

## 9. International protection of persons displaced by organised crime: Latin American legal and policy frameworks

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This chapter examines the challenge posed to the continuing relevance in Latin America of international refugee law – broadly construed – by forced displacement across borders as a result of organised crime. The protection needs of the victims of this displacement – the ‘new displaced’ – are only just being recognised. Yet, although a small body of literature exists on how the refugee law of North American countries such as the United States of America engages with this new form of displacement,<sup>1</sup> little has been written on the relevance of refugee law as applied in Latin America. By examining how the well-established existing body of Latin American refugee law pertains to the new displaced, and then reviewing certain important recent developments in this area, the chapter seeks to contribute a new perspective to this field of study.

### Refugee law in Latin America and the ‘new displaced’

The challenges involved in determining whether the new displaced qualify as refugees under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Refugee Convention) are largely the same for Latin America as for North America.<sup>2</sup> However, two particularities of the application of the Refugee Convention are relevant to note: 1) most Latin American States do not apply the concept of ‘internal flight alternative’; and 2) some States,

1 In addition to Reynolds, chapter 8, see M.J. Lister, ‘Gang-related asylum claims: an overview and prescription’, *University of Memphis Law Review*, 38 (2008), 827–52; L.M. Harris and M.M. Weibel, ‘Matter of S-E-G-: the final nail in the coffin for gang-related asylum claims?’, *Berkeley La Raza Law Journal*, 20 (2010), 5–30; G. Cheng, ‘Gang persecution as grounds for asylum in the US’, *Forced Migration Review*, 37 (2011), 50–1; J. Racine, ‘Youth resistant to gang recruitment as a particular social group in *Larios v. Holder*’, *British Columbia Third World Law Journal*, 31 (2013), 457–72; K.M. Manuel, ‘Asylum and gang violence: a legal overview’, background paper for the US Congressional Research Service (2014).

2 For an analysis of the issues in relation to refugee law as applied in the United States of America, please see Reynolds, chapter 8. For a more general analysis of the profiles of such applicants and the applicable legal criteria, see N. Rodríguez Serna, ‘Fleeing cartels and maras: international protection considerations and profiles from the Northern Triangle’, *International Journal of Refugee Law* (forthcoming 2016).

particularly in Central America, recognise gender-based persecution as an additional ground of refugee status.<sup>3</sup> In view of the geographical and gendered dynamics of displacement due to organised crime,<sup>4</sup> particularly within Central America, this suggests a stronger legal basis for protection in these States than in North America.<sup>5</sup>

However, there are additional bases for asylum in Latin America that are absent from North America. Although the political asylum framework has little relevance to the new displaced, the expanded refugee definition of the 1984 Cartagena Declaration on Refugees – based on the concept of a serious public order disturbance that threatens a person's life, safety or freedom – represents an important potential source of protection.<sup>6</sup> Expanded refugee definitions inspired by the Cartagena Declaration are currently found in the national legislation of 14 Latin American States, including many of those neighbouring countries affected by serious dynamics of organised criminal violence.<sup>7</sup>

Until recently, there has been no direct analysis of whether the Cartagena definition applies to situations of violence rooted in organised criminality.<sup>8</sup> Nonetheless, there can be no conceptual or principled objection to such application. It is clear from the terms of the expanded definition that its 'situational' element requires only that a minimum intensity of public order

- 3 See, for example, Argentinian Law no. 26165 (28 Nov. 2006), Art 53, Costa Rican Decree 36831-G (28 Sept. 2011), Art 13, El Salvadorian Law no. 918 (14 Aug. 2002), Art 4(a), Guatemalan Governmental Accord no. 383-2001 (14 Sept. 2011), Art 11(d), Honduran Decree 208-2003 (3 March 2004), Art 42(3)(e), Mexican Law on Refugees and Complementary Protection (27 Jan. 2011), Art 13(1), Nicaraguan Law no. 655 (20 June 2008), Art. 1A, Panamanian Decree 23/98 (10 Feb. 1998), Art. 5(2), Paraguayan Law no. 1938 (9 July 2002), Art 1(a), Uruguayan Law no. 18076 (14 Nov. 2006), Art 2A, Venezuelan Organic Law on Refugees and Asylees (3 Oct. 2001), Art 5.
- 4 See D.J. Cantor, 'The new wave: forced displacement caused by organized criminal groups in Central America and Mexico', *Refugee Survey Quarterly*, 33 (2014), 34–68.
- 5 Note, however, that the United States of America (USA) remains by far the principal country of destination for asylum-seekers from the Northern Triangle of Central America countries and Mexico, at least in terms of the numbers of asylum applications recorded as registered. Taking the example of asylum applications by El Salvador nationals in 2014, the only Latin American countries that registered more than 100 applications were Nicaragua (105), Costa Rica (303) and Mexico (418). By contrast, the USA registered 10,093 asylum applications that year from El Salvador nationals (UNHCR (2015) *Global Trends 2014: World at War* (Geneva), Annex, Table 12).
- 6 1984 Cartagena Declaration, Conclusion 3.
- 7 These are: Argentina, Belize, Bolivia, Brazil, Colombia, Chile, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru and Uruguay. Ecuadorian legislation was changed in 2012 to remove reference to the broadened definition in the Cartagena Declaration, although the Constitutional Court of Ecuador recently reinstated the Cartagena definition as applicable in Ecuadorian national law.
- 8 See, however, the discussion below concerning the approach recommended by the recent 2014 Brazil Declaration.

disturbance be reached by the violence.<sup>9</sup> Indeed, the definition appears almost tailor-made for ‘grey’ situations of violence for which characterisation in legal or political terms may be challenging.<sup>10</sup> In the alternative,<sup>11</sup> specific situations of organised criminality may easily be characterised as ‘generalised violence’, ‘massive violation of human rights’ and/or (if the criteria of international humanitarian law are applied) ‘internal conflicts’.

Of course, the fact that the situational element of the Cartagena definition may in principle be met by serious criminal violence of the kinds currently affecting parts of Latin America is not sufficient to make all persons from those countries ‘refugees’. It is also required that the definition’s second element (that of ‘threat’ as a result of the situation) be met.<sup>12</sup> As such, it may be the case that certain at-risk sectors of the population in areas where the organised criminal groups operate will have a *prima facie* claim to protection as refugees under the Cartagena definition. The importance of that protection is heightened because a number of Latin American States have not yet incorporated the human rights law-based principle of non-*refoulement* into their domestic legislation.<sup>13</sup>

Building on the Cartagena Declaration, the 2004 Mexico Declaration and Plan of Action (MPA) establishes a mechanism for the resettlement of Latin American refugees, specifically Colombians, from countries of first asylum, such as Ecuador, to other countries in the region.<sup>14</sup> The scheme exists alongside ‘traditional’ resettlement of this population to North America and other

9 In short, the final situation referred to by the Cartagena definition – ‘circumstances which have seriously disturbed public order’ – is actually the core concept of which the preceding four situations are merely factual examples. For further detail on this argument, see D.J. Cantor and D. Trimiño Mora, ‘A simple solution to war refugees? The Latin American expanded definition and its relationship to IHL’, in D.J. Cantor and J.F. Durieux (eds.), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Leiden, 2014).

10 This was certainly the case for the forms of violence in Central America in the 1980s that prompted the creation of the Cartagena definition.

11 In other words, if the attempt is instead made to define in legal terms each of the five elements individually, as per H. Gros Espiell, S. Picado and L. Valladares Lanza, ‘Principles and criteria for the protection of and assistance to Central American refugees, returnees and displaced persons in Latin America’, *International Journal of Refugee Law*, 2 (1990), 83–117.

12 I have argued elsewhere that this element should be understood as referring to the ability of the putative refugee to live a dignified life (see D.J. Cantor, ‘Post hoc comments: expert meeting on the “Interpretation of the expanded refugee definition included in the 1984 Cartagena Declaration on Refugees”, Montevideo – Uruguay, 15–16 October 2013’, available at [www.esrc.ac.uk/my-esrc/grants/ES.K001051.1/outputs/read/cbd41ea2-730c-4a84-8b67-6669479ea438](http://www.esrc.ac.uk/my-esrc/grants/ES.K001051.1/outputs/read/cbd41ea2-730c-4a84-8b67-6669479ea438) (accessed 31 March 2014)). If the inability to do so is as a result of the situation of violent disorder – i.e. rather than poverty etc. – then the definition will be met.

13 Moreover, the forms of harm addressed by the Cartagena definition are broader than those envisaged by the non-*refoulement* norms in provisions such as Article 3 of the Convention against Torture.

14 See, for example, W. Spindler, ‘The Mexico Plan of Action: protecting refugees through international solidarity’, *Forced Migration Review*, 24 (2005), 64–5.

countries in the global north. Regional burden-sharing has also implicitly been facilitated by the extension of the free movement principle among member States of MERCOSUR,<sup>15</sup> which has facilitated the 'resettlement' of Colombians through migratory routes rather than via those of international protection.

## **Identifying challenges and future opportunities: 2014 San Salvador expert workshop**

Existing law provides a sufficient framework for Latin American States to accord international protection on a unilateral basis to the new displaced; and it likely requires them to do so in a proportion of cases where the threat to the person is well-founded. From the standpoint of law, there is no reason why this should not take place. However, resistance to the application of these frameworks may derive instead from several quarters.

A first is a failure to appreciate the scale and nature of the problem. Although the office of the United Nations High Commissioner for Refugees (UNHCR) is seeking to raise its profile in the region, the risk persists that Latin American States continue to perceive the problem as an issue of mere isolated criminality or a security issue and thus not a humanitarian issue. However, at least in certain countries, the scale of organised criminality and its humanitarian and even political impact are extreme. These are the core contemporary dynamics of violence in Latin America and the new displaced have a serious need for protection that will sometimes be outside their countries.

A second concerns the spread of the external migration of new displaced within the region. It is a fact that the patterns of internal and external displacement are quite diverse.<sup>16</sup> Whereas some of the new displaced direct their flight out of the region – particularly towards North America and, to a lesser extent, Europe – others simply cross a border into a neighbouring State. The issue for some States thus becomes one of receiving a considerably larger number of such persons than others in the region by mere virtue of their geographical location, thus providing a ground for potential resentment.

Yet there may thus be benefit in seeking new multilateral approaches to the problem within the region. One potential basis for such collaboration is a common interest among States in responding to the violence and its consequences for their populations in view of the fact that it emanates to a

15 MERCOSUR is the Spanish acronym for the Mercado Común del Sur (Common Market of the South), an international organisation comprised of Argentina, Bolivia, Brazil, Paraguay, Uruguay and Venezuela, with Chile, Colombia, Ecuador and Peru among its associate members.

16 In relation to Central America and Mexico, see Cantor, 'The new wave'.

large extent from non-State actors.<sup>17</sup> This is in sharp contrast to the violence and displacement of the 1980s, in which States were also key perpetrators and divided by strong political differences but yet still managed to adopt and abide by joint principles in their treatment of refugees.

In this context, and with one eye on the upcoming Cartagena Declaration's 30th anniversary commemorations, I put forward several proposals at the Refugee Law Initiative (RLI)/Universidad Centroamericana José Simeón Cañas (UCA) expert workshop in San Salvador, El Salvador, at which this paper was originally presented in May 2014. Specifically, it was suggested that it would be appropriate to canvass and reinvigorate States' commitments to refugee protection through unilateral and joint action. Possible collaborative policy responses to be explored in responding to the new displaced included the following burden-sharing mechanisms and protection tools:

- A reworking of the MPA framework – which is presently overly burdensome, slow and small-scale, as well as being limited to Colombians – to increase its utility and also include other groups of those newly displaced by organised crime.
- An exploration of the extent to which regional migration agreements in contexts other than MERCOSUR could be tweaked to allow for 'resettlement' of new displaced. A particular emphasis could be placed on the examination of how this operates in relation to persons with dual nationality, as is the case for a sector of the relevant populations in affected countries.
- A revival of the 'humanitarian rescue' schemes that operated in the 1970s and 1980s directly from certain countries of origin as a means of providing urgent protection and also 'managing' the most acute parts of the exodus to as far an extent as possible.<sup>18</sup> This could involve global resettlement alongside that within the region of Latin America.

Finally, although acknowledging every effort must be made to preserve the institution of asylum, I argue that it is clear this needs to be accompanied by direct efforts to improve the humanitarian response within many affected countries. At least at present, it is evident that more people displace internally as a result of organised criminal violence than leave the country. In this context, the focus on internal displacement promoted by the 1994 San José Declaration on Refugees and Displaced Persons may take on a renewed significance.<sup>19</sup> These

17 Of course, this is not to suggest that State officials or institutions in these scenarios never collude or have other relationships with organised crime.

18 This approach to asylum correlates with the second of the three asylum paradigms identified by J.F. Durieux, 'Three asylum paradigms', *International Journal of Minority and Group Rights*, 20 (2013), 147–77.

19 See, particularly, 1994 San José Declaration, Conclusions 6, 14, 16–23.

recommendations were reflected in the report and recommendations adopted by the 2014 RLI/UCA San Salvador expert workshop.<sup>20</sup>

## **Emerging engagement by governments: Cartagena+30 process**

The question of regional cooperation on ensuring international protection for persons displaced by organised crime was first substantively considered by Latin American governments in the 30th anniversary commemorations of the Cartagena Declaration. This series of events – named ‘Cartagena+30’ – was developed largely by UNHCR with the support of Latin American (and, to a lesser extent, Caribbean) governments. The aim of the process was to build on the Cartagena framework, as advanced by previous ten-year declarations and plans of action. This was so as to respond to the coming decade’s strategic challenges and to strategically advance the work of the region towards persons in need of international protection, including refugees and internally displaced persons (IDPs).<sup>21</sup>

The diversity of refugee challenges experienced across Latin America and the Caribbean (LAC) led to governments holding a series of sub-regional consultative meetings prior to the plenary event in Brazil in December 2014.<sup>22</sup> These consultations were also organised in the MERCOSUR bloc countries (Buenos Aires, Argentina, 18–19 March 2014), the Andean countries (Quito, Ecuador, 9–10 June 2014), the countries of Mesoamerica (Managua, Nicaragua, 10–11 July) and those of the Caribbean (10–11 September 2014). Each sub-regional meeting was designed to engage with the refugee protection challenges particular to those countries and to produce a series of recommendations to be transmitted for consideration by LAC governments in order to agree a text for the declaration and plan of action in the final plenary event in Brazil.<sup>23</sup>

The issue of displacement generated by organised crime was first raised within the Mesoamerica sub-regional consultation in Managua, which was attended by the governments of Belize, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and, as observers, Brazil and Cuba. Indeed, the discussion document produced by UNHCR for

20 See RLI/UCA (2014) ‘Memorias: Los Grupos Criminales Organizados y la Nueva Ola de Desplazamiento Forzado en América Latina’, Taller de Expertos, Universidad Centroamericana ‘José Simeón Canas’, San Salvador, El Salvador, 22–23 May 2014.

21 UNHCR (2014) ‘Cartagena+30: documento conceptual’ (updated Jan. 2014).

22 Parallel processes of consultation with civil society in these sub-regions were also organised by UNHCR. Representatives of civil society and academia (including me) also attended the governmental sub-regional consultations.

23 The discussions that followed the sub-regional consultations took place largely in Geneva through the Group of Latin American and Caribbean Countries in the United Nations (GRULAC).

the Managua consultation made specific reference to ‘transnational organised crime and other situations of violence’ as key among the ‘new trends of forced displacement’ in that sub-region and one which presented a number of pressing protection challenges.<sup>24</sup>

Indeed, within the Managua sub-regional consultation, the first substantive panel comprised presentations devoted to the ‘Desafíos de protección ante las nuevas tendencias del desplazamiento forzado por motivos relacionados con el crimen organizado transnacional y otras formas de violencia en Mesoamérica’ [Protection challenges concerning the new trends of forced displacement for reasons related to transnational organised crime and other forms of violence in Mesoamerica]. I was invited to join this panel in order to present the principal conclusions and recommendations from the 2014 RLI/UCA San Salvador expert workshop to the governments in attendance.<sup>25</sup> They were as follows:<sup>26</sup>

1. It is important to understand that in some countries in the region displacement caused by organized crime is a humanitarian problem that has reached critical levels, which makes it necessary to formulate common responses by establishing a regional framework of shared protection. Under this concept, countries maintain a degree of responsibility towards individuals displaced by criminal violence both if they are their nationals – regardless of whether they have been internally or externally displaced – or if they are foreigners in their country.

This approximation allows the establishment of initiatives for solidarity that include both countries of origin and those of reception, without excluding any part and without carrying any judgment. As a result, it is essential to identify the strengths of each of the participating States and institutions to allow each of them to make a contribution towards the protection of people in their charge and the construction of a common system.

2. The first step towards developing this system is unifying approximations to the phenomenon of ‘organized criminal violence’ with the aim of establishing common criteria that allow a common starting point to understand this phenomenon and the formulation of joint strategies. An essential part of this component is identifying the methodological gaps of current approximations with the aim of crafting common indicators.

24 UNHCR (2014) ‘Documento de Discusión: proceso conmemorativo del trigésimo aniversario de la declaración de Cartagena’, Cartagena+30, reunión subregional de Mesoamérica, July 2014.

25 The other participants on the panel were: Yolanda del Carmen Perez Molina, subsecretary of social inclusion for the Secretary of State, Human Rights, Justice, Interior and Decentralization Office of Honduras; Liduvina Magarín, vice minister for Salvadorian Nationals Abroad, Ministry of Foreign Affairs of El Salvador; Werner Vargas, executive director of the Central American Integration System.

26 D.J. Cantor, ‘Organised crime and the new challenges for refugee law in Latin America’ (2014), paper presented at Mesoamerican sub-regional meeting of States for Cartagena+30, Managua, Nicaragua, 9 July 2014; see also RLI/UCA, ‘Memorias’, conclusiones y recomendaciones.

Likewise, it should be understood that violence has a direct impact on the lives of individuals who are not involved with organized crime and that it does not allow them to live their lives in peace. In that sense, it is necessary that there are indicators that allow the integral application of protection policies towards them. One example of that approximation is avoiding the construction of excessively technical definitions and pushing for the identification of victims through geographical indicators – related to violence in their region of origin – and their objective experience of abandoning their homes. This would enable the authorities to respond efficiently and identify the population's needs even when it has not yet requested protection.

3. Parallel to this conceptual effort it is necessary to develop as soon as possible a registration instrument to measure the levels and dynamics of displacement as well as general information of the target population, which should also be comparable and widely used both in regions of origin and those of reception. This registry, following protocols to anonymize information on individual cases to protect the identity of displaced individuals, can operate at several levels; for instance, it can unify information taken from registries on homes that have been abandoned, of direct victims of common crime when this has forced them to leave their countries and a specific registry on displacement.

In reception countries asylum claims are an indicator of this phenomenon but they are not a perfect indicator, as claims can be rejected for other reasons without denying that displacement has occurred; on the other hand, it is also possible that in many cases people do not report their displacement but instead seek other forms of migration regularisation or consular assistance, which means that these mechanisms should also develop protocols to register displacement.

4. All this information can then be compiled and consolidated in a wider information system, either using existing systems like SICA [the Sistema de Integración Centroamericana – Central American Integration System], or a new regional observatory. The objective of this system is to serve as a source of information for local authorities and international partners and in this way support the development of well-informed public policies that respond to real needs.

In particular, the establishment of this registry is essential in order to create measures to protect dispossessed property and the integrity of inhabitants who have stayed behind.

5. Additionally, and as a part of the acknowledgment that this violence is a common problem and of the shared responsibility towards its victims, affected States and the legal community in countries of reception should strive to ensure that systems for international protection adequately reflect the gravity of the situation in the countries of origin and that they grant international protection in an impartial, professional and efficient manner when due.

6. Existing mechanisms should be taken full advantage of, and lessons should be learned from past experiences to make this process more effective,



including the Central American experience in the Cartagena Process on refugees and the San José Declaration.

For instance, initiatives on regional citizenship and mobility like MERCOSUR can be used to provide immediate possibilities for reallocation and local integration of forced migrants, but it is essential to avoid that they are used to hide the needs of individuals who deserve international protection. In this sense, it is important to emphasize that the decision to request international protection or pursue mechanisms for migratory regularisation should rest on the individual, and that in this process he or she should be able to count on the States' support to be able to clearly understand the implications of this decision.

7. The construction of an integral policy should not detract attention from the importance of developing immediate responses to the most urgent humanitarian needs, of developing preventive policies to avoid more displacement in the future and of applying preservation measures to protect the life and property of displaced populations. In particular, it is necessary to develop and implement emergency plans that avoid the usual length of time behind public policies, which usually take several years to be formulated and made operational. In this sense, a mechanism that can be used effectively is the system for humanitarian evacuation, which allows State institutions to facilitate agile and immediate evacuations of high-risk profiles towards safe third countries.

These emergency plans should not be isolated, but instead they should be able to permeate local institutions and influence the development of coherent and systematic national policies in the long term.

8. This process should continue to be open to frank and cooperative dialogue between the different actors involved in the issue, in particular governments, academia, international organisations and humanitarian agencies, with the aim of seeking solutions from a multidisciplinary perspective.

Beyond these groups' intervention, there must be an effort to ensure the participation of displaced individuals and refugees both in the construction of urgent measures and long-term policies to enable them to share their opinions and have a central role in this process.

In summary, the presentation argued that, although Mesoamerica is not the only part of the world whose citizens are displaced by organised crime, it is the only region that has the foresight, creativity and opportunity to take the first steps to respond to the humanitarian needs of persons displaced by all regions' common enemy of organised crime.<sup>27</sup> In developing a marco regional de protección compartida [regional framework of shared protection] for these vulnerable persons, it suggested that the region may once again offer the world a model as inspiring as that of the original Cartagena Declaration.<sup>28</sup>

27 Ibid.

28 Ibid.

This input from the 2014 RLI/UCA expert workshop was largely reflected in the ‘Summary of Conclusions and Recommendations’ adopted by governments present at the Managua sub-regional consultation.<sup>29</sup> The relevant part of the document is reproduced here in full in order to demonstrate the complete scope of the recommendations adopted by Mesoamerican governments on this issue in Managua:

The sub-regional consultation made the following recommendations to address this phenomenon within a framework of close regional cooperation:

1. Highlight the fact that displacement caused by organized crime in Mesoamerica is a complex problem that must be addressed with a focus on human rights, responsibility sharing and solidarity. Regardless of whether people move within their countries or across international borders and recognize that, in the latter case, it can lead to the recognition of refugee status.
2. Confront the causes generating forced displacement in the region with the cooperation of States, civil society and international organisations, within a framework of responsibility sharing.
3. Develop an early warning system for displacement within SICA.
4. In the framework of the cooperation agreement signed between SICA and UNHCR, consider the creation of an Observatory of human rights for the migrant population subjected to forced displacement, with the active participation of civil society and Academia and the support and supervision of the Human Rights Ombudsmen at regional level. The aim would be to implement a common system of collection and analysis of quantitative and qualitative information on the phenomenon, which will facilitate the formulation of public policies and regional coordination and cooperation.
5. Develop a comprehensive regional policy for addressing forced displacement and provide assistance to victims with the support of international cooperation, without prejudice to the adoption of immediate national responses.
6. Prepare a harmonized registration Protocol to measure the levels of forced displacement and information for the displaced population.
7. Strengthen the work of existing networks within the States, international organisations and civil society to address the issue of forced displacement, focusing on border monitoring, with the participation of national institutions for the promotion and protection of human rights.
8. Consider the establishment of a regional mechanism of humanitarian evacuation to third countries, defining the criteria for their beneficiaries and the modalities of cooperation.

29 ‘Resumen de conclusiones y recomendaciones’, Consulta Subregional de Mesoamérica ‘Desafíos de la Protección Internacional y Oportunidades para un Nuevo Marco Estratégico de Cooperación Regional’ (2014), Cartagena+30, reunión subregional de Mesoamérica, Managua, 10–11 July 2014, Part II.

9. Strengthen national judicial systems and other national protection mechanisms, such as victims and witnesses protection programs.
10. Influence the authorities of the host countries of migrants or people who need asylum or international protection as refugees and a regional visa, in order to ease and streamline response mechanisms to applications originated by situations of violence.
11. Take into account UNHCR's guidance notes for refugee applications filed by victims of gangs or maras.
12. Promote a permanent regional forum of commissions of refugee status determination [RSD] for the exchange of good practices within the framework of SICA and find its connection with the Regional Conference on Migration (RCM), the Central American Court of Justice and other similar forums in Latin America.
13. Include the networks of civil society within SICA's Consultative Committee framework.

Through the Cartagena+30 process, these recommendations were transmitted to the plenary of LAC governments to consider and debate with a view to feeding into the eventual agreed text for the 2014 Brazil Declaration and Plan of Action. It can be seen that many of the key points reflect those proposed by the 2014 RLI/UCA expert workshop.

## **A novel framework: 2014 Brazil Declaration and Plan of Action**

The material outcome of the Cartagena+30 process was the successful adoption by LAC governments of the envisaged declaration and plan of action in a final plenary meeting in Brasilia, Brazil, on 3 December 2014.<sup>30</sup> This framework was named the 2014 'Brazil Declaration and Plan of Action' in recognition of Brazil's generous hosting of the conference and its important contribution to financing the process overall. It represents the next step of elaboration upon the regional principles agreed in the Cartagena Declaration in 1984. However, it is also important since it constitutes the first ever multilateral and intergovernmental acknowledgment of the need to respond to the humanitarian challenges of forced displacement generated by organised criminal groups.

The Brazil Declaration, effectively a principled preamble to adoption of the Brazil Plan of Action, makes merely passing reference to this new form of forced displacement. It does so explicitly only in a statement that the LAC governments:

recognize the existence of new challenges regarding international protection for some countries of the region that need to continue making progress in

30 Brazil Declaration and Plan of Action, 3 Dec. 2014.

the application of the regional extended refugee definition, thus responding to the new international protection needs caused, among others, by *transnational organised crime*.<sup>31</sup>

The focus of this paragraph is upon the use of the expanded refugee definition contained in the Cartagena Declaration. As such, the reference to organised crime as a cause of displacement is intended to emphasise the need to carefully consider developing the use of this extended definition as a means of responding to these new international protection challenges in practice.

Even so, the Declaration's framing of the issue in terms of 'transnational' organised crime is unhelpful, since the 'transnational' character of such groups is not routinely apparent or relevant to the generation of displacement in many of the pertinent Latin American contexts. Indeed, the inclusion of the adjective 'transnational' likely reflects the fact that international law dealing with combating organised crime tends to focus on that which has readily-identifiable transnational aspects and thus call for international regulation and cooperation, as in the 2000 United Nations Convention against Transnational Organized Crime and its Protocols.<sup>32</sup> However, the need for national or international protection in the context of displacement by organised criminal groups in Latin America does not depend on any transnational aspect to these groups but rather on the extent to which they use violence against local populations.<sup>33</sup>

Later in the Declaration, the reference to 'transnational organised crime' is supplemented by a statement concerning the displacement of persons from the Northern Triangle of Central America (NTCA) countries, in which the assembled governments:

Recognize that, owing to a multiplicity of causes, the displacement of persons ... forced to escape from their community of origin constitutes a new challenge in El Salvador, Guatemala and Honduras, and highlight[s] the importance of promoting *shared but differentiated responsibility* among the States of origin, transit and destination.<sup>34</sup>

The statement is rather oblique in that the element of organised crime as a factor that generates forced displacement in these countries is not specifically mentioned. However, this paragraph serves to set up closer consideration of the issue in the Brazil Plan of Action. Yet it does so by limiting the analysis of this

31 Brazil Declaration, 2.

32 See, in particular, its 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and its 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air.

33 See, for example, the various chapters in this volume dedicated to describing the nature of organised criminal groups in Latin America and their involvement in generating forced displacement in the relevant countries.

34 Ibid.

topic to the countries of the NTCA, thereby obscuring the existence of these trends in other countries of the region such as Mexico and Colombia. Even so, the paragraph remains important in terms of the response to be adopted, which is defined by reference to a newly proclaimed principle of 'shared but differentiated responsibility'.

This analysis is confirmed by the manner in which the issue of displacement in the NTCA is framed by the Brazil Plan of Action, that is:

In the Northern Triangle of Central America, displacement was observed of persons forced to escape their community of origin due to, among other causes, transnational organised crime. In particular, there has been a significant increase in the numbers of Guatemalan, Honduran and Salvadoran citizens who leave their countries in search for international protection or who are displaced internally owing to security reasons.<sup>35</sup>

In other words, the Plan of Action characterises the NTCA as a sub-region affected by increased displacement, of which the only named cause is 'transnational organised crime'. Whereas it is clear that the predominant concern in this sub-region is displacement caused by organised crime, similarly this form of displacement is framed as being confined only to these NTCA countries.

The characterisation of the NTCA displacement dynamics as generated by organised crime is wholly apparent in the framework provided by the Plan of Action for responding to the protection needs of refugees and displaced persons in this sub-region. This framework is largely provided by Chapter Four of the Plan of Action, which is titled 'Solidarity with the Northern Triangle of Central America in seeking and implementing durable solutions'. Reflecting the outcome of the Managua sub-regional consultation, this chapter recommends the establishment of three different programmes in the region to strengthen 'regional cooperation between States'.<sup>36</sup> These programmes are intended to give practical effect to the Brazil Declaration principle of 'shared but differentiated responsibility'.<sup>37</sup>

The Chapter Four programmes are quite distinct in their emphasis, although the extent to which they build upon the original RLI/UCA expert workshop proposals is interesting. Firstly, there is a programme to establish a Human Rights Observatory on Displacement within the framework of the Cooperation Agreement between SICA and the UNHCR.<sup>38</sup> Its objective would be to set up a common system for analysing quantitative and qualitative data about displaced populations forced to leave their homes in Central America in

35 Brazil Plan of Action, Chapter One.

36 Brazil Plan of Action, Chapter Four.

37 Ibid.

38 Chapter Four, the 'Human Rights Observatory on Displacement' programme.

order to help with formulating public policies and regional coordination and cooperation. It is envisaged as having an early warning and emergency response system for situations where there is a high risk of displacement. It is mandated also to conduct analyses of protection needs and identify trends and profiles for these groups.

Secondly, there is a 'Prevention' programme to strengthen national protection and assistance mechanisms for populations in vulnerable situations in the NTCA countries.<sup>39</sup> It includes the following actions:

the design and implementation of protocols for the registration of victims and displaced persons; coordination between human rights institutions and the competent State agencies responsible for the welfare of children returned or deported and reunified with their families; the development and implementation of assistance programmes for victims of violence perpetrated by organised criminal groups; and the provision of training and increased human and financial resources for national institutions for the protection of women and children.<sup>40</sup>

The focus of this programme is clearly on protection in the country of origin, such that its scope encompasses not only returnees but also, crucially, IDPs and those at risk of being displaced. The Plan of Action also encourages south-south and triangular cooperation schemes for implementing this programme, based on best practices and experiences of other countries of the region. To complement these actions, third party States are invited to contribute to funding the separate development initiative Plan Alliance for the Prosperity of the Northern Triangle, presented by the NTCA presidents to the United Nations.

Thirdly, within Chapter Four, there is also a 'Dignified and Safe Transit' programme, which seeks to improve access to differentiated and quality procedures for RSD.<sup>41</sup> It also seeks to promote in border areas:

better understanding among people of their right to seek international protection; the training of border officials on national mechanisms for refugee status determination, particularly concerning accompanied and unaccompanied children; and a rights-based approach that includes the design of procedures based on the best interests of the child.

This programme is clearly aimed at improving the procedural guarantees for international protection of persons fleeing from these causes in the NTCA, rather than for IDPs. Key to these efforts is also the intention to promote better understanding of the international protection needs of persons forced to leave their communities owing to the activities of organised crime. Towards this end, the programme also encompasses a commitment to disseminate and promote

39 Chapter Four, the 'Prevention' programme.

40 Ibid.

41 Ibid, Chapter Four, the 'Dignified and Safe Transit' programme.

use of the UNHCR ‘Guidance note on refugee claims relating to victims of organized gangs’.<sup>42</sup>

Given that the substance of the programme relates largely to the sufficiency of procedures for determining the need for international protection, the emphasis on safe and dignified ‘transit’ in the title of the programme is interesting. It may reflect a tacit acknowledgment that some of those NTCA nationals encountered outside their country and found by other NTCA States or Mexico to require international protection will ultimately move on towards the north. However, no doubt due to the politics surrounding these patterns of mobility in Central and North America, there is nothing in the actions recommended by the programme that speaks directly to the particular need of refugees and asylum-seekers in transit.

Finally, it is important to note that in the separate chapter of the Brazil Plan of Action relating to ‘Comprehensive, Complementary and Sustainable Solutions’, adjustments are proposed to the Latin American regional ‘Solidarity Resettlement’ programme, established by the 2004 MPA. These include the call to take specific action to:

(b) Identify current and mid-term priority situations that may require the support of the “Solidarity Resettlement” programme. In this respect, the following actions are proposed as expressions of solidarity and cooperation:

... ii. Cooperate with the three countries of the Northern Triangle given their vulnerability to the activities of transnational organized crime.<sup>43</sup>

In other words, the intention expressed in the Brazil Plan of Action is to consider using the regional resettlement programme, particularly operated by the MERCOSUR countries as a means of resettling vulnerable cases of persons fleeing organised crime in the NTCA.

In practical terms, the programmes proposed by the Brazil Plan of Action to address forced displacement by organised crime are ambitious and it is likely that challenges lie ahead in securing their implementation by the NTCA governments and others in the region. This impression was not dismissed by the Seminario de Planificación held at the Institute of International Humanitarian Law (IIHL) San Remo, Italy, in March 2015, in order to discuss ‘La Declaración y el Plan de Acción de Brasil: el reto de su implementación’.<sup>44</sup> Nonetheless, in relation to Chapter Four of the Brazil Plan of Action, the San Remo meeting did at least manage to set out a number of options for the implementation of these three NTCA programmes.<sup>45</sup>

42 UNHCR, ‘Guidance note on refugee claims relating to victims of organized gangs’ (2011).

43 Ibid, Chapter Three, the ‘Solidarity Resettlement’ programme.

44 IIHL, ‘Informe final’, Seminario de Planificación ‘La Declaración y el Plan de Acción de Brasil: el reto de su implementación’ (2015), San Remo, 4–7 March 2015.

45 Ibid, Chapter Four, pp. 7–8.

Yet, whatever the challenges that await in terms of practical implementation, at the conceptual level the 2014 Brazil Declaration and Plan of Action do still represent a significant milestone in their development of a framework for responding to the protection needs of persons displaced by organised crime in the region. Firstly, there is the express recognition of the real protection needs generated by these new forms of displacement. Secondly, there is a strong indication as to the positive applicability of the Cartagena expanded refugee definition to these scenarios. Thirdly, a regional approach beyond the affected countries is promoted that is rooted in the novel principle of proclaimed 'shared but differentiated responsibility'. Fourthly, specific programmes and actions are designed to implement this principle not only to meet international protection needs but also in relation to protection concerns in the context of internal displacement.

There is little doubt that the issue of displacement due to organised crime constitutes one of the main and most pressing protection concerns behind the Brazil Declaration and Plan of Action, nor that these documents seek to delineate a new approach to these problems in practice. Even so, the political nature of the Cartagena+30 process appears to have led to certain compromises. The most apparent is the decision to restrict acknowledgement of this form of displacement to the NTCA countries, when it is plainly present in other countries of Latin America. Similarly, it is unclear why the framework introduces an element of confusion by sometimes referring to the factor of organised crime as 'transnational'. It remains to be seen whether these aspects will compromise the framework in its implementation through law, policy and practice.

## **Conclusion**

As this chapter has shown, refugee law as applied in Latin America remains relevant and largely legally sufficient to ensure that the 'new displaced', that is, persons fleeing from organised crime, receive international protection where it is needed. Indeed, for countries that apply the region's extended refugee definition contained in the 1984 Cartagena Declaration, petitions for refugee status by such persons should be relatively straightforward to resolve, especially in light of the encouragement given by the 2014 Brazil Declaration. Of course, a number of these same cases will also qualify equally under the refugee concept expressed by the Refugee Convention, at least as it is interpreted and implemented in many Latin American countries.

Nonetheless, the express acknowledgment by the 2014 Brazil Declaration and Plan of Action of the protection needs of the newly displaced remains very welcome. It straightforwardly reaffirms that such scenarios do generate a need for international protection and responds by creating a principled framework



of programmes and practical actions for facilitating access to protection where it is merited, whether in the country of origin or across a border. Rooted in the novel principle of 'shared but differentiated responsibility', Latin America has set out its roadmap for protecting refugees and IDPs fleeing from organised crime. Only the coming ten years will show whether Latin American States have the will and capability to provide the new displaced with protection in line with the principles of the 2014 Brazil Declaration and Plan of Action. Nonetheless, a positive starting point has been made.