

Securing Protection for De Facto Refugees: The Case of Central America's Northern Triangle*

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The United Nations High Commissioner for Refugees (UNHCR) reports that the number of requests for international refugee or asylum protection increased fivefold from 2010 to 2015. In the United States these requests are mainly filed by citizens from El Salvador, Guatemala, and Honduras—the countries collectively referred to as the Northern Triangle of Central America (TNCA).¹ These applicants flee their countries of origin to escape threats to their lives and personal safety from gang violence, organized crime, and even police and military agents. Though the violence cannot be classified as a “war,” the daily life of many Central Americans is currently marked by human tragedies comparable to those experienced during the regional armed conflicts of past decades.

Despite these extreme conditions, protective status is almost always denied to those fleeing this violence because the threats facing the applicants are not those covered by the definition of a refugee codified in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. The source of these tragedies is defined in some academic circles as “unconventional violence,” that is, violence generated by nonstate actors outside an official context of war or armed conflict. In the absence of wars or internal conflicts involving state actors, traditional aid and humanitarian action mechanisms are difficult to activate: in other words, because the persecuted are not victimized by government agents due to membership in a protected group, they do not qualify for refugee status.

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The situation is further aggravated by the reluctance of governments to acknowledge the seriousness of the threats to their own civilians and to take urgent measures to establish response mechanisms. This violence represents a challenge that must be addressed at the structural level. Failure to do so will perpetuate the environment of impunity, corruption, and inequality, and will further the elimination of institutions that are so indispensable to democracy. Most importantly, the new scenarios of widespread violence in Central America make it necessary to clarify and broaden the definition of a refugee.

States and multilateral institutions need to act quickly to adapt and strengthen the mandates of public institutions so that victims can receive adequate care and protection. There have been several initiatives proposed to accomplish this goal, such as the United Nations Guiding Principles on Internal Displacement, the Cartagena Declaration, and the updated Brazil Declaration and Plan of Action produced by the Cartagena+30 conference. In July 2016 in San José, Costa Rica, participating countries at a High-Level Roundtable titled “Call to Action: Protection Needs in the Northern Triangle of Central America,” organized by the Organization of American States (OAS), also committed to responding to the needs of these threatened individuals. In his opening remarks at the roundtable, OAS Secretary-General Luis Almagro emphasized that “we must not forget that in most cases, displacement is not a choice It is our task to establish the route that will strengthen cooperation and regional alliances, to implement shared responsibility agreements, and to address the humanitarian impact of displacement.”²

The next section of this essay will illustrate the scope and scale of the crisis and describe how current protection mechanisms for victims fall short. The third section will then discuss efforts to reform institutions of protection at the domestic level, which are largely obstructed by the failure of some governments to officially recognize the problem; and the final section will survey the aforementioned regional and international efforts to provide a more integrated and comprehensive form of protection for “de facto refugees.” While these efforts have so far been insufficient, when considered together they provide a broad outline of one way forward.

THE NORTHERN TRIANGLE: WAR BY ANOTHER NAME

The Northern Triangle of Central America is one of the most violent regions in the world. Collectively, the three countries experienced more than 13,400 murders

in 2015 alone, with El Salvador accounting for nearly half. In September 2016, responding to the exodus of several families threatened by gangs, Vice President Óscar Ortiz, attempting to downplay the risk, famously remarked, “El Salvador is not Afghanistan.”³ Yet the statistics undermine his assertion. The 6,656 total homicides in El Salvador during 2015 correspond to a rate of 103 per 100,000 inhabitants.⁴ Compare this with Afghanistan, where civilian casualties related to the insurgency totaled 3,500 deaths and 7,400 injuries in 2015—a combined rate of about 38 casualties per 100,000 inhabitants.⁵ Moreover, the present human drama in El Salvador is on par with that experienced during its own civil conflict throughout the 1980s. In fact, the number of homicides in 2015 surpassed those of every other year except 1983, when there were over 7,000.

The magnitude of violence in the TNCA has driven residents of the three countries to seek greater security in their respective countries, in the broader Central American region, and internationally, but none of these locales has been able to provide adequate protection. In 2015 the Norwegian Refugee Council estimated that there were more than 550,000 internally displaced persons (IDPs) in the TNCA. Internally displaced Salvadorans made up 289,000, followed by Guatemala with an estimated 248,000 and Honduras with approximately 50,000. However, even these numbers may be on the low side. The Norwegian Refugee Council was unable to find reliable information for Honduras in 2015, and the nongovernmental organization CrisisWatch concluded that in 2016 there were 350,000 internally displaced Salvadorans. Children in particular have been affected by the violence. In a recent report on forced displacement, the Ombudsman’s Office of El Salvador cited figures from the Planning Department of the Ministry of Education showing that in 2014 and 2015 combined, 29,954 students dropped out of school due to crime or citing reasons relating to gender.⁶

IDPs flee their communities for a variety of reasons, including to escape death threats for witnessing a crime or for refusing to sell their land to criminal organizations, to prevent their children from being recruited by gangs, and to prevent their daughters from being raped or made sex slaves by gang leaders. Even more tragically, people are often forced to make the choice between fleeing with their families and abandoning them. In many cases, however, when an individual is threatened with an act of violence, the threat is also directed at his or her entire family. There are even cases in which groups of neighbors or entire communities have been expelled from their homes in the face of threats from criminal groups.⁷ Further, those who are internally displaced seldom find care, assistance, or effective

protection in their own countries, given that the same gangs and criminal groups responsible for their displacement exercise control and territorial power over other localities within the country. Thus, the internally displaced may be forced to seek international protection elsewhere. The Assistant High Commissioner for Protection at UNHCR, Volker Türk, confirmed this analysis in an interview with the EFE news agency, noting that victims of gang violence “first move, but then try to flee their countries because they feel totally unprotected.” He added that “many have dramatic experiences of violence, and there is no possibility of helping them inside the country because the causes [of their uprooting] are not solved, so all they have left is to leave.”⁸ Though the most obvious destinations are countries in the Central American region, a full 80 percent of the refugee applications from TNCA nationals have been made to the United States.

However, not all Central Americans who are forced to migrate because of the violence in the region are asylum seekers or refugees. These displaced persons migrate to the United States, Canada, and Mexico either as undocumented migrants or by seeking other legal options for their immigration status. According to estimates by the UN Population Division’s Department of Economic and Social Affairs, in 2015 nearly 3.5 million migrants of Central American origin were registered as residents in those three countries combined. The United States dwarfs Mexico and Canada with nearly 3.2 million, while the latter two registered 139,262 and 93,253, respectively.⁹ The rest of the displaced TNCA nationals have been distributed among countries such as Nicaragua, Costa Rica, and Belize—all seeing increasing numbers of refugee requests in recent years. For example, according to UNHCR, Costa Rica recorded 2,203 asylum applications in 2015, which is an increase of 176 percent compared to 2013. It should be noted, however, that in all these countries the official number of asylum applications is much smaller than the actual migratory flows. One indication of this is the estimation that 30 percent of the overall foreign-born population of the United States is in an irregular situation.¹⁰ Of all the Guatemalan immigrants in the United States, for example, the Migration Policy Institute estimated that in 2015 some 704,000 (51 percent of the total) were undocumented. Another estimate, from the International Organization for Migration in 2016, puts the figure even higher, at 73 percent.¹¹ In Nicaragua, 2015 closed with 100 pending requests from Salvadorans awaiting response for refuge. According to Salvadoran researcher Jaime Rivas, an expert on migratory issues, “This figure does not reflect the number of people living in Nicaragua who are in need of

protection.”¹² The discrepancies suggest that asylum seekers remain in these countries on an irregular basis, that is, without receiving official recognition and protection.

The level of protection and benefits afforded by these states varies. Until the end of 2014, Nicaragua had very favorable legislation toward asylum seekers and refugees. However, the Jesuit Migration Network has reported that the implementation of current legislation is becoming slower and more difficult. Some in the government have even pushed for the country to reform immigration laws in order to make them more restrictive.¹³ In Costa Rica, on the other hand, due to more favorable immigration legislation concerning asylum seekers and refugees and due to existing programs, TNCA refugee applicants have better prospects. The applicants even have access to financial aid and work permits while their applications are pending. In Panama, although there are often better job prospects than in neighboring countries, asylum applicants do not receive temporary permits for work or study while their applications are still pending.

Despite these mixed prospects, requests for asylum from TNCA countries have continued to increase since 2010. In the first half of 2015, for example, UNHCR registered 23,737 asylum applications from Salvadorans, Hondurans, and Guatemalans in the United States. For the first half of 2016, this figure increased to 32,179. According to the same UNHCR report, during the same two periods Mexico received 1,250 applications and 3,378 applications, respectively.¹⁴ The seriousness of this phenomenon prompted the U.S. government to expand its program of refugee admission to accommodate more Central Americans, as announced by Secretary of State John Kerry on January 12, 2016. However, on the date of Secretary Kerry’s announcement only 3,000 places per year were available for all of Latin America. Since then, the possibilities for asylum seekers and refugees seeking protection from the United States have further diminished due to U.S. President Trump’s anti-immigration rhetoric.

Migrants, both children and adults, who flee their country of origin to escape violence, are known as “de facto refugees” by international organizations, that is, people who, if returned to their country of origin, will find that their lives and safety are at risk, but who have not been persecuted by their government. One especially troubling development is the rising number of de facto refugees who are children. In a report published in 2015, the Inter-American Commission on Human Rights (IACHR) stated that in fiscal year 2014 the U.S. Border Patrol apprehended 68,541 unaccompanied children and adolescents

and 68,445 families. This represented a 77 percent increase in the number of arrivals of unaccompanied children and adolescents, and an increase of 361 percent in the arrival of families compared to fiscal year 2013. Official data show that the four main countries of origin for children, unaccompanied adolescents, and families were El Salvador, Guatemala, Honduras, and Mexico.¹⁵ In 2014 more than 32,000 unaccompanied Salvadoran children arrived at the border. Although this number fell in 2015, the decrease is not due to fewer children fleeing El Salvador, but rather to more deportations from Mexico, thus preventing these children from reaching the United States in the first place. For the first time, Mexico is actually deporting more Salvadorans than is the United States.¹⁶

Another major issue is that under the current refugee regime “de facto refugees,” despite their vulnerability, do not currently qualify for international protection mechanisms when they seek assistance from a foreign government. As a result, such refugees are frequently deported.¹⁷ When this happens, the consequences can be deadly. Elizabeth Kennedy, a researcher at San Diego State University, has documented eighty-three cases since 2014 where someone deported from the United States was killed within a few months of their return to Central America. Of these, forty-five cases were in El Salvador, three in Guatemala, and thirty-five in Honduras.¹⁸

Thus, the new scenarios of violence require the identification of new trends in forced displacement and in the criteria governing response mechanisms. This is necessary both for the protection of IDPs and for migrants who require asylum and refugee protection. Notably, in the three TNCA countries, despite their high levels of internal displacement, there are no specific governmental assistance or protection mechanisms. As the next section will discuss, in spite of some initiatives to officially recognize the problem and its seriousness, there is no real political will to make significant changes—a failure that affects the ability of existing institutions and programs to respond effectively and comprehensively to internal displacement.

DOMESTIC PROTECTION FOR THE INTERNALLY DISPLACED

Although covenants have been signed to end armed conflict in Central America, no significant progress has been made in addressing the current causes of forced migration. Violence continues to be a constant feature of daily life; only the faces of the perpetrators have changed. Once it was armed soldiers, now it is members

of organized crime syndicates and gangs. In El Salvador, for example, the 1992 Peace Accords were intended to bring about the democratization of the country, the unrestricted observance of human rights, and the reunification of Salvadoran society. The resulting cease-fire of the civil war has technically never been broken, but as shown by the murder rates and gang-related violence described above, the country remains far from peaceful.

Unfortunately, the Salvadoran state does not officially recognize the problem of internal displacement caused by widespread violence. Because the government denies that the phenomenon exists, there is no official record of how many Salvadorans have been internally displaced by violence. The government does not even keep statistics on the number of people who petition for aid from public authorities. The lack of data makes it difficult to design and implement public policies and specific programs to help the internally displaced; and the failure to recognize the severity of the situation renders the people affected by this problem largely invisible. For those victims who do petition, there are no programs or institutions that provide effective protection for those in need, who are mostly their family members.

One effort to remedy this lack of data is found in the proposal “Salvador Seguro,” which was submitted by the Salvadoran government, with the facilitation of the United Nations Development Programme (UNDP), to the executive body of the National Council of Public Safety and Coexistence. Item No. 4 of this proposal would implement and carry out a registry (or census) of persons meeting internal displacement status (initiative 106) and register those organizations in the fifteen municipal centers that care for victims of violence, especially those who have been displaced (initiative 111). With the support of UNDP, an effort will be made to carry out the census, not only in El Salvador but throughout Central America. Although the data is urgently needed, there is no timetable for when El Salvador will begin the census, when it will be concluded, or when the information will be made available to the public.

Unlike El Salvador, the Honduran government took an important step at the end of 2014 to establish, through executive decree, the Inter-Institutional Commission for the Protection of Persons Displaced by Violence. The commission is composed of seven ministries, three state institutions, and four organizations elected by civil society. The Secretariat of State for Human Rights, Justice, Governance, and Decentralization is the executive secretariat of the commission, the main objective of which is to analyze current trends in displacement in order

to identify protection gaps and promote public policies for the protection of displaced persons. It has a special focus on the most vulnerable populations, specifically those who are affected by organized crime and social violence.

While this is a helpful start, the Honduran government must still address such related issues as land struggles, the lack of human rights, and the absence of a free press—all of which exacerbate the domestic security situation. The Ombudsman's Office in Honduras receives requests from people throughout the country who want to leave their communities because they are threatened, but the office has admitted that it cannot address all these requests because there is a high level of impunity in the government. Consequently, people distrust the authorities, resulting in a preference to leave the country altogether. Additionally, the control exercised by drug cartels over certain areas of Honduras affects society at large. In a sense, cartels create their own *de facto* states, controlling the territory they need for their illegal businesses. This includes forcibly evicting people from their homes and recruiting young people from families in the areas under their control. If the young people do not comply, they and their families face almost certain death.

Guatemala, too, suffers from a lack of official data on forced internal displacement. A 2016 study on internal displacement conducted by the Institute of Research and Projection on Global and Territorial Dynamics (IDGT) concludes that “in general, public institutions and social organizations do not report cases of internal forced displacement.”¹⁹ The report found that the official sources do not match the researchers' own figures for internal displacements, mainly because the displaced simply do not report their complaints to government officials and, thus, they are not registered. Reasons for these displacements included extortion, threats, violence against women and children, evictions due to the implementation of megaprojects or court orders, and natural disasters. Despite the lack of official government record-keeping on many of these issues, in some cases international NGOs have worked with local institutions to collect and analyze data. In El Salvador, for example, the Norwegian Refugee Council has collaborated with the University Institute of Public Opinion (IUDOP) of José Simeón Cañas Central American University. A survey conducted by IUDOP in November–December 2016 showed that more than 212,000 Salvadorans were displaced due to threats or widespread violence throughout the country, and a staggering 96 percent of respondents stated that they had changed their residence in the past year due to violence or the threat of violence.²⁰ Further, the data shows that approximately a third had fled their homes more than once, and in some cases up to five times.

In sum, the identification mechanisms necessary to meet protection needs are either absent or insufficient both in countries facing internal displacement and in countries receiving forced migrants. As I will later describe, official state mechanisms to provide care and protection for the internationally displaced are also absent or insufficient. Given that the push factors have not been addressed, those who are repatriated or deported to their country of origin face continued threats to their lives and livelihoods. Thus, they are forced to resume the dangerous route of irregular migration, perpetuating the cycle.

THE WAY FORWARD: THE HUMAN RIGHT TO INTERNATIONAL PROTECTION AND THE COLLECTIVE RESPONSIBILITY OF STATES

This section argues that, in the absence of effective protection at the domestic level, the reality of forced displacement demands further action at the regional and international level. In August 2015, Refugees International issued a report urging the United States and Mexico to ensure that Salvadorans fleeing persecution and other human rights violations have access to an asylum officer before being deported. The report concludes that “it is critical that countries in the region keep open borders to those who are seeking protection. Those fleeing have the right to seek and receive protection when they have fled from a credible risk of torture or persecution. It is unacceptable that they be returned to a country where their life is at grave risk.”²¹ In other words, the crisis must be addressed from a human rights perspective, rather than from a strictly legal perspective, and in the context of unconventional conflicts. Further, an effective response must include both Mexico, the main transit country, and the United States, the main destination country for irregular migration. A number of organizations have proposed regional cooperation to address this phenomenon, and they have appealed to existing human rights instruments and declarations to do so. While these proposals represent fragile first steps, they can potentially usher in more substantive progress.

In February 2015 the Central American Council of Lawyers for Human Rights (*Consejo Centroamericano de Procuradores de Derechos Humanos*), an entity formed by the ombudsman offices in each of the seven Central American countries, issued “a call for countries to implement comprehensive migration policies and address the human rights situation of migrants, as well as to urgently recognize and protect victims of forced displacement caused by violence and

criminality.”²² It also called upon the governments of Central America to implement the Cartagena Declaration, the Guiding Principles on Internal Displacement, and the Brazil Declaration and Plan of Action.

The 1984 Cartagena Declaration is a regional instrument concerning the protection of refugees that builds and expands upon the Refugee Convention and Protocol. It reaffirms the importance of the principle of non-refoulement established by the former agreement, but goes further by highlighting the situation of displaced persons within their own country and expanding the definition of “refugee.” Rather than including only those who have been persecuted due to their membership in a protected group, the Cartagena Declaration’s definition includes people who have fled their home countries because their life, security, or freedom has been threatened by widespread violence, foreign aggression, internal conflicts, massive violations of human rights, or other circumstances that have seriously disrupted public order in a country.

The UN Guiding Principles on Internal Displacement is the main international instrument in this area, and they serve as a prescription for the actions that countries must take in order to address the problem of displacement in a comprehensive way. The document is based on existing legal provisions of international humanitarian law, refugee law, and international human rights law, as well as on the principle of “sovereignty as responsibility.” That is, the primary responsibility for the protection and assistance of a country’s internally displaced citizens falls to the country itself. It also recognizes international human rights standards for internally displaced persons and identifies the rights during each stage of displacement. The Guiding Principles prohibit the arbitrary displacement of populations, and emphasize that individual states have the first obligation to “prevent and avoid the conditions that can cause the displacement of people.”

In 2014 the government of Brazil commemorated the thirtieth anniversary of the Cartagena Declaration by hosting *Cartagena+30* together with UNHCR and the Norwegian Refugee Council. Over thirty countries participated in the gathering, which resulted in the Brazil Declaration and Plan of Action—a road map to address new displacement trends and end statelessness by 2024. The plan recognizes that nonstate actors, including transnational gangs, are responsible for displacement, and that governments have an obligation to protect people fleeing this type of persecution. The road map is divided into eight chapters and eleven programs, with the fourth chapter explicitly establishing solidarity with the Northern Triangle of Central America in the “Seeking and

Implementing of Durable Solutions.” Specifically, the chapter focuses on ways to improve refugee status determination procedures through establishing a “Human Rights Observatory on Displacement” and by developing alternatives to detention through the “Dignified and Safe Transit” program. As of March 2017, however, despite promising goals, implementation efforts on these programs have lagged.

Another attempt to address the crisis is the Alliance for Prosperity Plan. This is an initiative that is promoted by all the TNCA countries, has been supported and endorsed by the United States, and has a technical secretariat headed by the Inter-American Development Bank. Launched in 2014, the initiative was in response to the rise in unaccompanied minors arriving in the United States; but since then the proposal has been integrated into Washington’s efforts to reduce violence and crime in Central America, reduce irregular migration to the United States, increase economic opportunities for disadvantaged populations, and increase levels of transparency. The United States has allocated money to each of the TNCA countries, including \$65 million to El Salvador, \$98 million to Honduras, and \$112 million to Guatemala. Another \$400,000 has been earmarked to support regional cooperation. However, given the complexity of the plan’s goals and disbursements, progress has been slow.²³ There is also the possibility that President Trump could modify the terms of the Alliance to further derail the initiative.

The instruments and mechanisms above establish the rights of displaced persons and emphasize that they should be treated with respect during displacement. Additionally, they dictate that humanitarian assistance must be provided to the victims, along with a guarantee of return, resettlement, and reintegration. After several years of discussions, the conclusion among those involved is that a holistic approach is needed, one that addresses the conditions generating displacement and provides more effective protection during displacement. However, the pace of reform betrays the urgency and seriousness of the victims’ current situation.

CONCLUSION

Victims of gang violence would not need to seek external refugee status if the governments of their respective countries were able to ensure effective protection. However, the very inability of governments to provide protection is likely what makes them reluctant to officially acknowledge the problem of internal displacement and its seriousness. The growing number of Central American asylum

applicants who are threatened by gang-related activities has made it necessary to update the interpretation of the definition of “refugee” as it is contained in the 1951 Refugee Convention. Further, some major recipient countries, including the United States, do not apply the regional definition of “refugee” that was recommended by the 1984 Cartagena Declaration, although this definition has recently been incorporated into the internal regulations of Mexico and most Central American countries. (Even in these cases, however, asylum seekers often lack the evidence required to demonstrate their unique situations of persecution.) That definition has also been incorporated into the UNHCR Guidance Note on Refugee Claims Relating to Victims of Organized Gangs and the United Nations Convention against Transnational Organized Crime.

As the crisis continues to grow, attention is finally being paid on a global scale. In September 2016 world leaders convened at the first-ever UN Summit on Refugees and Migrants to address the connections between human mobility, development agendas, human rights, climate change, peace, and security. Member states declared their political will to protect the rights of refugees and migrants at a time when more people are being forcibly displaced across the world than during World War II. Summit delegates adopted the landmark New York Declaration, which contains “bold commitments both to address current issues and to prepare the world for future challenges.”²⁴ In addition, the summit marked the initial planning for an international conference in 2018 to discuss the adoption of a “global compact for safe, orderly, and regular migration,” as well as to protect the human rights of all refugees and migrants, regardless of status. This will include such goals as protecting the rights of women and girls, with an emphasis on ensuring education for all migrants; addressing sexual and gender-based violence; and ending the detention of children while their status is being determined. The global compact will identify ways to resettle refugees identified by UNHCR,²⁵ and seek to strengthen the global governance of migration. One major step was made toward this goal in 2016 with the inclusion of the International Organization for Migration into the United Nations system as a “related organization.”

For those displaced in the Northern Triangle, the global compact would go a long way toward providing protection if the commitments made were combined with those of the Brazil Plan of Action. However, given the slow response by governments to this crisis, civil society groups need to engage governments in ongoing dialogue. That said, many countries are still losing out on opportunities for

dialogue by denying either the existence or the seriousness of forced migration and displacement in the region. Given the magnitude of these problems, the lack of recognition remains a major obstacle to the collective search for possible solutions. To adequately respond to this challenge, more than just emergency responses are required. Humanitarian aid should be only the first stage in responding to the needs of affected families. There also needs to be more focus on the construction of permanent public policies for durable solutions. To address the issue in full, it is essential to link the causes of displacement and forced migration with the adoption of development and security policies that are based on human rights and joint efforts. That is the only truly sustainable path forward.

NOTES

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