who represents the Ministry of Justice. Although asylum claims are decided by such members, CONARE's daily activities are organized and managed by a general coordinator and an office staff of civil servants also situated within the Ministry of Justice. It so happens that, if an asylum seeker wishes to appeal a negative decision, the administrative body that will judge the appeal, supposedly independently of CONARE, is the Minister of Justice him or herself. In sum, the person who judges asylum appeals is also hierarchically superior to the individual who presides the committee which issued the first decision. Without a real third party to reevaluate the claim, there is no real due process of law, as the "provision for an independent instance of administrative appeal is, indeed, a necessity for the promotion of a fair procedure" (non-official translation).[14]

Moreover, if appeals are almost never judged or if it takes years for a final decision to be made,[15] it is safe to say the right to seek and be granted asylum is being violated, since there

12 It is not a mandatory course in any Law department, and only a few universities offer this class as an optional course.

13 Although there is no official data of the amount of appeals judged in the last five years, both the authors of this article have been directly providing legal assistance to asylum seekers for the last five years, and they have only seen two judged appeals.

14 Larissa Leite, "Esfera Recursal no Processo de Reconhecimento da Condição de Refugiado: Uma expectativa brasileira," in *Refúgio no Brasil: Comentários à Lei 9.474/97*, edited by Liliana Lyra Jubilut and Gabriel Gualano de Godoy (São Paulo: Quartier Latin, 2017), 253.

15 Drawing from our own experience as representatives of asylum seekers in their asylum claims, we have personally been informed that, since 2012, there is no general practice of judging appeals by the Minister of Justice.

is little chance that one's claim will be fairly judged in a timely manner. Leite's studies, for instance, demonstrated that, in January 2014, there were 309 pending decisions for appeals made in São Paulo, some of them, made in 2000.[16] Such practices could be interpreted as a political strategy to prevent asylum seekers from ever reaching international protection and preventing them from ever questioning CONARE's decision in national and international courts. Then why don't Brazilian civil society organizations promote judicial appeals?[17]

First and foremost, it is important to note that asylum seekers in Brazil have the right to work and study, even though their migratory status is only provisional. This means that, unlike other countries, asylum seekers in Brazil can still access basic rights. With that said, and considering judicial appeals are very unpredictable and could lead to negative results, most people – asylum seekers and their lawyers – still prefer the certitude of at least a provisional status, regardless of the many years it might take for appeals to be judged in the administrative sphere. While they wait, asylum seekers build a life in the country – they build a career, a household, a family. Many of them eventually change their migratory status not by means of international protection, but by accessing alternative migratory routes, such as labor or family reunification residencies. The delay in the decision-making forces asylum seekers to abandon the search for international protection. It also prevents them from ever really questioning CONARE's rulings, which makes the committee the sole adjudicator in refugee matters in the country.

Secondly, there are many asylum seekers who sought asylum because they wouldn't otherwise have a path to regular migration, such as many of the Senegalese in Brazil. Thus, to publicly and directly advocate for a more fast-paced appeal system would also mean that hundreds of immigrants would end up without a regular status to remain in the country, thus no organization would engage in this advocacy strategy.

All things considered, it would be safe to say that asylum cases will rarely be discussed in the judicial arena – with no judged appeals by the administrative bodies, no asylum seekers or even lawyers would try their chances in the judicial system. This might also be one of the reasons why Côrrea and Magalhães found so few asylum cases in STJ. It is also very unlikely for any case to be brought up to the Inter-American Human Rights system or UN Treaty Bodies soon. Consequently, it is correct to assert that CONARE is currently the major ruling court for deciding asylum claims, with only a few exceptions. Its decisions and the standards it decides to apply are thus of great importance to the refugee community and, as such, should be carefully analyzed.

Regarding the Venezuelan community in Brazil, specifically, CONARE's long lasting inaction concerning whether their refugee status would be recognized or not had a direct impact on the lives of the individuals in the country. Ever since 2016, when their influx increased significantly, the committee progressively postponed debates and decisions in this respect. Instead, the government came up with a temporary residency status for Venezuelans, which many could not access due to lack of documentation and could only rely on their asylum claims. It took CONARE around 3 years to come to a decision that will potentially influence the livelihoods of Venezuelan asylum seekers and refugees in Brazil. The lack of accountability

16 Larissa Leite, "Esfera Recursal no Processo de Reconhecimento da Condição de Refugiado", 251.

17 In Brazilian law, it is not necessary to exhaust all administrative appeals to be able to file for a judicial review, which means it would be possible to appeal both to the Minister of Justice (in the administrative sphere) and to the Federal courts.

and concern for international and national standards in the daily activities of the committee has definitely impacted the journey taken by CONARE towards decision-making. It is to hold CONARE accountable for its own actions and inactions regarding the decision-making process concerning Venezuelan displacement to Brazil that we propose to enlighten the main steps of its path towards the application of the Cartagena Declaration, as analyzed below.

2. CONARE'S PROCESS OF APPLYING THE CARTAGENA DECLARATION ON REFUGEES IN REGARDS TO VENEZUELANS

To comprehend such a journey towards the recognition of Venezuelans as refugees by CONARE one must first examine the legal milestones through which such steps were taken. The main legal instrument in the country regarding the protection of refugees and asylum seekers is the Brazilian National Law on Asylum (Law 9474/1997),[18] renowned worldwide for being at the forefront of the protection of the refugee population.[19] It contains an extended definition of a refugee, as in addition to the concept present in the 1951 Convention on the Statute of Refugees[20] and its 1967 Protocol, it also defines a refugee as a person who "due to a great and generalized violation of human rights is forced to leave their country of nationality to seek asylum in another country"[21] (non-official translation).

Considering that "there are different levels of implementation of the Cartagena Declaration on Refugees, as States remain 'free to determine whether and how to incorporate its guidelines and principles into national protection legislation',"[22] it is therefore obvious that Brazil, through the aforementioned normative instrument, has only partially internalized the extended definition of refugee contained in the Cartagena Declaration on Refugees of 1984 in what concerns "massive violations of human rights".[23] As Michael Reed-Hurtado found:

> (...) Four countries - Brazil, Colombia, Paraguay and Peru - have limited the definition of refugee to persons that are 'forced' or 'obligated' to leave their country as a result of the objective situation. This modification adds the element of compulsion, duress or obligation to the impetus of flight. In contrast, the regional refugee definition recommended by the Cartagena Declaration requires only that flight be a consequence of the (generic) threat to life, safety or freedom generated by one of the five objective

18 Also mentioned in this article as Refugee Law or Brazilian Refugee Law.

19 Liliana Lyra Jubilut, *O Direito Internacional dos Refugiados e sua Aplicação no Ordenamento Jurídico Brasileiro* (São Paulo: Método, 2007), 195-196.

20 Henceforth simply as the 1951 Convention.

21 Brazilian President of the Republic. *Law 9474/1997*, Brasilia: 1997, http://www.planalto.gov.br/ccivil_03/leis/l9474.htm.

22 Liliana Lyra Jubilut and Rachel de Oliveira Lopes, "Forced Migration and Latin America: Peculiarities of a Peculiar Region in Refugee Protection", 131-154.

23 Colloquium on the International Protection of Refugees in Central America, Mexico and Panama. *Cartagena Declaration on Refugees*, Cartagena: 1984, https://www.oas.org/dil/1984_cartagena_declaration_on_refugees.pdf

> situations contemplated. (...) Brazil has arguably most drastically varied the original wording proposed in the Cartagena Declaration.[24]

One would think that due to such an open and extended definition, the Brazilian State would easily be able to recognize forced migrants from Venezuela as refugees as have other Latin American states. However, CONARE failed to abide by its protection duties due to a historical restrictive application of the extended definition.

This inflow began with Dilma Rousseff, renowned left-wing, former president of Brazil. Her close international relations with international left-wing leaders were expected to impose severe difficulties in the recognition of Venezuelans as refugees in the country.

During this governmental period, CONARE still applied a very restrictive interpretation of the extended definition of a refugee when compared to international institutions' views. As discussed in the CIREFCA Conference,[25] for example, the first four reasons for flight according to the Cartagena Declaration ought to be interpreted through the lenses of International Humanitarian Law. Reed-Hurtado also found, in his field research throughout South America, that the CIREFCA legal document continues to be "the most frequently, if not the only, source cited by most national authorities to interpret the regional refugee definition",[26] and cited Brazil as one of them.

Nevertheless, the fifth reason, namely, massive violations of human rights, should be read in a comprehensive manner, including the combination of violations of great magnitude, on the one hand, and unlawful acts against International Human Rights Law on the other. In this sense, a violation of any human right would suffice, as long as perpetrated in great magnitude.

Throughout its history, a non-exhaustive list of countries whose nationals or former residents were recognized as refugees by CONARE based on the extended definition includes: Somalia; Angola; Democratic Republic of Congo; Liberia; ex-Yugoslavia; Nigeria; Ukraine; Colombia; and Syria.[27] What did these countries have in common? Their national socio-political reality was fundamentally characterized by generalized violence and, most importantly, by armed conflict. The lack of transparency and the absence of legal substantiation in CONARE's decisions prevented us from knowing the concept of great and generalized violation of human rights applied by the Committee prior to June 2019. However, we do know that every case decided as such until then, involved people who had fled regions with an ongoing and generalized armed conflict.[28]

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24 Michael Reed-Hurtado, *The Cartagena Declaration on Refugees and the Protection of People Fleeing Armed Conflict and Other Situations of Violence in Latin America* (Geneva: UNHCR, 2013), 17, https://www.refworld.org/pdfid/51c801934.pdf.

25 In 1989, as part of the anniversary of the 5 years of the Cartagena Declaration, the International Conference on Central-American Refugees (CIREFCA) was held in Guatemala in order to discuss durable solutions for UNHCR's population of concern. The Conference was attended by representatives from 53 States, including 23 American States (including Brazil).

26 Reed-Hurtado, *The Cartagena Declaration on Refugees*, 15.

27 Hannah Waisman Motta da Silva, "Os direitos dos refugiados(as) no Brasil: Reflexões sobre a grave e generalizada violação de direitos humanos na prática do reconhecimento da condição de refugiado(a)" (Master Thesis, University of São Paulo, 2017), 96-98.

28 Vivian Holzhacker, "A Situação de Grave e Generalizada Violação aos Direitos Humanos como Hipótese para o Reconhecimento do Status de Refugiado no Brasil", in *Refúgio no Brasil: Comentários à Lei 9.474/97*, edited by Liliana Lyra Jubilut and Gabriel Gualano de Godoy (São Paulo: Quartier Latin, 2017), 121-131.

Therefore, it is clear that CONARE's application of its extended definition went historically against the interpretation developed by CIREFCA's members. Such a conclusion further delayed the recognition of Venezuelans as refugees by the Committee in that although the socio-political situation in Venezuela is marked by growing statistics of urban violence and homicides,[29] it does not involve an armed conflict as defined by International Humanitarian Law. Moreover, CONARE has persistently resisted deciding positively on Venezuelans' asylum applications due to the fact that their country of origin was marked by violations of economic and social rights, which up until very recently, were not considered by our administrative court as founded reasons for recognizing someone as a refugee. The non-application of the Cartagena concept is not privy to Brazil. This is demonstrated by Jubilut and Fernandes, when they state that, in Latin America, there is a "preference by States in the region to use complementary forms of protection regarding Venezuelans as a way to achieve a regular migratory status" and "this can be seen as a way for States to decrease their responsibilities once International Refugee Law requires wider protection duties towards these forced migrants (…)".[30]

However, the political coup orchestrated against president Dilma Rousseff – apart from the tremendous violations committed against rule of law in Brazil and peoples' rights in the country - could mean a change in CONARE's approach towards Venezuelan cases. Different from his predecessor, president Temer was a high-ranked center-right politician, who was critical of the Venezuelan left-wing leaders. No change. As the institution to which CONARE is subordinated, the Ministry of Justice also developed different kinds of jugglery to prevent Venezuelan asylum seekers from significantly increasing the numbers of demands to be decided by CONARE and, consequently, from acquiring international protection during Temer's administration. Firstly, it published the Normative Resolution 126 of the National Council of Migration (RN 126 CNIg) in March 2017, which established the possibility of temporary residency authorization for nationals of countries which shared borders with Brazil and were not part of the MERCOSUR Residency Agreement. However positive that might seem at first glance, a number of problems did arise. First of all, it was a residency authorization valid only for two years, with no possibility of extension or transformation into permanent residence. Second, and most importantly, all applicants were required to sign a declaration stating that they preferred the temporary resident status instead of being recognized as refugees: clear proof that the Ministry was unwilling to guarantee their right to protection.[31]

Once the expiration date of RN 126 CNIg was about to be reached, Temer published what seemed at first to be a turning-point in CONARE's approach towards Venezuelans: the

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29 Amnesty International, *Amnesty International Report 2016/17 - Venezuela*, (London: Amnesty International, 2017), https://www.refworld.org/docid/58b0339a15.html.

30 Ananda Fernandes and Liliana Jubilut, "A Atual Proteção aos Deslocados Forçados da Venezuela pelos Países da América Latina", in *Migrações Venezuelanas*, edited by Rosana Baeninger and João Carlos Jarochinski Silva (Campinas: NEPO/Unicamp, 2018), 170.

31 As Protection Agents at the Centre for the Protection of Refugees and Immigrants of the Casa de Rui Barbosa Foundation, we even came across cases of Venezuelans who were given a Declaration by the Federal Police stating that they gave up on their asylum processes by applying for temporary residence. A clear attempt to illegally use the normative instrument in order to force the applicant to commit an error. Moreover, during a discussion with a CONARE's employee regarding a truly serious case of an asylum seeker who suffered persecution in Venezuela based, among other reasons, on the lack of provision of HIV medicine, we were told that (s)he most certainly would have his/her case denied. One more example of how CONARE did not want Venezuelans to be recognized as refugees.

Presidential Decree 9.285/2018, which recognized a situation of humanitarian crisis in Venezuela to have caused an important, disordered and unpredictable migratory influx to the state of Roraima. From this day, members of civil society began to discuss whether such decree would eventually be used by CONARE to recognize Venezuelans as refugees. Unfortunately, it did not.

Instead, the Brazilian government published the Interministerial Ordinance n. 09 in March, 2019. The pros of the instrument were unquestionable: it guaranteed the Venezuelans' right to apply for temporary residence authorization which, after two years, could change into an authorization of residence with an indefinite deadline. However, the next move of the National Committee for Refugees would demonstrate it is agenda. By the end of the same month, it published its Normative Resolution 26, which established that the Committee could terminate an asylum demand ex officio without a merit resolution in every case whose applicant had previously received any other type of residence authorization.

Whilst such maneuvers were means to prevent a positive application of the extended definition of a refugee to the forced inflow of Venezuelans, several attempts were made by both civil society and UNHCR in order to discuss the matter in the administrative court. In the Plenary Meeting number 129,[32] for example, the Public Defender Gustavo Zortea argued that Venezuelans should be recognized as refugees based on the extended definition. In agreement, the UNHCR representative Mrs. Isabel Marquez stated that Venezuelans should be given the right to apply for asylum, whilst also defending the application of Cartagena's extended definition. On the whole, such demands were responded to through meaningless discourses of the President and the Coordinator of the Committee, who, besides refusing the recognition, given the Venezuelans' alleged desire to go back to their country of origin, postponed the discussions based on a supposed need to further discuss the topic.

Until very recently, Brazil presented a true contradiction between its international discourses made through the Ministry of International Affairs (MRE) and the decisions made by CONARE. On the one hand, MRE showed itself to be profoundly critical of the socio-political situation of Brazil's northern neighbor on various occasions. In 2016, for example, it published a note condemning the aggravation of the humanitarian and human rights situation in the country,[33] while in 2017, it published a common announcement in conjunction with Mercosur State-parties urging Venezuela to free its political detainees and apply human rights standards in State's actions.[34] On the other hand, the Ministry of Justice, through the presidency and coordination of CONARE, strongly resisted the application of the extended definition to such cases as previously analyzed.

Months and years went by and thousands of applications kept accumulating on CONARE's desks without any constructive solutions. This constant increase in demands, added to the

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32 CONARE, *Minute of the 129th Plenary Meeting*, Brasilia: 2018, https://www.justica.gov.br/seus-direitos/refugio/anexos/minuta-de-ata-da-128a-reuniao-ordinaria.pdf/view

33 Ministério das Relações Exteriores do Brasil, *Situação na Venezuela*, Brasília, 2016, http://www.itamaraty.gov.br/pt-BR/notas-a-imprensa/14145-situacao-na-venezuela-2.

34 "Declaración de los Estados Partes del Mercosur sobre la República Bolivariana de Venezuela -Buenos Aires, 1 de abril de 2017", *Ministério das Relações Exteriores*, April 1, 2017, http://www.itamaraty.gov.br/es/notas-a-la-prensa/17907-declaracion-de-los-estados-partes-del-mercosur-sobre-la-republica-bolivariana-de-venezuela-buenos-aires-1-de-abril-de-2017.

pressure exerted from civil society were vital to what would happen in June 2019. CONARE would finally begin to recognize the Venezuelan inflow as forced migration. Venezuelans would eventually be recognized refugees in Brazil. However, it is of extreme importance to have an in-depth understanding of the basis of such decision and what we may expect from its application.

3. CONARE'S DECISION AND POSSIBLE OUTCOMES

CONARE's decision concerning the situation in Venezuela, and whether it could amount to a situation of generalized violation of human rights was issued in the plenary meeting which took place on June 14, 2019. According to the Country of Origin Information (COI) study issued the previous day by CONARE's general coordinator, the committee wanted to investigate whether or not the extended concept of refugee, inspired by the Cartagena Declaration, and established in the Brazilian Refugee Law, would be applicable in the situation of Venezuelans in Brazil. In order to do so, the COI study would base itself on the Cartagena Declaration's guidelines, as well as UNHCR's and the MRE's official considerations. It would amount to seven different criteria: 1) generalized violence; 2) foreign aggression; 3) internal armed conflicts; 4) massive violation of human rights; 5) circumstances that severely disturbed public order; 6) UNHCR's guidelines; and 7) the official position of the MRE.

In the first part of the study, CONARE's general coordination traces a chronological background covering the main aspects of Venezuela's recent political history leading up to what the study calls an aggravation of humanitarian crisis in 2019. It then follows an intricate study of the seven aforementioned criteria.

With regards to generalized violence, CONARE's general coordination defines it as indiscriminate violence that affects many people or whole populations, and may manifest itself by: the high number of victims and violent events, and may cause severe suffering; the use of torture, massacres, cruelty, degrading and inhuman treatments, assassinations, amongst others; the purpose of acts of violence used to provoke terror and displacement; violence that could be caused by state and non-state actors, with impunity for both parties; and such high rates of violence as to severely damage ordinary social life. Therefore, in order to analyze whether the situation in Venezuela amounts to generalized violence, the investigation studied the situation of internal security and human rights, arbitrary detentions and violations of the due process of law, as well as the use of torture. The main sources used to perform such analysis were reports by Human Rights Watch (HRW), the Office of the High Commissioner for Human Rights (OHCHR), the Inter-American Commission on Human Rights (IACHR) and Venezuelan NGOs. The general coordination then came to a conclusion that it is possible to declare that there is a situation of generalized violence in Venezuela, due to reports of extrajudicial executions, gender violence, torture of detained and imprisoned individuals, a high homicide rate, among other reasons. It was also verified that such violence is perpetrated by both state and non-state actors, with impunity.

The COI's study determined that it is not possible to say that there is a situation of foreign aggression in Venezuela, since there has been no use of force by any other Nation-State against Venezuela's sovereignty, territorial integrity or political independence. However, CONARE's general coordination did find reasons to believe that there are internal armed conflicts, understood as "situations of armed violence that may put at risk the life, safety and freedom of

civilians who need international protection" (non-official translation).[35] This type of armed conflict is perpetrated by armed groups such as *Colectivos*, *Megabandas*, *Fuerzas de Libertación Bolivariana*, *Ejército de Libertación Nacional de Colombia (ELN)* and the *Ejército Popular de Libertación*.

In relation to the situation of massive violation of human rights, the COI study first considered that it would amount to violations that generally affect many different social actors by systematically denying them their civil, political, economic, social and cultural rights. CONARE's general coordination focused on violations of economic, social and cultural rights in general, and the rights to food, health, and education specifically. It was also in relation to this topic that the situation of forced displacement within and out of the country was examined. Overall, it was found that over 80% of Venezuelans currently live in a situation of extreme poverty, and 90% of them have no sufficient income to afford enough food. Apart from that, there has been a drop of 95% of investments in public health, with the consequential plight of medical professionals, increase in maternal and infant mortality, and shortage of 90% of essential medicines. IACHR reports have shown the necessary plight of Venezuelans, forcibly displaced to find better livelihood conditions elsewhere.

The study also found that there were grounds to believe there are circumstances that severely disturb the public order, defined as the harmonic institutional operation, based upon values and principles, such as institutional stability, freedom of expression, etc. CONARE's general coordination analysis applied IACHR's reports which demonstrate political interference in the National Assembly and the disruption of the principle of the separation of powers. The study also showed police corruption, a state of economic crisis, and progressive violation of freedom of expression, with arbitrary and political detentions, as well as mistreatment of political opponents.

The COI's study also demonstrated how both the UNHCR and the Brazilian Ministry of Foreign Relations assume that there is a situation of generalized violation of human rights in Venezuela, and finally recommends that the committee should recognize that there is such a situation in Venezuela for the purposes of applying Article 1(3) of the Brazilian Refugee Law in asylum claims made by Venezuelan nationals. However, it is noteworthy that, at the time, this did not mean a *prima facie* recognition for Venezuelan asylum seekers. In other words, the over 100,000 Venezuelan asylum seekers in Brazilian territory[36] would have to be interviewed, albeit in a more simplified interrogation, so as to first verify whether or not there are grounds for refugee recognition under the 1951 Convention, which requires individual assessment. Only when it is verified that the 1951 Convention cannot be applied, will the committee recognize refugee status under the Cartagena Declaration.[37]

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35 Ministério da Justiça e Segurança Pública. *Nota Técnica nº 3/2019/CONARE_Administrativo/CONARE/DEMIG/SENAJUS/MJ. Processo nº 08018.001832/2018-01. Estudo de País de Origem - Venezuela*, Brasília: 2019, https://www.justica.gov.br/news/collective-nitf-content-1564080197.57/sei_mj-8757617-estudo-de-pais-de-origem-venezuela.pdf.

36 CONARE, "Refúgio em Números".

37 Although this is not specifically written in the COI study, it was mentioned by several CONARE members and individuals that were present at the plenary meeting that decided to apply the Cartagena Declaration and article 1(3) of Refugee Law with regards to Venezuelan asylum seekers in Brazil.

It must be mentioned, first, that such subsidiary application of the Cartagena Declaration is per se a violation of International Refugee Law. Nowhere in the 1951 Convention, the Cartagena Declaration, or Brazilian Law 9474/1997, does it say that the extended definition should be applied to a demand only in the case when the conventional reasons for persecution cannot be applied. Instead, it is common ground according to UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status that the reasons for persecution are not exclusive, but may be applied in conjunction in each individual case.[38] Furthermore, local scholars have already demonstrated that the application of the Cartagena Declaration is a regional customary law and, consequently, must be applied to every individual who demands asylum based on the declaration's reasons. By applying it in a subsidiary manner, CONARE is committing a wrongful act which constitutes a breach on Brazil's international obligations under International Law. According to Mondelli, the Cartagena Declaration incorporates the right to seek and be granted asylum, and, due to that, administrative courts, such as CONARE, as well as judicial bodies have to make sure such interpretation is applied, especially due to the binding nature of the Cartagena Declaration.[39]

Reed-Hurtado had already found that Brazil rarely used the Cartagena refugee definition as an autonomous source, and rather almost always applied it only if refugee status was granted under the 1951 Convention.[40] What it has done differently now, in the case of Venezuelans, is to only consider its application if the 1951 Convention's definition does not apply. Either way, it is possible to say that Brazil has not accomplished its international obligations, and ever since the country's Refugee Law was issued, has not fully applied the Cartagena Declaration as an independent and binding concept on its own.

Moreover, CONARE's general coordination COI study focused on reminding the committee to verify any exclusion clause; that is, whether there is any reason to believe the asylum seeker belongs to an armed group, such as the *Colectivos* or *Megabandas*. The study even mentioned UNHCR's reminder that such individuals cannot be refugees. Out of the six recommendations, two referred to the necessary verification of any criminal background.

Such emphasis on criminal background should be treated with caution. Even though there is a legitimate interest to protect the Venezuelan refugee population, such interest must not be used in order to criminalize the migratory flows. In many cases, the criminal background of an asylum seeker may be related to his or her own persecution, in which the state criminalizes the person in order to perpetuate a threat to their life, freedom or safety. We also argue that the two recommendations referring to the need to verify criminal background merely state the obvious; the Federal Police already verifies, in every asylum claim, whether there is criminal background and whether or not there are grounds for excluding refugee status, as per the Brazilian Refugee Law. In this sense, why raise these concerns regarding the application of the extended definition to Venezuelans if criminal investigation of asylum seekers is an already

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38 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva: UNHCR, 2019), 94, https://www.unhcr.org/publications/legal/5ddfcdc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html.

39 Juan Ignacio Mondelli, *La fuerza vinculante de la definición regional de la declaración de Cartagena sobre Refugiados (1984)* (San José: UNHCR, 2018), 109, https://www.refworld.org.es/docid/5d03d0b54.html.

40 Reed-Hurtado, *The Cartagena Declaration on Refugees*, 22.

long-established practice by one of the permanent members of the committee? What do they hope to achieve by stating the obvious? The immediate effect of that, we argue, is the excessive and discursive criminalization of Venezuelan migrants.

Moreover, another flaw of CONARE's decision concerns the non-application of an immediate *prima facie* approach to the recognition of Venezuelans as refugees at that point. In not doing so, CONARE neglected its own human and material resources which have led the institution to reach its highest level of cases in backlog since the Brazilian Law on Asylum was published in 1997.

Although such initiative must be praised for as it marked a turning-point in the decision-making process for Venezuelan applications, its flaws are undeniable. Despite the establishment of the possibility of recognition under the extended definition of refugee, Venezuelans will still suffer from the lack of protection suffered by asylum seekers of other nationalities: the institutional incapacity of CONARE to analyze and decide upon cases in a reasonable time period. Perhaps, if the reason not to establish a fast-track process for Venezuela was the need to prevent criminals from acquiring international protection, a more sophisticated and interesting solution could be the development of a two-fold process, as proposed by UNHCR's Guidelines on International Protection n. 11:[41] a fast-track phase for all cases and a second, regular, phase for those who are found to have committed crimes and whose cases should be further analyzed in order to respect their rights to a due process of law and legal defense. By doing so, international protection for Venezuelans could be granted and the Brazilian international obligations fulfilled.

CONCLUSION

Ever since the beginning of increased immigration from Venezuela, the Brazilian Government has attempted to appear as though it fulfills its obligations concerning the international protection of this community. Although CONARE only decided positively on recognizing Venezuelans as refugees under its extended definition in June 2019, news media in general broadcasted articles always referring to how Brazil welcomed the community not only with open arms but as *refugees*.

The reality, nonetheless, was completely different. The National Committee for Refugees failed to comply with its international duties as a result of its unwillingness to provide international protection to the Venezuelan migratory flux to Brazil. It took more than three years for the organ to begin to apply the extended definition of refugees to Venezuelans, even though such application was mandatory to Brazil since the beginning of the inflow due to its legal nature of regional customary law.

Emphasis must be placed on two important actors whose actions were vital to the committee's change of approach in terms of applications from Venezuelans. First, civil society. By the constant demand at CONARE's Plenary Meetings, as well as informal conversations in the

41 UNHCR, *Guidelines on International Protection n. 11: Prima Facie Recognition of Refugee Status* (Geneva: UNHCR, 2015). https://www.refworld.org/docid/555c335a4.html.

background, civil society representatives showed that such institutions' role may be central in the guarantee of refugees' rights to protection in Brazil.

Second, emphasis should be placed on the role of asylum seekers themselves. By continuing to apply for asylum against all attempts from the government to prevent such individuals from acquiring protection, Venezuelans proved to CONARE not only their entitlement to international protection but the committee's duty to provide it. Without their constant demands, visibility would have reduced and this important token might not have been achieved in the Brazilian scenario.

The advances of this decision are undeniable. The action of asylum seekers and civil society led CONARE to reach a ruling, which certainly represented a new milestone in the protection of refugees in the country. Not only did the instrument allow for Venezuelans to be granted asylum, but it also defined what, according to CONARE, is a great and generalized violation of human rights. By doing so, it acknowledged that a massive violation of economic, social and cultural rights (ESCR) may amount to a massive violation of human rights. Such evolution takes Brazil a step further in the protection of refugees, since ESCR have been historically neglected in Refugee Status Determination (RSD) procedures worldwide. Eventually, this definition might even be used by civil society organizations and refugees' legal representatives who advocate for similar cases of people of different nationalities.

Nevertheless, the work required to guarantee the right of international protection for Venezuelans in the administrative court is not complete. The lack of a *prima facie* process[42] and the current state policy of constant decrease of investment in CONARE's human and material resources will surely result, in practice, in an enormous delay in the granting of refugee status to Venezuelans. In this scenario, strategic litigation might seem an interesting approach in the protection of this population. Only by the construction of the international protection of the Venezuelan population as a right may we finally change the current reality.

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42 The application of a *prima facie* approach would only occur in December, 2019, more than 2 months after the submission of this article. This evolution in CONARE's RSD procedures should be praised, and both the civil society and asylum seekers should be congratulated for their constant advocacy for the right of the Venezuelan population to international protection. However, this gain must be closely monitored as its future application remains uncertain given its sui generis nature in the region. The fact that it has not been recognized as a right, as well as the constant change of ministers, may influence the previous consensus.

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