

SECURING A DURABLE RIGHT TO ASYLUM: COMPARING ACCESS TO PROTECTION UNDER THE EUROPEAN AND INTER-AMERICAN SYSTEMS

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I. INTRODUCTION

Countless crises and conflicts worldwide have forced more individuals to flee their home countries than in the last 25 years.¹ In particular, the Syrian conflict and the Russian invasion of Ukraine have triggered devastating humanitarian crises, leading to millions of refugees being displaced and leaving even more in need of humanitarian assistance.² Similarly, the military and

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1. See António Guterres, *EU Stakeholders Conference: "An open and safe Europe - what next?"*; Statement by António Guterres, United Nations High Commissioner for Refugees, U.N. HIGH COMM'R FOR REFUGEES (Jan. 29, 2014), <https://perma.cc/X3JB-A8BV>; see also *Displacement in Central America*, U.N. HIGH COMM'R FOR REFUGEES, <https://perma.cc/B4XC-NT3V> (last visited Mar. 4, 2022) ("Growing numbers of people in Central America are being forced to leave their homes.").

2. See Marianna Fotaki, *A Crisis of Humanitarianism: Refugees at the Gates of Europe*, 8 INT'L J. OF HEALTH POL'Y & MGMT. 321, 321–23 (2019); Helen Regan, Paul P. Murphy & Tim Lister, *One Million Refugees Flee Ukraine as Russia Escalates Bombardment of Key Cities*, CNN, <https://perma.cc/GAJ2-R3JD> (last updated Mar. 4, 2022); see also ADEMOLA ABASS & FRANCESCA IPPOLITO, REGIONAL

political conflicts that plagued Central America during the 1970s and 1980s have resulted in the ongoing persecution and displacement of millions of persons from El Salvador, Guatemala, and Nicaragua.³ While international refugee law—drawing inspiration from other areas like international human rights law—established foundational principles of international protection, regional treaties and declarations have sought to clarify the rights and processes guaranteed to persons seeking protection at the state level.⁴ As the number of displaced persons continues to grow exponentially, regional responses to each crisis not only illustrate the strengths and limitations of each approach to securing and reinforcing protection rights but also highlight the need to examine foundational norms as well as regional and domestic actions to ensure durable solutions for protected persons.⁵

II. BACKGROUND

Article 14(1) of the Universal Declaration of Human Rights first recognized the right to “seek and to enjoy in other countries asylum.”⁶ This international principle of protection was formally defined, however, in the 1951 Convention relating to the Status of Refugees⁷ and the 1967 Protocol relating to the Status of Refugees.⁸ In particular, the Convention established, and the Protocol incorporated almost entirely by reference, the definition of “refugee” and the obligation of *non-refoulement*, as well as rights afforded to beneficiaries of such protection.⁹

First, the treaties defined “refugee” as any person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, due to his fear, is unwilling to avail

APPROACHES TO THE PROTECTION OF ASYLUM SEEKERS 16 (Ademola Abass & Francesca Ippolito eds., 2014) [hereinafter REGIONAL APPROACHES] (“At the national, regional or international level, the legal frameworks for dealing with [asylees] are often the same for dealing with refugees.”). The terms are often used interchangeably in discussing legal norms and reform efforts.

3. Susan Kneebone, *Comparative Regional Protection Frameworks for Refugees: Norms and Norm Entrepreneurs*, 20 INT’L J. HUM. RTS. 153, 156 (2016).

4. See FRANCES NICHOLSON & JUDITH KUMIN, REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE PROTECTION & BUILDING STATE ASYLUM SYSTEMS (2017), <https://perma.cc/G5WZ-5Z23>.

5. See Exec. Comm. of the High Comm’r’s Programme, Report of the Fifty-Sixth Session of the Exec. Comm. of the High Comm’r’s Programme, at 14, U.N. Doc. A/AC.96/1021 (2005); see, e.g., Ruairi Casey, *‘The Least We Can Do’: Germany Welcomes Ukrainian Asylum Seekers*, ALJAZEERA (Mar. 3, 2022), <https://perma.cc/G5SB-227H>; but see Hassan Hankir & Hams Rabah, *Arab Refugees See Double Standards in Europe’s Embrace of Ukrainians*, REUTERS (Mar. 2, 2022), <https://perma.cc/B3YF-GZQS>.

6. See Executive Comm. of the High Comm’r’s Programme, *supra* note 5; see also G.A. Res. 217A (III), Universal Declaration of Human Rights, art. 14(1) (Dec. 10, 1948).

7. U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

8. U.N. Protocol relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].

9. See Refugee Convention, *supra* note 7, at art. 1; Refugee Protocol, *supra* note 8, at art. 1(1).

himself of the protection of that country.”¹⁰ Second, the treaties required States not to “expel or return . . . a refugee . . . to the frontiers of territories where his life or freedom would be threatened on account of [a protected ground].”¹¹ As “the cornerstone of international refugee protection,” the principle of *non-refoulement* has evolved into a customary norm “binding on all States, including those which have not yet become a party to either treaty.”¹²

Despite their noteworthy function in shaping the protection of displaced persons, neither international instrument confers a right to asylum; rather, the treaties “essentially . . . regulat[e] the status of those . . . accepted as refugees by a State.”¹³ In other words, there is no inherent right to asylum; access to such protection is generally within the states’ discretion.¹⁴ States have afforded protection to victims of persecution for centuries, but contemporary principles of international refugee law only emerged in the aftermath of the Second World War “as well as [a result of] the refugee crisis of the interwar years that preceded it.”¹⁵

Over time, regional human rights institutions and their governing instruments have contributed to the development of international refugee law, ensuring the “right to seek and be granted asylum in a foreign territory, *in accordance with the legislation of the state* and international conventions.”¹⁶ Given that “every sovereign state is deemed to have exclusive control over its territory and . . . persons [there]in,” individual states are ultimately responsible for developing asylum eligibility criteria, adjudicating claims, and regulating access to such protection.¹⁷ Furthermore, international law prohibits other states from interfering with such sovereign jurisdiction and challenges to a State’s right to offer asylum status within its borders.¹⁸

10. Refugee Convention, *supra* note 7, at art. 1(A)(2). The Refugee Protocol removed the Convention’s geographic and temporal limitations to the definition of “refugee.” Refugee Protocol *supra* note 8, at art. 1(2).

11. Refugee Convention, *supra* note 7, at art. 33(1); Refugee Protocol, *supra* note 8, at art. 33(1).

12. U.N. HIGH COMM’R FOR REFUGEES, ADVISORY OPINION ON THE EXTRATERRITORIAL APPLICATION OF NON-REFOULMENT OBLIGATIONS UNDER THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL para. 5, 15 (2007), <https://perma.cc/GH7N-TLVC>.

13. Roman Boed, *The State of the Right of Asylum in International Law*, 5 DUKE J. COMP. & INT’L L. 1, 11 n.56 (quoting Christian Tomuschat, *A Right to Asylum in Europe*, 13 HUM. RTS. L.J. 257, 258 (1992)).

14. See Boed, *supra* note 13, at 4 n.9 (quoting GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 121 (1983)).

15. *Asylum & the Rights of Refugees*, INT’L JUST. RES. CTR., <https://perma.cc/5ZTR-SCT4> (last visited Oct. 24, 2022).

16. See, e.g., Organization of American States, American Convention on Human Rights, art. 22(7), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (emphasis added). While “the [European Convention] does not contain asylum-specific provisions,” the ECtHR has recognized a right of *non-refoulement* under the framework of Article 3 of the Convention. REGIONAL APPROACHES, *supra* note 2, at 11.

17. Boed, *supra* note 13, at 3–4.

18. Paul Weis, *The Right of Asylum in the Context of the Protection of Human Rights in Regional and Municipal Law*, 66 INT’L REV. RED CROSS 470, 471 (1966).

Both the European and Inter-American systems have played a crucial role in shaping and promoting international protection.¹⁹ In particular, regional institutions and individual States have devised regional standards to complement and clarify aspects of the international refugee protection regime as well as the rights and processes afforded to protected persons.²⁰ These policy initiatives have nevertheless been guided by international practice, including through the 2016 New York Declaration for Refugees and Migrants and the Global Compact for Migration, both of which were concluded to facilitate a common approach to international protection and migration at the local, regional, and global levels.²¹ The following sections discuss how each regional system has regulated access to asylum; the efforts undertaken by each system and member states thereof to secure a durable right to asylum, including implementing international and regional treaty-based obligations; and their overall contribution to international refugee law.

A. *The European Regional System*

Given its comprehensive and sophisticated framework for receiving refugees and asylees, Europe has been a long-standing “destination of choice for thousands of those who . . . seek [protection] outside their country of origin.”²² However, despite being “the region with the strongest magnet for asylum seekers,” Europe’s governing documents do not themselves provide for asylum-based rights.²³ Regional institutions, in this case, the European Court of Human Rights (ECtHR), instead have recognized an inherent obligation not to expel persons to countries where they would face a “real risk of being subjected to treatment contrary to Article 3 [of the European Convention on Human Rights].”²⁴ Unlike the Refugee Convention’s general safeguard against persecution based on certain protected grounds, Article 3 of the European Convention prohibits specifically “torture, inhuman or degrading treatment or punishment” of any kind, irrespective of the basis for such

19. See Boed, *supra* note 13, at 4–5 (noting the international principle of asylum was confirmed by way of regional instruments, including of the European and Inter-American systems); see also Esraa Adnan Fangary, *A Peculiar Leap in the Protection of Asylum Seekers, The Inter-American Court of Human Rights’ Jurisprudence on the Protection of Asylum Seekers*, 16 AGE OF HUM. RTS. J. 31, 32 (2021) (noting the tremendous “scope of the rights and values adopted by the [Inter-American regional system] and its stunning [legal] doctrine on refugees”).

20. NICHOLSON & KUMIN, *supra* note 4, at 19, 36 (noting that the European Court of Human Rights and the Inter-American Commission and Court of Human Rights have “issued leading judgments interpreting regional instruments that protect asylum-seekers and refugees”); see, e.g., Kneebone, *supra* note 3, at 157 (recognizing that the Inter-American definition of “refugee” clarifies ambiguities in the definition proposed by other international instruments by addressing the root causes of forced displacement).

21. See G.A. Res. 71/1, New York Declaration for Refugees and Migrants (Sept. 19, 2016); G.A. Res. 73/195, Global Compact for Safe, Orderly and Regular Migration, annex (Dec. 19, 2018).

22. REGIONAL APPROACHES, *supra* note 2, at 10.

23. *Id.* at 10–11.

24. See Salah Sheekh v. The Netherlands, App. No. 1948/04 ¶ 135 (Eur. Ct. H.R. Jan. 11, 2007).

threats or the victim's immigration status or own conduct.²⁵ However, the ECtHR qualifies this right of non-return by requiring the victim to demonstrate that they would face the prospect of "ill-treatment" if returned to their country; such treatment "must attain a minimum level of severity," which would depend on the totality of the circumstances, including the "duration of the treatment, its physical or mental effects, and, in some cases, the sex, age and state of health to the victim."²⁶

While the ECtHR imposes conditions for a person to successfully invoke Article 3 in their asylum case, the obligations enshrined in this provision are absolute and unconditional; yet, European States have repeatedly tried to circumvent their Article 3 obligations.²⁷ Two primary issues have emerged in the European System: (1) properly identifying the individual State responsible for adjudicating a person's asylum application and (2) guaranteeing that domestic procedures for securing asylum status conform with international human rights standards.²⁸

A momentous opportunity for the European Union (EU) to overcome both issues while ensuring the protection of asylees came when the Treaty of Amsterdam entered into force in 1999.²⁹ This Treaty empowered the EU to draft asylum legislation with the goal of adopting a Common European Asylum System (CEAS).³⁰ In subsequent years, the EU launched the "Eurodac" database to store, share, and compare biometric data³¹ and began developing regional minimum standards for the Member States receiving asylum seekers as well as eligibility criteria for international protection.³² In establishing these programs, the States intended to harmonize domestic legislation, maintain fairness towards persons needing protection, and mitigate the prioritized entry of asylees into States based on domestic infrastructure and protection mechanisms.³³

25. See *Fact Sheet on Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms*, U.N. HIGH COMM'R FOR REFUGEES (Aug. 1, 2006), <https://perma.cc/5VT9-34HG>.

26. See *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at ¶ 162 (1978).

27. REGIONAL APPROACHES, *supra* note 2, at 11. For example, states routinely claim that national security considerations justify restricting the provision's scope, albeit the hostile conditions that would await refugees in their home country. *Id.*

28. See EVANGELIA TSOURDI & PHILIPPE DE BRUYCKER, EU ASYLUM POLICY: IN SEARCH OF SOLIDARITY AND ACCESS TO PROTECTION 3–4 (2015) [hereinafter EU ASYLUM POLICY].

29. See Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 115); see also EUROPEAN PARLIAMENT, MIGRATION AND ASYLUM: A CHALLENGE FOR EUROPE 4 (2018), <https://perma.cc/73NJ-S4AY> [hereinafter MIGRATION AND ASYLUM].

30. MIGRATION AND ASYLUM, *supra* note 29, at 4.

31. *Id.*

32. See generally Council Directive 2004/83, 2004 O.J. (L 304) 12 (EC) (providing minimum standards for the qualification and status of third country nationals or stateless persons as refugees or otherwise protected persons and the content of such protective status); Council Directive 2005/85, 2005 O.J. (L 326) 13 (EC) (on minimum standards on procedures in Member States for granting and withdrawing refugee status).

33. See EU ASYLUM POLICY, *supra* note 28, at 2.

Founded on principles of solidarity and a fair share of responsibility, the CEAS encouraged Member States to form concrete mechanisms to allocate responsibility.³⁴ These efforts were unavailing, however, because there has not been an objective discussion regarding what an equitable share of responsibility could be.³⁵ Despite coordinated state efforts to manage migration flows and develop host countries' protection capabilities, Member States have not been able to equitably distribute responsibility for the growing number of displaced persons.³⁶ This result is understandably related to regional funding, which is allocated based on absolute, as opposed to relative, figures and thus cannot account for the burdens of individual state asylum systems.³⁷ Moreover, the EU only funds a small portion of expenses incurred by States in receiving and otherwise protecting refugees and asylum seekers.³⁸

Even if EU States intended to fairly share responsibility for displaced persons, "differentiated levels of economic development between [them and] . . . of investment in their [respective] asylum processing and reception systems" have resulted in broadly deviating recognition rates and reception conditions that made the goal of harmonization more difficult.³⁹ Partly in response to such divergences, the European Council and European Parliament established the European Asylum Support Office (EASO).⁴⁰ Since its inception, EASO has strived to improve information collection and analysis and to develop practical cooperation between Member States' asylum systems.⁴¹

In 2009, the Treaty of Lisbon⁴² entered into force, transitioning the European approach to asylum from developing minimum harmonized standards to creating a uniform system with parallel procedures.⁴³ That same year, the European Council adopted the Stockholm Programme, reaffirming the EU's commitment to achieving a "common area of protection and solidarity based on common asylum procedure and a uniform status for those granted international protection."⁴⁴ The EU subsequently enacted various laws and directives to address mounting concerns over mass displacement and burden-shifting among Member States. Three instruments are of particular importance to this discussion, which are each described in turn.⁴⁵

34. *Id.* at 3.

35. *Id.* at 5.

36. *Id.* at 3.

37. *Id.* at 4.

38. *Id.*

39. *Id.*

40. See Regulation 439/2010, of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, 2010 O.J. (L 132).

41. See EU ASYLUM POLICY, *supra* note 28, at 4–5. Despite its "great potential . . . [to] fulfil[] existing needs," the Office is limited by its underwhelming budget and restrained authority over EU Member States. *Id.*

42. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 54 (E.U.).

43. See MIGRATION AND ASYLUM, *supra* note 29, at 4.

44. *Id.* at 5.

45. Another critical EU instrument is the Reception Conditions Directive, which was adopted to establish minimum standards regarding conditions in which asylees are received, such as access to housing,

First, the Qualification Directive⁴⁶ was enacted, inter alia, to clarify legal concepts related to the asylum process, streamline the application process, and reduce the administrative costs and burdens imposed upon Member States.⁴⁷ However, not only have these objectives not been met,⁴⁸ but they have produced unexpected consequences. For example, the Directive broadened the scope of “family members” of asylum beneficiaries that may qualify for certain derivative benefits but failed to cover certain members, such as married minor children who may rely on their beneficiary parent for support and protection.⁴⁹

Second, the Dublin Regulation (also known as Dublin III) offered a mechanism for identifying the country responsible for reviewing an application for international protection.⁵⁰ Under the Regulation, only one Member State examines each asylum application.⁵¹ The responsible Member State generally is the State where the asylum-seeker first “irregularly [entered] . . . having come from a third country.”⁵² Although Dublin III is based on the assumption that asylum seekers “enjoy similar levels of protection in all EU Member States,” asylum law and practice continue to vary significantly between Member States, “causing [persons] to receive different treatment across Europe.”⁵³ Therefore, the general criterion for assigning responsibility over an asylum claim may be derogated if there are “substantial grounds for believing that there are systemic flaws in the [receiving State’s] asylum procedure and in the reception conditions for applicants . . . resulting in a risk of inhuman or degrading treatment.”⁵⁴ A Member State may also choose to

healthcare, schooling, and employment. See Council Directive 2013/33, of the European Parliament and of the Council of 26 June 2013, Laying Down Standards for the Reception of Applicants for International Protection, 2013 O.J. (L 180) 96 (EU). While reception conditions can factor into a person’s migratory movement in the EU, the Directive is outside the scope of this paper.

46. Directive 2011/95, of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast), 2011 O.J. (L 337) 9 [hereinafter Qualification Directive].

47. See Francesca Ippolito, *Establishing the Common European Asylum System: ‘It’s a Long Long Way to Tipperary’* in REGIONAL APPROACHES, *supra* note 2, at 113, 118.

48. *The Qualification Directive*, U.N. HIGH COMM’R FOR REFUGEES, <https://perma.cc/F6EH-B6F2> (last visited Oct. 24, 2022).

49. See IPPOLITO, *supra* note 47, at 119.

50. See Council Regulation 343/2003, 2003 O.J. (L 50) 1 (EC), *superseded by* Council Regulation 604/2013, 2013 O.J. (L 180) 31 (EC) [hereinafter Dublin Regulation].

51. Dublin Regulation at art. 3(1).

52. *Id.* at art. 13(1).

53. *The Dublin Regulation*, U.N. HIGH COMM’R FOR REFUGEES, <https://perma.cc/BY7Y-AKUV> (last visited Oct. 24, 2022). The ECtHR fortified the principle of international protection and the right against indirect refoulement under Dublin III by mandating member states to refrain from returning asylees to countries possessing deficient asylum procedures or ineffective safeguards against arbitrary removal. *M.S.S. v. Belgium and Greece*, App. No. 30696/09, ¶ 218, 231–34 (Jan. 21, 2011), <https://perma.cc/D5H9-66EZ>.

54. Dublin Regulation, *supra* note 50, at art. 3(2); *but see* IPPOLITO, *supra* note 47, at 127 (noting that “legislator[s] ha[ve] not taken the opportunity to better clarify under which circumstances there are ‘systemic deficiencies in the asylum procedure and reception conditions for asylum applicants’”).

evaluate an asylum claim, “even if such examination is not its responsibility under the criteria laid down in th[e] Regulation.”⁵⁵

Finally, the Asylum Procedures Directive provides minimum standards in the following areas: (a) access to the asylum process, (b) the right to interview, (c) access to legal and interpretation services, and (d) the appeals process.⁵⁶ In particular, this Directive provides certain procedural safeguards, including the right to receive information from and communicate with the U.N. High Commissioner for Refugees (UNHCR) and the right to counsel and to appeal.⁵⁷ Despite these basic guarantees, lingering disparities in Member States’ asylum procedures remain, resulting in variable approval rates based on where the asylum claim is ultimately raised.⁵⁸

In 2020, the European Commission issued the New Pact on Migration and Asylum in an attempt to continue the expansion of CEAS.⁵⁹ However, given the current state of the refugee crisis and the COVID-19 global pandemic, the status of such reform efforts remains unclear as of the writing of this article.

B. *The Inter-American System*

Although the Inter-American system initially “host[ed] ‘relatively few refugees and asylum-seekers,’” its regional institutions have become impressive and progressive “norm entrepreneurs” of international refugee law.⁶⁰ Regional reception trends seemingly have changed as the Inter-American States begin welcoming more international refugees.⁶¹

Since the 1980s, the region has advanced international protection efforts significantly through collaborative actions and agendas, ultimately becoming “a model in the topic by the international community.”⁶² The Inter-American Commission on Human Rights (the Commission) has recognized the right to seek and receive asylum in accordance with domestic law and international agreements, as provided for under the American Declaration of the Rights

55. Dublin Regulation, *supra* note 50, at art. 17(1).

56. See generally Directive 2013/32, of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast), 2013 O.J. (L 180) 60 [hereinafter Asylum Procedures Directive].

57. *The Asylum Procedures Directive*, U.N. HIGH COMM’R FOR REFUGEES, <https://perma.cc/QE7J-5JVD> (last visited Oct. 24, 2022).

58. *Id.*

59. See *New Pact on Migration and Asylum*, EUR. COMM’N, <https://perma.cc/4NMN-2A7D> (last visited Oct. 24, 2022).

60. See Kneebone, *supra* note 3, at 156.

61. For example, Brazil and Argentina have recently begun taking steps to offer protection to Ukrainian refugees. Both States intend to grant humanitarian visas, at no expense, which can ultimately result in permanent residency. The Argentine Congress has additionally been considering providing free airfare and temporary economic aid for fleeing Ukrainians. See Silvina Premat, *Argentina Also to Take in Ukrainian Refugees, Hosted by Ukrainians Who Fled 80 Years Ago*, PIME ASIAN NEWS (Mar. 12, 2022), <https://perma.cc/U923-NRK4>. Moreover, the UNHCR has been in active dialogue with Inter-American States to facilitate the resettlement of international refugees. See *Argentina Discusses ‘Resettlement Opportunities’ for Ukrainian Refugees with UN Body*, BUENOS AIRES TIMES (Mar. 14, 2022), <https://perma.cc/DK4Y-X5DJ>.

62. See Liliana Lyra Jubilit, *Fora and Programmes for Refugees in Latin America*, in REGIONAL APPROACHES, *supra* note 2, at 245.

and Duties of Man⁶³ and the American Convention of Human Rights.⁶⁴ The Inter-American Court of Human Rights has interpreted this right as being accessible by the direct person claiming protection and their family members.⁶⁵

In response to mass displacement resulting from armed conflicts in Central America as well as “waves of re-democratization . . . [that] brought about renewed commitments to human rights,”⁶⁶ several States adopted the landmark Cartagena Declaration on Refugees to promote the adoption and overall harmonization of domestic legislation implementing the Refugee Convention and Protocol.⁶⁷ The Declaration supplemented both international treaties by connecting the definition of “refugee” to root causes of forced displacement and, consequently, encouraging States to adopt legislation protecting persons threatened due to “generalized violence, forced aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.”⁶⁸ Moreover, by the end of the twentieth century, the Commission’s asylum jurisprudence had shifted so that the right to asylum was interpreted almost entirely by reference to international refugee-related instruments.⁶⁹ Under this new framework, the right has been conceived as being “recognized by the State rather than conferred by it.”⁷⁰

Since the Cartagena Declaration’s adoption, Latin American States have additionally developed mechanisms to address emergent refugee issues in the

63. American Declaration on the Rights and Duties of Man, Res. XXX, art. 27, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Colombia, Mar. 30-May 2, 1948, at 38, *reprinted in* Handbook of Existing Rules Pertaining to Human Rights, OEA/Ser.L/V/II.23 Doc. 21 Rev. 6, at 5 (1979).

64. *See* American Convention on Human Rights “Pact of San Jose, Costa Rica”, Nov. 22, 1969, 1144 U.N.T.S.123; *see also* Inter-Am. Comm’n H.R., Report on the Situation of Human Rights in Argentina, OEA/Ser.L/V/II.49, doc. 19, ch. IV, ¶ 4 (1980). While neither document created binding legal obligations, they have assisted in promoting international protection of persons and in crystalizing the right to asylum under customary international law. *See* Fangary, *supra* note 19, at 34.

65. The Institution of Asylum and Its Recognition as a Human Right in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22.7 and 22.8 in Relation to Article 1(1) of the American Convention on Human Rights), Advisory Opinion OC-25/18, Inter-Am. Ct. H.R. (ser. A) No. 25, ¶ 123 (2018) [hereinafter IA Asylum Advisory Opinion].

66. *See* Jubilit, *supra* note 62, at 252.

67. Cartagena Declaration on Refugees, Nov. 22, 1984, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66, doc.10, rev. 1 (1985).

68. *Id.* at ¶ III(3); *see also* Kneebone, *supra* note 3, at 157 (noting the Cartagena Declaration fills in gaps in the definition of refugee proposed by other international instruments). At least 15 Latin American countries have since adopted this broader definition in their national legal systems. *See* Jubilit, *supra* note 62, at 255. It is important to understand that the Declaration is not meant to replace the international agreements but complement them. *Id.* (“The Cartagena Declaration declares that aside from the refugees recognized under the 1951 Convention there exists other persons that require international protection”).

69. *See* Report on the Situation of Human Rights of Asylum-Seekers within the Canadian Refugee Determination System, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.106, doc. 40, ¶ 60 (2000). The Commission has also recognized certain procedural guarantees related to the right to asylum, including (1) the right to apply for asylum; (2) the right to have one’s claim adjudicated by a competent authority; (3) the right to fair procedures; (4) the right to obtain a proper judgment; and (5) the right against *non-refoulement* pending adjudication of one’s asylum claim. *See* David James Cantor & Stefania Barichello, *Protection of Asylum Seekers under the Inter-American Human Rights System*, in REGIONAL APPROACHES, *supra* note 2, at 276–77.

70. *See* Report on Terrorism and Human Rights, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.116, doc. 5, rev. 1 corr. ¶ 394 (2002).

region and have held regular regional meetings to encourage States to make coordinated efforts in developing humanitarian solutions to the ongoing refugee crisis.⁷¹ On the tenth anniversary of the Cartagena Declaration, the San José Declaration on Refugees and Displaced Persons was adopted.⁷² This declaration reiterated the salience of its predecessor's provisions and extended the scope of protection to cover displaced persons.⁷³ The Mexico Declaration and Plan of Action (MPA)⁷⁴ was adopted thereafter, providing a "regional strategic and operational framework . . . to address the complex humanitarian situation resulting from forced displacement" throughout the region.⁷⁵ Some of the initiatives that emerged from the MPA included researching and developing international legal principles on rights of refugees and asylum seekers, undertaking training and institutional capacity-building, and instituting "program[s] on durable solutions for promoting the self-reliance and local integration of refugees [and asylum-seekers]."⁷⁶ Most recently, the Brasilia Declaration and Plan of Action were adopted to supplement preceding regional documents and address developing issues of statelessness as well as mixed migration flows consisting of both economic migrants and refugees.⁷⁷ This Declaration reflects the Inter-American system's unceasing commitment to promote protection on a regional and international scale.⁷⁸

III. ANALYSIS

Although the right to asylum has arguably become a part of international custom, access to this right varies by region and state.⁷⁹ Nevertheless, notable differences in each regional system's approach reveal elements vital to securing a durable right to asylum. First, while the ECtHR has interpreted a right to protection under Article 3 of the European Convention, the European

71. See Kneebone, *supra* note 3, at 157.

72. San José Declaration on Refugees and Displaced Persons (Dec. 7, 1994), <https://perma.cc/EAN6-TAVZ>.

73. See Kneebone, *supra* note 3, at 157.

74. MEXICO DECLARATION AND PLAN OF ACTION TO STRENGTHEN THE INTERNATIONAL PROTECTION OF REFUGEES IN LATIN AMERICA, ORG. OF AM. ST (2004), <https://perma.cc/TC96-PTSM>.

75. U.N. HIGH COMM'R FOR REFUGEES, MEXICO PLAN OF ACTION: THE IMPACT OF REGIONAL SOLIDARITY 11 (2007), <https://perma.cc/R4SL-NC4P>.

76. See Philippe Lavanchy, *The Mexico Declaration and Plan of Action: Reaffirming Latin America's Generous Traditions of Asylum and Innovative Solutions*, 18 INT' J. REFUGEE L. 450, 451 (2006).

77. See Daniel Jatoba & Patricia Nabuco Martuscelli, *Brazil as a Leader in the Latin American Refugees' Regime*, 4 J. INT'L REL., PEACE STUD., & DEV. 1, 11 (2018).

78. In addition to regional documents, the Inter-American Commission has maintained a notable presence in the field of international refugee law by issuing reports on individual countries' human rights conditions as well as statements responding to current events affecting the region. See, e.g., Press Release, Inter-Am. Comm'n H.R., IACHR Expresses Deep Concern about the Situation of Migrants and Refugees in the United States, Mexico, and Central America (July 23, 2019) (on file with the Organization of American States), <https://perma.cc/V7FN-V7KC>. (addressing the burden-shifting asylum cooperative agreements between the United States and certain Central American countries).

79. GOODWIN-GILL, *supra* note 14, at 121.

system does not explicitly have a right to asylum under the Convention,⁸⁰ whereas the Inter-American system provides such right in the American Declaration and American Convention, as reinforced by decades of cooperative agendas and state-led initiatives.⁸¹ Second, the European system provides a basis for family members of asylum seekers to obtain protection but does not mandate states to formally grant protected status to those persons.⁸² This differs from the Inter-American system's articulation of the right, which mandates States to grant protective status to qualifying persons as well as their family members.⁸³ Third, persons who receive asylum from an EU Member State are generally disallowed from applying for such status in another Member State's territory.⁸⁴ Comparatively, under the Inter-American system, asylum status applies extraterritorially, facilitating the person's continued security in the region.⁸⁵

While the Inter-American system has made progressive contributions to international refugee law that seemingly surpass the efforts of the European system,⁸⁶ the latter still receives significantly more refugees.⁸⁷ Nevertheless, both regions struggle to handle the influx of international refugees and asylum seekers, in part because many States currently lack the institutional capacity to receive those persons.⁸⁸ At least for the EU, this issue is further exacerbated by the underwhelming sense of cooperation among its Member States and the ongoing need for equitable distribution of responsibility.⁸⁹ Paradoxically, the EU does provide funding to, and the EASO assists its Member States in building up their institutional capacities to handle imminent crises,⁹⁰ while the Inter-American system fails to offer concrete financial support.⁹¹ Although the UNHCR has supported strengthening Latin American States' capacities at the national and local level,⁹² Inter-American

80. REGIONAL APPROACHES, *supra* note 2, at 10–11.

81. See Jubilit, *supra* note 62, at 248–50.

82. Qualification Directive, *supra* note 46, at art. 23(2).

83. IA Asylum Advisory Opinion, *supra* note 65, at ¶ 123.

84. Asylum Procedures Directive, *supra* note 56, at art. 33(2).

85. IA Asylum Advisory Opinion, *supra* note 65, at ¶ 123.

86. See Fangary, *supra* note 19, at 31–32.

87. U.N. HIGH COMM'R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2020 12 (2021), <https://perma.cc/94KG-X97W>.

88. See EU ASYLUM POLICY, *supra* note 28, at 4; see also ORG. OF AM. STATES, STRENGTHENING THE CAPACITIES OF LOCAL AUTHORITIES IN THE RECEPTION AND INTEGRATION OF MIGRANTS AND REFUGEES: CONCEPT NOTE 2 (2020), <https://perma.cc/CH6L-ACJL> [hereinafter OAS CAPACITY BUILDING].

89. Compare EU ASYLUM POLICY, *supra* note 28, at 4–5 (highlighting the need for increased solidarity among EU Member States and the ongoing lack of “fair-sharing”); Kneebone, *supra* note 3, at 158 (noting that “regional cooperation in Latin America is well developed at the policy level, and . . . this cooperation is implemented at the national level”).

90. See EU ASYLUM POLICY, *supra* note 28, at 5.

91. See OAS CAPACITY BUILDING, *supra* note 88, at 2 (noting that States, rather than a regional institution, “have the main responsibility for providing essential services” to arriving refugees and asylees).

92. See, e.g., U.N. HIGH COMM'R FOR REFUGEES, EXEC. COMM. OF THE HIGH COMM'R'S PROGRAMME, UPDATE ON UNHCR'S OPERATIONS IN THE AMERICAS 2–3 (2022), <https://perma.cc/Z4CK-E9HD>; see also BUENOS AIRES TIMES, *supra* note 61.

States continue to lack the institutional capacity, relative to EU Member States, to host as many refugees and asylum seekers.⁹³

IV. RECOMMENDATIONS

Both the European and Inter-American systems have the common goal of securing international protection for asylum seekers. However, fundamental changes in each region's approach must occur to secure a durable right to asylum at the regional level. First, more so for the European system, Member States must agree on a process for distributing responsibility fairly, relying on clear and objective factors such as the State's infrastructure, capacity, and access to regional funding.⁹⁴ Beyond having the potential to enhance mutual trust and solidarity among Member States,⁹⁵ an efficient, unambiguous process would help the EASO identify Member States with underperforming systems that require additional funding and assistance in building their protection capacity.

Second, both regional systems should continue investing in solidarity tools to promote a standard regional asylum system. Among other initiatives, the EU should increase EASO funding and resources to match the expectations regional institutions have placed upon the Office while also strengthening EASO's authority so it can encourage "joint or common processing of asylum applications."⁹⁶ Moreover, the EU should not only increase the amount of funding allocated to individual Member States commensurate to their asylum reception capabilities but also develop protection capabilities for underperforming countries. To fairly distribute responsibility among Member States, EU institutions may develop intra-regional relocation programs, easing the extent of migrants entering hot spot countries. Similarly, the Inter-American System should enhance its Member States' institutional capacities to protect refugees and asylum seekers. Moreover, Inter-American policies would be more effective if Member States encouraged other countries in the region—primarily Canada and the United States—to contribute to or collaborate with the regional system's protection efforts.

Finally, both regional systems must strive to extend access to protection for all forcibly displaced persons. The European system may accomplish this objective by, *inter alia*, incorporating a more expansive definition of "refugee," like that expressed in the Cartagena Declaration, which covers the root causes of the refugee crisis. While the Inter-American system aspires to provide such expansive protection through its policymaking, it must do so by

93. Kneebone, *supra* note 3, at 156. Despite the traditionally underwhelming reception of refugees in the region, Latin American States have begun collaborating with international actors, including the UNHCR, to enhance their reception capabilities and provide support to displaced persons in light of recent crises. See BUENOS AIRES TIMES, *supra* note 61 (describing Argentina's efforts to develop domestic reception capabilities to receive Ukrainian refugees).

94. See EU ASYLUM POLICY, *supra* note 28, at 8.

95. *Id.*

96. *Id.* at 9.

more enforceable means than reliance on aspirational declarations that do not carry the force of law.⁹⁷ As the number of refugees continues to grow exponentially, collaborative efforts and an inclusive definition are vital to securing a durable right to asylum.

97. *See generally* Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 33-34 (July 14, 1989) (providing that a declaration is not a legally-binding treaty); *cf* Vienna Convention on the Law of Treaties, art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (defining “treaty” as an agreement enforced and “governed by international law”).