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Comprehensive Solutions for Colombian Refugees in Latin America

Martin Gottwald
Deputy Representative
UNHCR Colombia

Nicolás Rodríguez Serna
Assistant Protection Officer
UNHCR Colombia

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**United Nations High Commissioner for Refugees
P.O. Box 2500, 1211 Geneva 2
Switzerland**

Web Site: www.unhcr.org

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Introduction¹

According to UNHCR data² forced displacement has reached unprecedented levels: 59.5 million people were displaced by the end of 2014, compared to 51.2 just one year earlier and 37.5 ten years earlier. These levels of displacement do not only reflect the proliferation of armed conflicts in the Middle East, but also the intensification of other forms of violence and instability in other regions, and as a result the possibility of reaching solutions for displacement is still remote in most cases. As outlined by the UN Secretary-General's report for the World Humanitarian Summit, this will require stronger and more coordinated action by all actors in order to respond quickly and efficiently to humanitarian emergencies, and at the same time promote development and socio-political stability to address their root causes.³

In this context, Latin America is witnessing ongoing negotiations to bring to an end the longest running war in the region, the Colombian armed conflict, which has caused the displacement of almost seven million people internally and over 360,000 across the country's borders. The peace negotiations between the Colombian Government and the guerrilla group FARC-EP (*Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo*) and news of the start of a new process with ELN (*Ejército de Liberación Nacional*) are a notable exception to a rather more bleak global panorama, particularly now that negotiations with the first group appear to be coming to a successful termination.⁴

These processes foster hope that the implementation of the agreements may lead to a considerable decrease in levels of violence in many areas, and at the same time allow the consolidation of state presence in historically marginalized regions, such as some border areas.⁵ At the same time, while there are reasons for hope, other risks, including the presence of other violent groups in key regions, evidence the need for a careful evaluation of how close the country is to bringing protracted displacement and recurrent emergencies to an end.

Despite these challenges, the peace processes hold an enormous potential to promote real change in Colombia. In this paper, we aim to evaluate the interaction between peace and solutions processes for Colombian refugees, particularly those in Latin America.

In this context, durable solutions are understood as long-term processes in which the state, together with its national and international partners and with the participation of refugees, seeks to create the necessary context for them to resume their life projects in conditions of security and dignity, thus bringing the cycle of displacement

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² UNHCR, 'Global Trends: Forced Displacement in 2014' (2015).

³ UNGA, 'One Humanity: Shared Responsibility, Report of the Secretary-General for the World Humanitarian Summit' (2016) UN Doc A/70/79. The application of this logical framework in the case of Syria, for instance, is evidenced in OCHA, 'Updated Overview: 2015 Syria Response Plan and 2015-2016 Regional Refugee and Resilience Plan' (2015).

⁴ As of mid-2016.

⁵ UARIV, 'Índice de Riesgo de Victimización: 2010-2014' (2014).

to an end.⁶ The execution of these plans should be ‘comprehensive’, that is, (1) take into account the different pathways to the restoration of refugees’ rights – voluntary repatriation, local integration and resettlement – and (2) promote synergy between these three mechanisms, with the aim of providing solutions that are tailored to each refugee’s particular circumstances, as well as (3) synergy between these processes and those directed at internally displaced persons (IDPs).⁷ In that sense, it is more appropriate to shift the discourse from ‘durable solutions’ to ‘comprehensive solutions’.⁸

Comprehensive solutions should be aimed not only at individuals who have been formally recognised as refugees, but at all those who fall within the refugee definition, regardless of whether they have other protection status, such as complementary or temporary humanitarian protection,⁹ or if they have no formally recognised status at all. The current wording in the Agreement on Victims reached with FARC, for instance, mentions measures for ‘victims abroad’, which allows both a general strategy for this entire group as well as specific responses to particular sub-profiles, including refugees. At the same time, the peace process with ELN is only in its first stages.¹⁰

This means that there is still a chance to design an integral system that not only sets out a pathway for returns, but that also offers concrete strategies towards other solutions. As highlighted by the UN Secretary-General, refugees and IDPs have an essential role in peacebuilding and in preventing new cycles of violence in post-conflict scenarios, and as such finding durable solutions is an essential component in the search for peace.¹¹

This paper seeks to analyse the perspectives for comprehensive solutions for Colombian refugees in the region under international law and through lessons learned in similar situations across the globe, study UNHCR’s role in this process and highlight the measures needed to ensure that this process is carried out in accordance with international standards, acknowledging that it is not taking place in a vacuum, but in the context of a global effort to improve solutions to displacement in post-agreement and post-conflict scenarios.¹²

⁶ UNHCR EXCOM, ‘Conclusion No. 56 (XL)’ (1989).

⁷ There is an undeniable link between internal displacement and cross-border displacement, particularly when the former occurs near border areas. See, for instance, Centro Nacional de Memoria Histórica, ‘Cruzando la Frontera: Memorias del Éxodo Hacia Venezuela. El Caso del Río Arauca’ (2014).

⁸ M Gottwald, ‘Back to the Future: The Concept of “Comprehensive Solutions”’ [2012] 31(3) RSQ 101. This topic will be explored further in this paper.

⁹ See further UNHCR Executive Committee (EXCOM), ‘Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime’ (2000) UN Doc EC/50/SC/crp.18 and ‘Conclusion No. 103 (LVI): Conclusion on the Provision on International Protection, Including through Complementary Protection’ (2005) UN Doc A/AC.96/1021 and UNHCR, ‘Guidelines on Temporary Protection or Stay Arrangements’ (2014).

¹⁰ As of mid-2016.

¹¹ United Nations Secretary General, ‘Decision No. 2011/20 – Durable Solutions: Follow Up to the Secretary-General’s 2009 Report on Peacebuilding’ (2011)

¹² See in particular United Nations Secretary General, ‘Decision No. 2011/20 – Durable Solutions: Follow Up to the Secretary-General’s 2009 Report on Peacebuilding’ (2011), its annex ‘Ending Displacement in the Aftermath of Conflict: Preliminary Framework for Supporting a More Coherent, Predictable and Effective Response to the Durable Solutions Needs of Refugee Returnees and

Colombian refugees in the region and the fight against invisibility

Under the Geneva Convention on the Status of Refugees¹³ and its Protocol¹⁴ a refugee is a 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, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁵

Similarly, the 1984 Cartagena Declaration on Refugees, adopted by the national legislations of many countries in the region, and which is now an integral part of the right to asylum in Latin America,¹⁶ states that refugees are also those who

(...) have fled their countries because their life, security or liberty have been threatened by generalized violence, foreign aggression, internal conflict, massive human rights violations or other circumstances that have gravely perturbed public order.¹⁷

According to UNHCR the Colombian conflict has produced at least 360,298 refugees,¹⁸ who in most cases have fled to border areas in neighbouring countries.¹⁹ However, due to different reasons, including physical, political and legal obstacles,²⁰ most Colombian refugees in neighbouring countries have not been able to access asylum procedures.²¹ As a consequence, many remain under irregular migration

Internally Displaced Persons' and the subsequent development of this framework in Inter-Agency Standing Committee (IASC), 'Durable Solutions: Preliminary Operational Guide' (2016).

¹³ Convention relating to the Status of Refugees (adopted 28 July 1951, entry into force 22 April 1954) 189 UNTS 137 (1951 Convention).

¹⁴ Protocol relating to the Status of Refugees (adopted 31 January 1967, entry into force 4 October 1967) 606 UNTS 267 (1967 Protocol).

¹⁵ Article 1(A) of the 1951 Convention.

¹⁶ *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, Advisory Opinion OC-21/14, Inter-American Court of Human Rights (19 August 2014), para. 79.

¹⁷ Cartagena Declaration on Refugees, adopted by the 'Colloquium on the International Protection of Refugees in Latin America, Mexico and Panama', held at Cartagena, Colombia from 19 to 22 November 1984 (1984).

¹⁸ UNHCR, 'Global Trends 2014: World at War' (2015). This number is reached by adding the total number of officially recognised refugees with that of people in a refugee-like situation, that is, in most cases refugees who lack a formal recognition of their status and people who are under similar protection statuses but who would otherwise qualify as refugees.

¹⁹ See, for instance, A Lari and S Garcia, 'Colombia: Crisis Bubbling Over: Colombians Seeking Refuge in Ecuador and Venezuela' (Refugees International 2009).

²⁰ *ibid*, as well as D Gómez and J Gamboa, 'Diáspora y Participación Política en el Proceso de Paz' in V de Currea-Lugo (ed.), *Negociación Gobierno – ELN: Y sin Embargo, se Mueve* (Antropos 2015).

²¹ M Gottwald, 'Protecting Colombian Refugees in the Andean Region: The Fight against Invisibility' [2004] 16(4) IJRL 517. See also the very wide gap between the figures on Colombian recognised refugees and those in a refugee-like situation in neighboring countries; for instance, on UNHCR's PopStats page at <http://popstats.unhcr.org>.

statuses or in some cases under regular migration statuses that do not contain non-refoulement provisions, curtailing the effective enjoyment of their rights and creating a constant fear of being forcibly returned to Colombia.

In any case, any person who fulfils the refugee definitions of the 1951 Convention or the Cartagena Declaration automatically acquires this status, and its recognition through an administrative or judicial procedure is merely a declaratory, not constitutive, measure.²²

This means that the lack of formal recognition does not deprive a person of his or her status as a refugee or of the rights derived thereof, except in limited cases related to local integration that will be explored later in this paper. In consideration of this important distinction, the rights discussed in this paper, with the aforementioned exception, are not exclusive to Colombians who have been formally recognised as refugees, but are extended to all who fall within the refugee definition. These provisions are complemented by the standards set by the Inter-American Human Rights system, which has explored several cases regarding Colombians who have been displaced abroad.²³

After setting this general context, it is crucial to highlight that the category of 'refugee' and that of 'victim abroad', coined by the Victims Law, are not interchangeable. Not all Colombians who have fled abroad are refugees, and not all Colombian refugees fall within the definition of 'victim' contained in the Victims Law. One of the main differences is that these categories are built upon different premises: victim status presupposes the occurrence of a human rights violation *in the past*, while refugee status, which may or may not include a past violation, is grounded on a well-founded fear of persecution *in the future*.²⁴

Although the two categories do not perfectly coincide, there is an overlap in many cases where the application of the *pro homine* principle indicates that if there are two different dispositions on the rights of an individual the most favourable one should be applied.²⁵ Therefore, beyond being consistent and predictable, solutions processes must not only meet the standards set under International Refugee Law, but also under applicable dispositions in the universal and Inter-American human rights systems.

²² UNHCR, 'Note on Determination of Refugee Status under International Instruments' (1977) UN Doc EC/SCP/5.

²³ *Gutiérrez Soler v. Colombia* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 132 (12 September 2005); *Valle Jaramillo and Others v. Colombia* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 192 (27 November 2008) and *Manuel Cepeda Vargas v. Colombia* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 213 (26 May 2010). In the Inter-American Commission, see the case of journalist Nelson Carvajal Carvajal, presented to the Court at the end of 2015 in 'CIDH Presenta Caso sobre Colombia a la Corte IDH' (11 November 2015).

²⁴ The same situation occurs when comparing 'victim' and 'IDP' statuses; see N Rodríguez Serna and JF Durieux, 'The Displaced as Victims of Organised Crime: Mexico and Colombia Compared' in DJ Cantor and N Rodríguez Serna (eds.), *The New Refugees: Crime and Displacement in Latin America* (ILAS 2016).

²⁵ See, for instance, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-American Court of Human Rights (13 November 1985), para. 52.

The convergence of different protection systems does not mean that developing mechanisms to clearly identify refugees is not necessary. The experience of refugees from Rwanda highlights the fact that the lack of such mechanisms leads to semiotic discussions on the limits of the concept of 'refugee' that can, if left unchecked, lead to considerable delays in the pursuit of solutions.²⁶

Durable solutions and comprehensive solutions

A durable solution is a process that brings the cycle of displacement to an end, allowing displaced people – either within a country or externally – to effectively enjoy their rights and to resume their life projects in conditions of security and dignity. In the case of refugees, durable solutions are (1) voluntary repatriation to the country of origin, (2) local integration in the country of asylum and (3) resettlement to a third country. Although there is no formal hierarchy between these three solutions, in practice voluntary repatriation was historically highlighted as the preferred solution,²⁷ as it allows individuals to return to their territories, recover their property²⁸ and repair the social fabric that was torn when they were displaced.

Despite the advantages offered by voluntary repatriation, it is not a perfect mechanism and does not always respond to the complex challenges that arise in return processes, such as difficulties in reintegration, social clashes that may arise or security risks derived from the emergence and consolidation of new violent actors in their territories. In the Colombian context the strongest argument to avoid focusing exclusively on repatriation, and considering it only one option in a complex and interconnected system²⁹ is that, after more than fifty years of war and a number of failed peace processes, Colombians, including refugees, are understandably very cautious at the promise of lasting peace.

As a result, and based upon the classical concept of *durable* solutions, the concept of *comprehensive* solutions pushes for further evolution, building on the understanding that problems faced by refugees reflect those that exist in their communities of origin. A true solution, thus, can only be reached if the root causes of displacement,³⁰ which are the result of a complex interaction between political, social, economic and cultural factors in each particular context³¹ are addressed.³²

²⁶ G Cole, 'Negotiating Durable Solutions for Refugees: A Critical Space for Semiotic Analysis' [2015] Int J Semiot Law 1.

²⁷ See for instance UNHCR EXCOM, 'Conclusion No. 46 (XXXVIII): General Conclusions' (1987).

²⁸ On this particular issue see UN Human Rights Committee, 'Principles on Housing and Property Restitution for Refugees and Displaced Persons' (2005) UN Doc E/CN.4/Sub.2/2005/17 and UNHCR, FAO, NRC, IDD, OHCHR and UN-HABITAT, 'Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the Pinheiro Principles' (2007).

²⁹ BS Chimni, 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems' (UNHCR New Issues in Refugee Research Paper No. 2, 1999) and A Fielden, 'Local Integration: An Under-Reported Solution to Protracted Refugee Situations' (UNHCR New Issues in Refugee Research Paper No. 158, 2008).

³⁰ UNHCR EXCOM, 'Conclusion No. 46 (XXXVIII): General Conclusions' (1987).

³¹ This shift in the approximation to displacement is not exclusive to 'classic' refugees, but is also relevant for conflict and disaster-related displacement. See H Lambert, 'Causation in International Protection from Armed Conflict' in D J Cantor and J-F Durieux (eds.), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill 2014) 57 and N Rodríguez Serna, 'Human Mobility in the Context of Natural Hazard-Related Disasters in South America' (Nansen Initiative 2015).

Therefore, this approximation does not assume that the disappearance of the immediate cause of displacement implies the disappearance of its structural causes, but requires viewing displacement as the interaction of permanence, expulsion and resistance factors in a territory and in some cases attraction towards another.

With the aim of adapting the protection response to this complex scenario, the concept of comprehensive solutions implies that the three solutions should be applied jointly and complementarily³³ in the framework of an integral and viable strategy, adapted to the particular circumstances in each context and in coordination between different national and local institutions.³⁴ In this sense, it is a positive precedent that states in the region, including Colombia, highlighted in the 2014 Brazil Declaration – which sets up the strategic framework for the protection of refugees, IDPs and stateless people in Latin America and the Caribbean for the next decade – the importance of adopting a ‘comprehensive durable solutions strategy which (...) provides for simultaneous and inclusive implementation of local integration, resettlement and voluntary repatriation’.³⁵ It is also noteworthy that the concept has been crystallized in its Plan of Action as a series of programmes under the banner of ‘Comprehensive, Complementary and Sustainable Solutions’.³⁶

In practical and strategic terms, as this process involves complex legal and logistical issues, this strategy should be carried out within Quadripartite Agreements that ensure the participation of Colombia as the country of origin, host countries, UNHCR and refugees themselves. The next step towards this goal is defining the way in which each of the durable solutions should be pursued.

Voluntary repatriation

As its name suggests, voluntary repatriation entails the free and voluntary return of refugees to their country of origin.³⁷ Repatriation is based on every individual’s fundamental right to return to his or her country, which has been recognised, *inter alia*, in the Universal Declaration of Human Rights,³⁸ the International Covenant on Civil and Political Rights,³⁹ the Convention for the Elimination of all Forms of Racial

³² M Gottwald, ‘Back to the Future: The Concept of “Comprehensive Solutions”’ [2012] 31(3) RSQ 101.

³³ The interplay and complementarity of all solutions into a comprehensive approach was first highlighted in UNHCR, ‘Agenda for Protection’ (3rd Edition, 2003), 15-16.

³⁴ See, for instance, ACNUR, ‘Documento de Discusión: Proceso Conmemorativo del 30º Aniversario de la Declaración de Cartagena sobre los Refugiados “Cartagena+30”, Consulta Temática Subregional de los Países Andinos, Quito, 9-10 de junio de 2014, Contexto Regional, Soluciones y Cooperación Internacional’ (2014).

³⁵ Brazil Declaration: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean (adopted in Brasilia on 3 December 2014).

³⁶ Brazil Plan of Action: A Common Roadmap to Strengthen Protection and Promote Sustainable Solutions for Refugees, Displaced and Stateless Persons in Latin America and the Caribbean within a Framework of Cooperation and Solidarity (2014), Chapter Three.

³⁷ See, in general UNHCR, ‘Handbook on Voluntary Repatriation’ (1996).

³⁸ Universal Declaration of Human Rights (adopted 10 December 1948), UNGA Res 217 A(III), Article 13(2).

³⁹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171, Article 12(4).

Discrimination⁴⁰ and the American Convention on Human Rights.⁴¹ At the national level this right is enshrined in Article 24 of the Colombian Constitution.

Although not explicitly included in the 1951 Convention or its 1967 Protocol, voluntary repatriation is derived from the principle of non-refoulement contained in Article 33, which forbids states from forcibly returning refugees to a territory where they are at danger. Similarly, the 1984 Cartagena Declaration highlights the importance that every repatriation responds to an individual manifestation of voluntariness and occurs with UNHCR's collaboration.⁴²

Repatriation is built upon the premise of *voluntariness*,⁴³ that is, it has a *sine qua non* requirement that it can only be a true solution if refugees return voluntarily to their country. This decision is voluntary if the individual has the information to make an informed decision⁴⁴ and if the return is due to his or her will and not to other forms of pressure from the countries of origin or asylum. Before such a process can even start, the state of origin has the duty to ensure that areas of reception allow refugees to live in conditions of security and dignity and with their basic needs satisfied.⁴⁵

The first step in these processes is the verification of security conditions, that is, making sure that the situation in the regions refugees fled, or where they plan to relocate to, has seen considerable improvement. This improvement should be profound and durable, as if it is not there is a risk that returnees will be displaced once again. In that sense, security is understood from three perspectives: (1) legal security, (2) physical security and (3) material security.⁴⁶ The content of these dispositions is not only based on International Refugee Law, but is also enriched by parallel developments in the Inter-American Human Rights system.

Legal security implies the existence of legal mechanisms that allow return without fear of retaliation from the authorities, institutional stability and, in this particular context, respect for commitments derived from the peace process. Physical security includes all necessary measures to ensure that returnees are not affected by physical risks, including armed attacks, anti-personnel landmines and unexploded ordnance. Lastly, material security requires the existence of the conditions necessary to ensure the satisfaction of basic material needs, such as nutrition, water, housing, healthcare and access to livelihoods.⁴⁷

The experience of international organisations in Haiti and Bosnia-Herzegovina stresses the need to continue efforts to guarantee safe returns to communities of origin and to ensure that state institutions have the capacity to tend to these people's

⁴⁰ International Convention on the Elimination of all Forms of Racial Discrimination (adopted 21 December 1965, entry into force 4 January 1969) 660 UNTS 195, Article 5(d)(ii).

⁴¹ American Convention on Human Rights (adopted 21 November 1969, entry into force 18 July 1978) 1144 UNTS 123, Article 22(5).

⁴² Conclusion II(f).

⁴³ UNHCR EXCOM, 'Conclusion No. 18 (XXXI)' (1980).

⁴⁴ UNHCR EXCOM, 'Conclusion No. 101 (LV)' (2004).

⁴⁵ *Case of the Moiwana Community v. Suriname* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 124 (15 June 2005), paras. 209-215.

⁴⁶ UNHCR, 'Handbook on Voluntary Repatriation' (1996).

⁴⁷ UNHCR EXCOM, 'Conclusion No. 101 (LV)' (2004).

needs, because otherwise return is neither safe nor durable.⁴⁸ Likewise, Mozambique's case highlights that programmes directed at returnees should not only tend to their immediate needs, but also be linked to medium and long-term development strategies.⁴⁹

Lastly, the standard of 'dignity' implies that all actors should focus on ensuring that refugees can return in a dignified manner. In this context, dignity implies ensuring that there are no family separations during return, that the process is free from discrimination and that all authorities involved are committed to upholding the protection of individuals and communities as the main goal of this process.⁵⁰ Because of this, repatriation is not only a logistical exercise, but rather a long-term project in which institutions must carry out an integral response to returnees' needs and in which the population – refugee or returnee, depending on the stage of the process – should be able to actively participate in the process of making decisions on their return and reintegration.

From an operative standpoint, repatriation can be either organised or spontaneous. In an ideal scenario, these movements are organised through Quadripartite Commissions including Colombia as the country of origin,⁵¹ host countries, UNHCR as the guardian of International Refugee Law and refugees⁵²/victims abroad,⁵³ with the aim of promoting and verifying the existence of the necessary conditions for repatriation to be successful. Its activities include not only planning and logistical exercises, but also mechanisms like go-and-see visits to allow refugees to directly evaluate conditions for return.

In contrast with these organised processes, repatriation is spontaneous when refugees return through their own means and in their own time, which do not necessarily coincide with the well-laid plans described in this section. As return to one's country is a fundamental right, refugees have the right to choose how and when to do it, which means that states and UNHCR⁵⁴ have the duty to evaluate relevant factors and provide information of these conditions so that they can make an informed decision.

Lastly, it is also essential to highlight that spontaneous repatriation might not be voluntary if refugees leave the host country due to fear or pressure, as was the case of many Colombians who returned from Venezuela between August and October

⁴⁸ P Weiss Fagen, 'The Long-Term Challenges of Reconstruction and Reintegration: Case Studies of Haiti and Bosnia-Herzegovina' in E Newman and J van Selm (eds.), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (United Nations University Press 2003), 221.

⁴⁹ OT Juergensen, 'Repatriation as Peacebuilding and Reconstruction: The Case of Northern Mozambique, 1992-1995' (UNHCR New Issues in Refugee Research Working Paper No. 31, 2000).

⁵⁰ See further the 2014 Brazil Declaration.

⁵¹ *Case of Manuel Cepeda Vargas v. Colombia* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 213 (26 May 2010), para. 247.

⁵² Brazil Plan of Action, Chapter Three.

⁵³ *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 253 (19 August 2012), para. 308; *Valle Jaramillo et al v. Colombia* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 192 (27 November 2008) paras. 227-233.

⁵⁴ UNHCR, 'Handbook on Voluntary Repatriation' (1996).

2015,⁵⁵ when at least 420 individuals who declared they were either refugees or asylum seekers were present in the total of 22,342 individuals who came back to Colombia,⁵⁶ with many more in similar situations likely present and invisible.

Colombian legislation, including a Law on Return (*Ley de Retorno*)⁵⁷ and its regulation through Decree 1067 of 2015, foresees 'solidary return'⁵⁸ for, among others, Colombians who have been abroad for at least three years and are in a situation of poverty or are victims of the armed conflict, providing benefits on taxes and administrative procedures.⁵⁹ At the same time, the Special Fund for Migrations (*Fondo Especial para las Migraciones*), which is also regulated in Decree 1067, establishes measures to support Colombians abroad who are in need of protection due to their vulnerability. These mechanisms, in conjunction with those foreseen under the Victims Law, can be the first steps towards the development of a more robust regime in the future, although their implementation thus far has faced challenges that will be discussed further along this paper.

Local integration

Return to the country of origin may not or not yet be possible or desirable for some refugees, so staying in their host country can be a preferable option. In these situations, local integration is a valuable alternative, as it leads to the effectiveness of their rights and the acquisition of a stable legal status that is equivalent to that of a permanent resident, or even to naturalisation in some cases.⁶⁰ Local integration requires the active involvement of the host country, its civil society, refugees and sometimes the country of origin itself.

Unfortunately, not every refugee has the right to local integration, as the 1951 Convention links rights associated to local integration to refugees 'lawfully staying' in its territory, which is a higher standard than that of only being 'lawfully present'.⁶¹ In other words, a refugee whose status has been formally recognised by the host country has a better chance at achieving integration than one who has been unable to access asylum procedures, as the obligations imposed on the state by the Convention are considerably lower.⁶²

Refugees who enjoy a regular status experience integration in three contexts. The first is legal, and occurs when, upon registration of their status, they have adequate

⁵⁵ In that instance, deportation and fear thereof, added to fear and uncertainty about their status in the country and their ability to retain their property and protect their family unity (including in the case of children born in Venezuela) led over 22,000 Colombians and their families to cross the border into Colombia. This situation was the result of changes in border crossing policies and restrictions on Colombians and their families.

⁵⁶ OCHA, 'Colombia: Humanitarian Snapshot: Frontera Colombia – Venezuela' (15 October 2015).

⁵⁷ Ley 1565 de 2012.

⁵⁸ Ley 1565 de 2012, Article 3.

⁵⁹ See for instance Ley 1465 de 2011 and Decretos 1067 and 1743 of 2015.

⁶⁰ On the matter of integration in developing countries, see K Jacobsen, 'The Forgotten Solution: Local Integration for Refugees in Developing Countries' (UNHCR New Issues in Refugee Research Research Paper No. 45, 2001).

⁶¹ For an in-depth analysis, see J Hathaway, *The Rights of Refugees under International Law* (CUP 2005), Chapter 3: 'The Structure of Entitlement under the Refugee Convention'.

⁶² R da Costa, 'Rights of Refugees in the Context of Integration: Legal Standards and Recommendations' (UNHCR Legal and Protection Policy Research Series 2006).

documentation to certify their situation, pursue family reunification and access essential public services in conditions equivalent to those enjoyed by nationals. Later, this status will ideally transform into a permanent status through permanent residence or naturalisation.⁶³ Secondly, economic integration occurs when refugees are recognised as inherently capable of working for their own well-being⁶⁴ and are given the tools to actively participate in the country's economic life, and can therefore not only become self-sufficient but can also in many cases have a positive net impact on the economy.⁶⁵ Lastly, integration is also social when refugees are accepted by their host community and can become active members of society.

Tanzania's experience with Burundian refugees shows that these processes cannot occur without wide agreement between political actors in the host country.⁶⁶ Latin American states have also been clear in highlighting the importance of the participation of civil society and the private sector in refugees' integration, as established in the 'Local Integration' programme included in the Brazil Declaration and Plan of Action.⁶⁷

The Colombian state can support the local integration of Colombian refugees by working with states of asylum to promote access to measures that respond to their particular needs. One example is making it easier for refugees to carry out administrative procedures from abroad, which includes promoting agreements for the recognition of academic or professional qualifications, facilitating pension transfers,⁶⁸ and, importantly, ensuring the accessibility and effectiveness of the reparation process for victims abroad.

Additionally, another proposal for a new pathway for the satisfaction of refugees' needs was included in the 2014 Declaration and Plan of Action through a Labour Mobility Programme. Under this scheme, refugees granted asylum by countries that are part of regional mobility arrangements, such as MERCOSUR, would also be entitled to this right, which means they would not necessarily have to stay in the country of asylum but could also reside in other participating states, either permanently or temporarily, without losing their status and right to non-refoulement.

This program would make refugees' rights more similar to those enjoyed by nationals and also work as a burden-sharing mechanism. Its implementation remains to be seen, but it is certainly an interesting initiative that puts the region at the forefront of International Refugee Law. However, labour mobility is not in and of itself

⁶³ See in particular the conception of '*de facto*' and '*de jure*' integration in A Fielden, 'Local Integration: An Under-Reported Solution to Protracted Refugee Situations' (UNHCR New Issues in Refugee Research Paper No. 158, 2008).

⁶⁴ E Easton-Calabria, "'Refugees Asked to Fish for Themselves': The Role of Livelihoods Trainings for Kampala's Urban Refugees' (UNHCR New Issues in Refugee Research Paper No. 277, 2016).

⁶⁵ A Betts, L Bloom, J Kaplan and N Omata, 'Refugee Economies: Rethinking Popular Assumptions' (University of Oxford Humanitarian Innovation Project 2014).

⁶⁶ J Milner, 'Can Global Refugee Policy Leverage Durable Solutions? Lessons from Tanzania's Naturalization of Burundian Refugees' [2014] 27(4) IJRL 553.

⁶⁷ Brazil Declaration and Plan of Action (2014).

⁶⁸ One option in this direction is the flexibilization of the 'Acuerdo sobre Residencia de MERCOSUR' (MERCOSUR Residence Agreement). See MERCOSUR, 'Acuerdo sobre Residencia para Nacionales de los Estados Partes del MERCOSUR, Bolivia y Chile' (2002).

a 'fourth solution', as it presupposes that it is a parallel process to integration abroad or a prelude to repatriation further down the line.⁶⁹

Resettlement

Resettlement to a third country aims to resolve the situation of refugees who cannot return to their country nor stay in the host country. This procedure, which is neither automatic nor an individual right, is based on agreements between UNHCR and other countries to receive these refugees.⁷⁰

In this area, Latin American states have, building upon the 2004 Mexico Declaration and Plan of Action, laid the groundwork for deeper cooperation on this matter in the Brazil Declaration and Plan of Action through the 'Solidary Resettlement' programme, specifically mentioning the case of Ecuador, which hosts the largest refugee population in the region,⁷¹ composed mainly of Colombians.⁷² The importance of resettlement processes for Colombian refugees is also made evident by the fact that UNHCR submitted more requests for resettlement of Colombians than for any other American nationality between January and November 2015, for a total of 1,142.⁷³

As resettlement is a process that requires specific agreements with countries willing and able to receive refugees it can only be used in a small percentage of refugee cases.

The need to complement the Agreement on Victims of the Conflict

The fifth item in the peace negotiations between the Government and FARC was the discussion of the issue of victims of the armed conflict and mechanisms to offer them reparation. As a result of these negotiations, the parties jointly approved an 'Agreement on Victims of the Conflict', which is one of the most important steps in the peace process.

The Agreement foresees in point 5.1.3.5, 'collective processes for the return of displaced people and reparation of victims abroad', making a clear distinction between both populations, and establishing that

(...) the National Government, in development of this agreement and in the context of the finalization of the conflict, will carry out, on one hand, collective programmes with territorial and gender focus for the return and relocation of displaced people, and plans for accompanied and assisted return of victims abroad, on the other, and will strengthen its articulation at the territorial level with other components of the Policy for the Reparation of Victims, in particular programmes for collective reparation and land restitution, and with the implementation of the agreement 'towards a new Colombian countryside: integral rural reform'.

⁶⁹ K Long, *The Point of No Return: Refugees, Rights, and Repatriation* (OUP 2013), 213.

⁷⁰ For more information see UNHCR, 'Resettlement Handbook' (1997, updated 2011).

⁷¹ Brazil Declaration and Plan of Action (2014).

⁷² UNHCR, 'Global Trends 2014: World at War' (2015).

⁷³ UNHCR, 'Brazil Plan of Action – One Year of Implementation' (2015), 3.

It is of enormous importance that the Agreement specifically mentions the needs of victims abroad. The way forward is to derive specific plans of action with the aim of leading to comprehensive solutions for refugees. The Agreement itself reflects this need by establishing that its dispositions will be in effect 'without prejudice to the different measures that, in a scenario of the end of the conflict, will have to be adopted to boost and promote the return of exiles and other Colombians who abandoned the country due to the conflict'.

This does not imply, however, that the phrasing and interpretation of the Final Agreement does not have to be carried out with extreme caution, as, once signed, peace agreements, including those between a state and an armed group, create international obligations for the parties.⁷⁴ In particular, the fact that neither resettlement nor local integration abroad are mentioned indicates that these initiatives have to be developed based on the general framework that exists in Colombia, and will require new normative developments in many cases.

From the viewpoint of refugees, there are five essential topics that need further development with the aim of directing the agreements towards compliance with applicable international standards: (1) considering whether refugees are indeed willing to return to Colombia, (2) understanding the difference between promoting and facilitating repatriation, (3) evaluating the focus on repatriation above other solutions, (4) acknowledging that many refugees will remain abroad even after the peace process and that cross-border displacement will continue to occur and (5) exploring the interaction between refugee repatriation and victim reparation.

It cannot be assumed that all refugees want to return

When discussing the topic of Colombian victims abroad, the Agreement on Victims envisions 'accompanied and assisted return'. Although there are no lights on how to interpret the two words that qualify said returns, it is still crucial that the overall phrasing is premised on the fact that refugees want to return to Colombia.

This poses, at least for the moment, a great difficulty: intention surveys suggest that Colombian refugees do not, in fact, want to return. This is because they have doubts about repatriation⁷⁵ that appear to be very reasonable, including uncertainty about the peace process' effectiveness in leading both to the end of a conflict that has lasted more than fifty years and to safety from other risks, including displacement by other armed and criminal actors.⁷⁶ In Ecuador, where most formally recognised

⁷⁴ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entry into force 27 January 1980) 1155 UNTS 331, Article 3. See further C Bell, 'Peace Agreements: Their Nature and Legal Status' [2006] 100(2) AJIL 373.

⁷⁵ ACNUR and Instituto de la Ciudad, 'Perfiles Urbanos de Población Colombiana en Quito: Refugiados, Solicitantes de Asilo y Otras Personas en Situación de Movilidad Humana: Principales Resultados y Recomendaciones' (2014), 19.

⁷⁶ UNHCR, 'Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Colombia' (2015) UN Doc HCR/EG/COL/15/01. These concerns are not exclusive to Colombia, but rather areas for the exploration of lessons learned in similar processes. See F Rey Marcos and S Duval, 'The Humanitarian Dimension in the Aftermath of a Peace Agreement: Proposals for the International Community in Colombia' (Norwegian Peacebuilding Resource Centre 2015).

Colombian refugees are present, a study carried out by UNHCR in 2014 revealed that only 6% of refugee households⁷⁷ in Quito wanted to return to Colombia.⁷⁸

At the same time, refugees have other reasons to want to stay in their host country, including personal and professional reasons, and thus making this decision is a complex process.⁷⁹ A possible solution to this dilemma is recognising the transnational nature of refugee communities and adopting measures that reflect this circumstance.

In this sense, the case of West Africa is highly illustrative. The region has hosted refugees from Sierra Leone and Liberia for decades, which has given them the chance to integrate into society. When the situation in their countries improved, their interest in reconnecting with them increased as well, but coexisted with an interest of maintaining their social and economic links in host countries. The solution was the adoption of an agreement on the free movement of persons under the auspices of the Economic Community of West African states (ECOWAS) and an agreement between countries involved and UNHCR to permit international labour mobility, thus turning refugees into 'community citizens'.⁸⁰ Although based on different premises, another system that promotes the regional mobility of refugees is the 'Labour Mobility Programme' discussed earlier in this paper.

Repatriation can be either promoted or facilitated, depending on how the situation evolves

Another problem linked to refugee repatriation is the Agreement on Victims' reference to 'boosting' and 'promoting' the return of 'exiles' and 'victims abroad'. In both cases, an interpretation based on the common usage of these terms would lead to understanding that this process would entail intervention and support of the Government. As these terms have no equivalent in the wider field of International Refugee Law, which uses the terms 'organised' and 'spontaneous' repatriations, it is difficult to properly interpret how this proposal for a national standard differs from international standards.

For UNHCR the 'promotion' of voluntary repatriation flows means actively engaging in wide-ranging measures to stimulate the return of refugees.⁸¹ This promotion is not automatic, but rather an organised process going through several stages that, as mentioned in the relevant section above, can only occur in the context of organised

⁷⁷ In this study, these households are defined as those containing Colombians who are either refugees, asylum seekers, rejected asylum seekers or persons potentially in need of international protection.

⁷⁸ ACNUR and Instituto de la Ciudad, 'Perfiles Urbanos de Población Colombiana en Quito: Refugiados, Solicitantes de Asilo y Otras Personas en Situación de Movilidad Humana: Principales Resultados y Recomendaciones' (2014), 19.

⁷⁹ O Bakewell, 'Returning Refugees or Migrating Villagers? Voluntary Repatriation Programs in Africa Reconsidered' (UNHCR New Issues in Refugee Research Research Paper No. 15, 1999).

⁸⁰ M Gottwald, 'Back to the Future: The Concept of "Comprehensive Solutions"' [2012] 31(3) RSQ 101. See further A Adepoju, A Boulton and M Levin, 'Promoting Integration through Mobility: Free Movement and the ECOWAS Protocol' (UNHCR New Issues in Refugee Research Research Paper No. 150, 2007). On the general development of transnational links of refugee communities see N van Hear, 'From Durable Solutions to Transnational Relations: Home and Exile among Refugee Diasporas' (UNHCR New Issues in Refugee Research Working Paper No. 83, 2003).

⁸¹ UNHCR, 'Handbook on Voluntary Repatriation' (1996).

repatriation processes. Arriving to a point where repatriation can be promoted is not something that can be scheduled at the beginning of the process, but rather something that is arrived upon organically after several years of observing the situation in the country.

UNHCR's experience in several peace processes in the last sixty years leads to the conclusion that even if the agreement between FARC and the Government is signed, and is followed by a similar agreement with the ELN, the agreements themselves are not enough to justify the promotion of repatriation. The adoption of the agreement is, rather, the starting point for a long period of time in which the state has to considerably improve the human rights situation and increase prosperity in territories throughout the country, including guaranteeing non-repetition, halting the violent actions of other armed groups⁸² that are progressively responsible for a larger proportion of displacement⁸³ and ensuring that power vacuums that arise in areas where guerrilla forces disappear are filled by civil institutions and not other armed groups.⁸⁴

Carrying out this process will take several years, and attesting to its durability will take several more, and as such the promotion of repatriation is something that will not occur in the short but rather medium term. Therefore, oversight from interested parties, including Colombia's own Constitutional Court and Office of the Ombudsman, will play a crucial role in measuring progress.

The importance of not rushing repatriation cannot be overestimated. Analysis of fifteen post-conflict scenarios around the globe⁸⁵ indicates that premature repatriation has a negative impact on peacebuilding, while in processes where repatriation is carried out sustainably⁸⁶ returnees can help to consolidate peace,⁸⁷ a necessary element when historic trends indicate that between twenty and fifty percent of non-international armed conflicts ending in settlements recur.⁸⁸ In this sense, the principle of 'stabilisation' in the land restitution process under the Victims Law, which establishes that return and relocation should be voluntary and under

⁸² Regardless of whether they pursue political or criminal objectives.

⁸³ G Rojas Andrade, 'Grupos Posdesmovilización y Desplazamiento Forzado en Colombia: Una Aproximación Cuantitativa' in DJ Cantor and N Rodríguez Serna (eds.), *Los Nuevos Desplazados: Crimen y Desplazamiento en América Latina* (ILAS 2015).

⁸⁴ A clear example of this situation is the complaints made by the Organización Nacional Indígena de Colombia (ONIC) on the entry of ELN forces into territories where FARC presence has decreased, particularly in the southeast of the country ('ONIC Denuncia Presencia del ELN en Territorios de Injerencia de las FARC' *RCN Radio* (28 February 2016), available at <http://goo.gl/fSNJdW>). A particularly interesting development is the Ministry of Defence's Directiva Permanente 15 de 2016, which created the category of Organised Armed Groups (GAO), placing some groups formerly considered criminal bands in this level, which allows further use of military force against them. Its impact will be discussed later in this paper.

⁸⁵ Angola, Burundi, Chad, Cote d'Ivoire, Democratic Republic of the Congo, Eritrea, Liberia, Mozambique, Namibia, Rwanda, Sierra Leone, Somalia, Sudan, South Sudan and Western Sahara.

⁸⁶ BS Chimni, 'Post-Conflict Peace-Building and the Return of Refugees: Concepts, Practices, and Institutions' in E Newman and J van Selm (eds.), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (United Nations University Press 2003) 195.

⁸⁷ J Milner, 'Refugees and the Peacebuilding Process' (UNHCR New Issues in Refugee Research, Research Paper No. 224, 2011).

⁸⁸ CT Call and EM Cousens, 'Ending Wars and Building Peace: International Responses to War-Torn Societies' [2008] 9 *International Studies Perspectives* 1 and A Suhrke and I Samset, 'What's in a Figure? Estimating Recurrence of Civil War' [2007] 14(2) *Int Peacekeeping* 195.

conditions of sustainability, security and dignity, is a positive standard that allows the development of special norms for the protection of returnees.⁸⁹

While the pieces that are necessary for the promotion of repatriation fall into place, it would be more appropriate to talk about ‘facilitating’ repatriation, particularly spontaneous repatriation for certain profiles or to safer regions, as the return of large groups to Colombia, in the style of large-scale processes in Central America in the eighties and nineties, is not a realistic prospect. Facilitation is premised on the fact that, even if conditions are still not ideal for return, refugees still have a fundamental right to return if they wish to do so, and therefore there is an obligation to take measures so that the exercise of this right is as safe as possible.⁹⁰ As this is an individual decision, these types of return are usually ‘drop-by-drop’ and not necessarily in massive or easily observable flows.

In this sense, Governments and UNHCR can facilitate voluntary repatriation when refugees show a strong desire to return and/or have already started to do so of their own accord, warning them of risks in particular regions and trying to offer all necessary aid so that they can make a free and informed decision. However, this facilitation can only really occur when UNHCR is convinced that refugees’ desire to return is voluntary and is not due to coercion or external pressures. Simultaneously, Quadripartite Commissions should continue to work to verify the conditions for organised repatriation in the future and to plan for all the legal, logistical and human aspects of promoting repatriation.

Comprehensive solutions should include all durable solutions at the regional level, not only repatriation

As discussed, at this point most Colombian refugees do not wish to return to the country, although there has been interest in particular cases to obtain more information about the situation in regions of origin. Even if this interest increases, the situation in the country indicates that most repatriations will likely not occur in the short but rather in the medium and long term.

In this sense, the Agreement’s exclusive focus on voluntary repatriation does not correspond with the desires or current needs of Colombian refugees. For that reason, it is important that the Colombian Government, along with other members of the Quadripartite Commissions, formulates strategies and commitments not only on repatriation, but within a larger framework for all durable solutions at the regional level, including local integration and resettlement. In other similar contexts around the globe the lesson learned is that the joint and coordinated implementation of all three solutions is the best way to respond to refugees’ particular needs.

In the case of Burundian refugees in Tanzania, for instance, only a small number wanted to repatriate, mainly because most of them had already achieved a certain level of integration. In response, both Governments and UNHCR organised a voluntary repatriation scheme for those wishing to go back to Rwanda, while simultaneously offering support to consolidate the local integration of those who had

⁸⁹ Ley 1448 de 2011, Article 73 Numeral 4^o.

⁹⁰ UNHCR, ‘Handbook on Voluntary Repatriation’ (1996).

made considerable advances in that regard, including measures such as opening a pathway to naturalisation. Finally, UNHCR complemented these measures by coordinating with third countries and the International Organization for Migration the resettlement of a small number of refugees in very specific situations.⁹¹

An additional example is that of Guatemalan refugees in Mexico after the end of the civil conflict in the eighties. Although a large number of refugees wanted to repatriate, many families wished to stay in Mexico. In response, the Mexican Government, in coordination with UNHCR, allowed them to naturalise and supported their local integration through an intervention adapted to the predominantly rural nature of host communities.⁹²

The peace agreement and reparation process do not entail the automatic cessation of refugee status nor the end of cross-border displacement

In the scenario described above, where few Colombian refugees might want to return to the country, those who decide to stay in their host countries also require special attention. Although some of them might benefit from local integration and thus at some point no longer require a special protection status, these processes always lead to questions on the application of clauses for the cessation of refugee status, as established in Article 1C of the 1951 Convention, particularly clauses 1C (4) and 1C (5), known as the 'voluntary repatriation' and 'ceased circumstances' clauses respectively.⁹³

The nature and purpose of protection under the Convention and its Protocol is to offer refugees the protection that their state of origin could not or would not give them by placing them under the surrogate protection of a third state. In that sense, international protection is only justified as long as national protection is unavailable, which means that once the circumstances behind an individual refugee's case or in the country of origin disappear, refugee status ceases.⁹⁴

If refugees voluntarily re-avail themselves of their state's protection it is understood that they no longer require international protection. This does not imply that any visit to the country of origin leads to the automatic cessation of their status, as people can need to enter briefly for other reasons, such as gathering documentation or responding to emergencies. There are two notable examples in recent years: in 2015, some Colombian refugees left Venezuela due to collective and disguised expulsions of Colombians, and in early 2016 a small number of Colombian refugees in Ecuador briefly returned to Colombia following seismic activity.

⁹¹ International Organization for Migration (IOM), 'Burundi: Refugee Resettlement Programme' (June 2015).

⁹² K Jacobsen, 'The Forgotten Solution: Local Integration for Refugees in Developing Countries' (UNHCR New Issues in Refugee Research Research Paper No. 45, 2001).

⁹³ It is worth noting that Article 1(C)(6) also refers to a change of circumstances, although it applies exclusively to stateless persons in regard to their state of habitual residence. For more information on the cessation clauses and their application, see J Fitzpatrick and R Bonoan, 'Cessation of Refugee Protection' in E Feller, V Türk and F Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003).

⁹⁴ See, in general, UNHCR, 'The Cessation Clauses: Guidelines on their Application' (1999).

In these cases the ideal scenario, included in many asylum legislations in the region, is that refugees request a special permission to return to the country, but administrative difficulties in situations of *force majeure* should never be an obstacle for their continued protection.

Similarly, under both international law⁹⁵ and Colombian administrative practice⁹⁶ it is clear that the Victims Law is an instrument for reparation, not protection – and thus accessing reparations should not be understood as re-availing oneself of national protection, and, consequently, cannot lead to the denial or cessation of refugee status.

The ceased circumstances clause applies when the situation that led someone to flee the country and become a refugee disappears. In this case, the process usually occurs in the framework of international discussions that end in the adoption of a generalized declaration of cessation. However, this declaration and its effects do not come immediately after the change of circumstances; they require proof that change is durable and that therefore the risk of displacement or other violations upon repatriation has subsided. As verifying these circumstances is complex, the clause is applied between host countries and UNHCR, which should verify impartially and after a long period of time that conditions in the country of origin have changed in a ‘fundamental’ manner.⁹⁷

In Colombia, this means that the signature and ratification of the peace agreements are not enough to lead to the declaration of cessation of the refugee status of Colombians who fled the conflict, as it is only the start of a long and careful process of verifying the situation in the country before talking about a true change in the circumstances. Once this goal has been reached there could be discussions on whether it is viable to cease refugee status under this clause, and if it is there should be steps towards the establishment and operation of an impartial and duly regulated cessation process. This mechanism would allow refugees who do not want to or cannot return to Colombia to explain their reasons and stay in the country of asylum if they fulfil the requirements for exemption, or direct them toward other legal statuses that might allow them to stay.⁹⁸

The persistence of the exodus of Colombians seeking protection abroad even in the context of the reduction of violence during the Havana negotiations⁹⁹ strongly suggests that adjudicators will need to continue evaluating the individual merits of

⁹⁵ DJ Cantor, ‘Restitution, Compensation, Satisfaction: Transnational Reparations and Colombia’s Victims’ Law’ (UNHCR New Issues in Refugee Research Research Paper No. 215, 2011).

⁹⁶ See for instance the position of the Victims Unit at <http://www.unidadvictimas.gov.co/es/connacionales-v%C3%ADctimas-en-el-exterior/8942>.

⁹⁷ UNHCR, ‘Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses) (2003) UN Doc HCR/GIP/03/03. See further UNHCR EXCOM, ‘Conclusion No. 69 (XLIII)’ (1992).

⁹⁸ UNHCR, ‘Guidelines on Exemption Procedures in respect of Cessation Declarations’ (2011).

⁹⁹ UNHCR, ‘Elegibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Colombia’ (2015) UN Doc HCR/EG/COL/15/01.

each asylum claim with the aim of responding to protection needs stemming from other causes of displacement. These include the actions of other armed or illegal groups, which over the last few years are responsible for a growing share of violations and displacement in the country¹⁰⁰ and which are in some cases taking over territories and criminal networks that have been vacated by FARC. Most notably, in early 2016 the Ministry of Defence decided that some groups formerly designated as ‘criminal bands’ would now be categorized under the *sui generis* status of Organised Armed Groups’ (GAO),¹⁰¹ a further recognition of their actual nature and impact on the civilian population.

The reparation process alone is not enough to address refugees’ needs

Even in the context of an ongoing conflict, the state has made important efforts to set up and execute a policy for the reparation of victims that has been very ambitious, and which is without a doubt the largest process of this nature in history. However, similarly to what happens in the case of internal displacement,¹⁰² the status of ‘victim’ – in this case, ‘victim abroad’ does not necessarily address all the dimensions of displacement, and is thus not an adequate stand-in for the status of ‘refugee’. This implies that the answer to the needs of refugees should necessarily be delivered through processes that respond to their specific circumstances.

The current wording of the Agreement on Victims appears to suggest that the return of Colombian victims abroad and the reparation process are the only mechanisms needed to satisfy the rights of this population. However, these measures are only a starting point, as they are not enough to satisfy the requirements set out in international standards on durable solutions. This gap between what has been foreseen thus far and what the standards prescribe is an opportunity to establish integral and comprehensive mechanisms. The nature of reparations and solutions is fundamentally different: while the former requires taking all measures to undo the harm suffered and offer compensation for damages that cannot be reversed, the latter seeks, instead, to offer pathways to dignity and safety within the current situation.

First, Colombia has built a normative framework background to offer victims abroad the same benefits as those in the country through registration as victims and reparation, land restitution and return measures from abroad.¹⁰³ However, as the taxative list of ‘victimising facts’ leading to victim status include internal but not cross-border displacement, there is no real ground to reflect the differential nature and harm inherent to the latter, which in turn limits reparations and recognition of these victims’ status. Like any other victim abroad, the fact that a refugee remains outside the country cannot be an obstacle to the effectiveness of his or her right to integral

¹⁰⁰ Gottwald, M., ‘Peace in Colombia and Solutions for its Displaced People’ [2016] 52 FMR 14.

¹⁰¹ Ministerio de Defensa, Directiva Permanente 15 (2016).

¹⁰² For a perspective on this issue on the Victims Law, see N Rodríguez Serna and JF Durieux, ‘The Displaced as Victims of Organised Crime: Mexico and Colombia Compared’ in DJ Cantor and N Rodríguez Serna (eds.), *The New Refugees: Crime and Displacement in Latin America* (ILAS 2016).

¹⁰³ Access to these programmes is not automatic, but depends on the needs of victims abroad under coordination of the Victims Unit (UARIV), as set out in Paragraph 2^o of Article 66 of the Ley 1448 de 2011.

reparation.¹⁰⁴ In that sense the state's efforts to promote this process and land restitution¹⁰⁵ through its diplomatic and consular offices abroad is certainly a welcome development, although one that in practice requires a stronger institutional effort to ensure that these measures are effectively and efficiently available to all victims abroad.

In practical terms, the National System for the Attention and Integral Reparation of Victims (SNARIV) is overburdened,¹⁰⁶ in no small part due to the considerable challenge of trying to tend to the needs of almost eight million victims, and there have been consistent complaints about the accessibility of the procedure through consular and diplomatic offices abroad. Victims abroad and returnees are at the bottom of a long waiting list in terms of lack of effective provision and coordination of services, and thus effective solutions.

For instance, data updated up to the beginning of August 2015¹⁰⁷ indicates that only 2,838 requests for registration of victims abroad have been received, leading to 5,302 people being registered. Data on the land restitution process shows that up to the same period 1,028 requests for registration had been received, out of which 389 were in micro-focalized areas while the remaining 639 were in non-micro-focalized areas.¹⁰⁸ In this context, a non-micro-focalized area is one where the state, due to logistical or security complications, has not been able to fully carry out studies to evaluate land restitution.

This reveals two important trends: first, even if, as previously acknowledged, not all refugees are necessarily victims abroad under the Victims Law, the number of individuals registered as victims is dismally low. Secondly, the fact that the state has struggled to evaluate conditions on the ground in land restitution procedures suggests that similar difficulties can occur in repatriation or cessation procedures.

In addition to the legal framework, national and local authorities need to develop clear and comprehensive public policies to promote local integration, particularly in urban settings. In 2016, 27 cities hosted half of Colombia's internally displaced

¹⁰⁴ See *Case of Humberto Sánchez v. Honduras* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 99 (7 June 2003), paras. 127 and 132; *Case of Maritza Urrutia v. Guatemala* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 103 (27 November 2003) and *Case of the Moiwana Community v. Suriname* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 124 (15 June 2005). See further DJ Cantor, 'Restitution, Compensation, Satisfaction: Transnational Reparations and Colombia's Victims' Law' (UNHCR New Issues in Refugee Research Research Paper No. 215, 2011) and Comisión Colombiana de Juristas (CCJ), 'Refugiados y Ley de Víctimas: Impactos de la Ley de Víctimas en la Situación de las Personas que se Encuentran en Necesidad de Protección Internacional' (2012) and CCJ, 'Reparación para las Personas en Necesidad de Protección Internacional: Igualdad en el Acceso y Diferencia en su Desarrollo y Aplicación' (2012).

¹⁰⁵ Ley 1448 de 2011, Article 73 Numeral 2. Regarding this disposition, see further Corte Constitucional, Sentencia C-715 de 2012.

¹⁰⁶ Data presented in the 'Encuentro de Víctimas de Frontera y Connacionales en el Exterior', Bogotá, 27 and 28 August 2015. This is the latest batch up publicly available data as of June 2016.

¹⁰⁷ 'Encuentro de Víctimas de Frontera y Connacionales en el Exterior', Bogotá, 27 and 28 August 2015.

¹⁰⁸ Victims abroad are also entitled to support for voluntary returns, but data on this issue is not publically available.

population, who are often forced to move into irregular settlements where crime and violence create further expulsions and where essential services are lacking. In that sense, integration processes for returnees will also require support to formalise irregular settlements, strengthen community cohesion and local authorities and create chances for socioeconomic development.¹⁰⁹

Beyond these logistical challenges, the applicable international standards highlight that the victims of human rights violations who have been forced abroad have a right to special reparation measures that are not foreseen under the Victims Law. These include compensation for expenses incurred to maintain family links with relatives in the country of origin,¹¹⁰ for non-pecuniary damages derived from family separation,¹¹¹ costs incurred while fleeing the country and loss of movable assets left behind,¹¹² expenses derived from having to live abroad,¹¹³ loss of income¹¹⁴ and, in the case of ethnic groups, the loss of ancestral territories necessary for their subsistence.¹¹⁵ Lastly, it is also important to highlight that the state can also be responsible for expenses incurred when obtaining medical treatment abroad for injuries or trauma suffered by victims that either caused or resulted from their flight.¹¹⁶

Similarly, under the standards developed by the UN Human Rights Committee in the case of a Colombian refugee, the state also has the duty to take measures to offer compensation, guarantee the refugees' personal security and enable their return to the country, as well as carry out independent investigations¹¹⁷ on the facts that led to displacement, prosecute those responsible and take measures to ensure non-repetition.¹¹⁸

¹⁰⁹ See, for instance, the joint UNHCR-UNDP Transitional Solutions Initiative (TSI) on <http://tsicolombia.org>.

¹¹⁰ *Urrutia* paras. 159-160 and *Case of Lysias Fleury et al v. Haiti* (Merits and Reparations) Inter-American Court of Human Rights Series C No. 236 (23 November 2011), para. 137.

¹¹¹ *Urrutia* paras. 168-169; *Fleury* paras. 143-146 and *Chitay Nech et al v. Guatemala* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 212 (25 May 2010) para. 278.

¹¹² *Urrutia* para. 159-160, *Fleury* para. 137 and *Case of Expelled Dominicans and Haitians v. Dominican Republic* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 282 (28 August 2014) paras. 479-482.

¹¹³ *Cepeda Vargas* para. 247.

¹¹⁴ *Urrutia* para. 158, *Case of J. v. Perú* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 275 (27 November 2013) para. 416.

¹¹⁵ *Case of the Moiwana Community v. Suriname* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 124 (15 June 2005), para. 186.

¹¹⁶ *Case of Penal Miguel Castro Castro v. Peru* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 202 (25 November 2009), paras. 433 and 450; *Case of Vélez Loo v. Panama* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 218 (23 November 2010), paras. 263 and 433; *J. v. Peru*, para. 397; *Diario Militar*, para. 340; *Case of Nadege Dorzema et al v. Dominican Republic* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 251 (24 October 2012), paras. 259-261 and *Case of Vélez Restrepo et al v. Colombia* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 248 (3 September 2012), para. 271.

¹¹⁷ On the particular issue of the importance of legal justice in return processes, see S Hirsch, 'Chilean Exiles, Reconciliation and Return: An Alternative View from Below' [2015] 29(1) J Refug Stud 82.

¹¹⁸ UN Human Rights Committee, *Jiménez Vaca v. Colombia* (2002) UN Doc CCPR/C/859/1999.

Consequently, if the state wishes to live up to its international obligations, it cannot limit itself to applying the Victims Law, but should also ensure the application of the international regime derived from International Refugee Law and the Universal and Inter-American Human Rights systems.

One last difficulty for refugees wanting to return to the country with the state's support for victims abroad is that they need to be registered and fulfil the rest of the requirements set out under the Victims Law, including that the 'victimising fact' occurred between 1 January 1985 and 10 June 2011, and that the declaration is made before June 2017, except when the fact occurred after June 2011, in which case the deadline is two years after the fact. The limitation of reparation under the Victims Law to those affected by groups the Government considers are parties to the armed conflict raises questions about its application once the Government considers that these groups have laid down their arms, which will not necessarily take into account the very likely possibility of post-demobilization successor groups.

Similarly, this policy for the reparation of victims of the conflict, in which the concept of victim is narrowly defined, still leaves outside its scope victims of factions or armed groups that are not considered sufficiently linked to the conflict, including post-demobilization paramilitary groups. This category is permeated by political considerations and still requires refinement, as evidenced by the recent determinations that children who have been victims of forced recruitment by post-demobilization groups are indeed entitled to the benefits included in the Law,¹¹⁹ and, as mentioned earlier, that some successor groups formerly considered 'criminal bands' are now to be referred to as 'Organised Armed Groups' (GAO).¹²⁰

To summarise, it is essential that the Colombian state complements the reparation system with a public policy that establishes a strategic framework for comprehensive solutions for refugees abroad or their reintegration in Colombia, regardless of whether they have a formally recognised refugee status or not. This programme needs to be able to adapt to the particular situation and difficulties for registration of victims abroad, and at the same time be complemented with other initiatives to be able to fully restore that civil, political, social, economic and cultural rights of refugees and respond to new threats and violations, areas that are clearly beyond the reparation system set out under the Victims Law.

UNHCR's role

Under its Statute, UNHCR, 'acting under the authority of the General Assembly, shall assume the function of providing international protection (...) to refugees and of seeking permanent solutions to the problem of refugees'.¹²¹

This mandate over refugees extends not only to those who have been formally recognised as such, but to all who fall within the refugee definition. Similarly, the mandate covers the protection of both refugees in mixed migration flows and those

¹¹⁹ Corte Constitucional, Sentencia C-069 de 2016.

¹²⁰ Ministerio de Defensa, Directiva Permanente 15 (2016).

¹²¹ Statute of the Office of the United Nations High Commissioner for Refugees, UN GAOR Res. 428(V) (14 December 1950); see further UNHCR, 'Note on the Mandate of the High Commissioner for Refugees and his Office' (2013).

where their presence is clear. In short, UNHCR has a clear mandate over refugees around the globe, regardless of where they are, and this mandate can be expanded under special agreements.

Additionally, UNHCR has the duty of supervising state compliance with International Refugee Law,¹²² a mandate that implies not only providing authoritative interpretation of legal instruments but also supervising their application. State Parties to the Convention, including Colombia and host countries, have assumed the duty to comply with this supervision through several mechanisms, including reporting on the state of refugees and public policies that might affect them.

On the specific issue of solutions, UNHCR's Statute calls upon states to cooperate with the Office in the exercise of its functions, which includes supporting its 'efforts to promote voluntary repatriation or assimilation within new national communities',¹²³ (2) promoting 'through special agreements with Governments the execution of any measures calculated to improve the situation of refugees',¹²⁴ and (3) 'engag(ing) in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at (the High Commissioner's) disposal'.¹²⁵

UNHCR's mandate also extends to refugees who have returned to their country of origin but who have not yet fully reintegrated, as although their formal status as refugees might have ceased in some cases, the Agency has a legitimate interest in ensuring that repatriation is truly a durable solution. UNHCR's Executive Committee, which is composed of states' representatives, has recognised UNHCR's interest in ensuring that repatriation is a truly durable solution, as well as its role in supervising returnees' well-being.¹²⁶ Lastly, the UN Secretary General's recent plan on displacement after conflict has determined that UNHCR must lead the efforts of other UN agencies, programmes and funds¹²⁷ towards solutions for displacement.¹²⁸

Within this mandate and the larger framework explored in previous sections, UNHCR's role in favour of refugees can be divided into two large sections: work with refugees themselves and work with states.

In the first case, UNHCR informs refugees of the situation in their country of origin and the obstacles that exist for them to overcome their vulnerability, including root causes of displacement and socio-economic hardships, and acts directly and through partners to promote their effective participation in decision-making processes both in the country of asylum and in the country of origin and support their search for solutions.¹²⁹

¹²² Para. 8(1) of the Statute, Article 35 of the 1951 Convention and Article II of the 1967 Protocol.

¹²³ Para. 8(c).

¹²⁴ Para. 8(b).

¹²⁵ Para. 9.

¹²⁶ UNHCR EXCOM, 'Conclusion No. 18 (XXXI)' (1980).

¹²⁷ See also UNHCR EXCOM, 'Conclusion No. 74 (XLV)' (1994).

¹²⁸ UNHCR EXCOM, 'Conclusion No. 40 (XXXVI)' (1985).

¹²⁹ See in particular UNHCR's duties in 'Ending Displacement in the Aftermath of Conflict (...)'.¹²⁹

Vis-à-vis states, UNHCR has multiple roles, including setting up Quadripartite Commissions to adopt, execute and supervise durable solutions strategies and support their compliance with international and national standards, in large part thanks to its experience and its role in transferring best practices and lessons learned from other countries to Colombia.¹³⁰ Similarly, as the guardian of the 1951 Convention, its Protocol and regional instruments like the Cartagena Declaration, it must strive to support local integration, promote adequate methods for repatriation, conduct resettlement processes and ensure that individuals who continue to leave the country have access to fair and efficient asylum procedures and that the rights of those facing cessation are upheld.

In this role, UNHCR not only has a clear legal mandate, but also the experience of over sixty years of work in favour of refugees, and thus a central role in the promotion and supervision of the rights of refugees during every step of the process towards comprehensive solutions.

Conclusion

The term 'historical' is often used to describe particular stages or moments in a country's development, but it is rarely more appropriate than it is right now in Colombia. The next months and years not only hold the possibility for the termination of a conflict that has lasted over half a century, but also foster hope for the effectiveness of human rights for a considerable portion of the Colombian population. As a result, the Government's efforts to provide victims with reparations, carry out land restitution and pursue peace processes with FARC and ELN merit special recognition.

These efforts are not ends in and of themselves, but only means to reach solutions for displaced people and other victims as well as for society at large, and as such they can and should seek constant improvement. This requires not only a deep understanding of the Colombian context, but also learning from the experience of other countries that have tread similar paths before, in order to be able to learn from their mistakes and adopt their best practices. In the case of the needs of over 360,000 Colombian refugees, the best way to do it is by promoting comprehensive solutions, which reflect that the complexity of displacement requires an equally complex and nuanced response that manages to coordinate processes for refugee repatriation, local integration and resettlement as well as parallel processes for internally displaced persons.

In this quest, however, the Colombian state does not stand alone. Just as the international community and the United Nations system have supported displaced Colombians and the peace processes, they also can and will support the establishment of a system to respond to the needs of those affected by violence, including refugees. Quadripartite Commissions, including the functions of Commissions for Comprehensive Solutions for Colombian Refugees, can coordinate the efforts of the Colombian Government, asylum countries, UNHCR and refugees to reach truly comprehensive solutions with the support of sectors including civil

¹³⁰ Regarding best practices in Latin America on issues related to local integration see ACNUR, 'Protección de Refugiados en América Latina: Buenas Prácticas Regionales' (online database, available at <http://goo.gl/dtk0b7>).

society,¹³¹ the private sector and academia. UNHCR's work, which spans more than six decades and has reached every corner of the globe, its deep knowledge of the Colombian context and the trust it has built up with communities make it an essential ally in this endeavour.

This wide experience, leads to the conclusion that, given the necessary support, refugees can play a crucial role in post-agreement scenarios and promote the consolidation of peace.¹³² In that sense, working towards comprehensive solutions for refugees is not only a moral and legal imperative, but also an investment in durable peace for Colombia.

¹³¹ See, for instance, Servicio Jesuita a Refugiados et al, 'Plan de Acción de Brasil en el Contexto de los Diálogos de Paz en Colombia: Informe País' (2016).

¹³² S Harris Rimmer, 'Reconceiving Refugees and Internally Displaced Persons as Transitional Justice Actors' (UNHCR New Issues in Refugee Research Research Paper No. 187, 2010) and A Coffie, 'Filling in the Gap: Refugee Returnees Deploy Higher Education Skills to Peacebuilding' [2014] RSQ 1.

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