

## Indigenous Peoples in a Refugee-Like Situation: Living on the Border Between Colombia and Brazil

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This article proposes to raise relevant topics of interest for Latin America in the debate on international refugee protection, concerning indigenous rights, internal and international displacements, hospitality and border cities. This brings into question the international protection system, the production of refugees' identity and subjectivity, the nondemocratic principle of nation-state borders and the Eurocentric lenses of this political-legal field. After setting out the theoretical and normative frame of reference, the article develops an informative narrative about the context of indigenous refugees in the Amazon region (from Colombia to Brazil). In the conclusion, the text addresses the broader refugee definition and protection in order to be attentive to the peculiarities of indigenous forced relocation and dispossession in the region.

### Introduction

Asylum-seekers, refugees, populations displaced due to armed conflict and environmental causes, all face similar difficulties that demand special international protection and humanitarian assistance. The 1951 United Nations Convention relating to the Status of Refugees defines, in its first article, a person as a refugee only if there is a well-founded fear of persecution and if he or she has crossed an international border and is unable to return to his or her country of origin. This article concerns the circumstances facing indigenous

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peoples who are in a refugee-like situation in the Amazon region, on the border between Colombia and Brazil.

There are approximately 40 indigenous ethnic groups living near Colombian international borders. This population tends to remain invisible—intermingled in communities on either side of the border. They neither register themselves as persons in need of internal protection nor formally request asylum. In spite of this, it is clear that forced displacements of indigenous peoples is taking place, affecting in some cases the survival capacity of the ethnic group itself. Today, the United Nations High Commissioner for Refugees (UNHCR) and the international community have to deal with a new and complex dynamic of forced migration, in which the differences between categories are blurred.<sup>1</sup>

To address the issue, this article explores the consequences of Patricia Tuitt's considerations on the legal technique used to fabricate a particular person—the refugee—and the role of international refugee law in constructing the authentic refugee identity.<sup>2</sup> This article will also elaborate some concerns on how this law operates in Brazil, such as the selective exclusion of indigenous persons from the refugee protection regime, and the violence represented by the border itself. The formal inclusion of indigenous peoples within the state-form is articulated in such a way that continues to perpetrate their political exclusion. To survive the experience of being originally dispossessed, the indigenous peoples have to deal with the experience of desubjectivation.<sup>3</sup> Following Giorgio Agamben,<sup>4</sup> it is possible to argue that those non-status indigenous persons exemplify a form of depoliticised bare life, the subjects of politics of exception and border violence.

There exists a multiplicity of reasons for someone to seek or to be granted asylum. Forced displacements do not have a specific and distinct source but do have multiple, complex, and interrelated ones. Competition for land and resources, abrupt economic and political

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<sup>1</sup> This article does not reflect the UNHCR's opinion on the matter.

<sup>2</sup> Patricia Tuitt, *False Images: Law's Construction of the Refugee* (TJ Press 1996) 2.

<sup>3</sup> Judith Butler and Athena Athanasiou, *Dispossession: The Performative in the Political* (Polity Press 2013) 28.

<sup>4</sup> Giorgio Agamben, *Means without End: Notes on Politics* (Vincenzo Binetti and Cesare Casarino trs, University of Minnesota Press 2000) 23.

transitions, authoritarian governments, growing inequality among people and communities, identity politics and historical legacies such as colonialism, are the most frequent factors that lead to violent conflict.<sup>5</sup>

Displaced persons can be considered refugees if their status fits into the legal definition of the term, however many of those displaced lives are not incorporated into that definition. This is the case for many displaced populations that do not cross international borders but become internally displaced persons (IDP) within their own countries. It is important to point out that there is no legal definition of IDP under international law. An even more unprotected situation is the case of other displaced populations who have no specific international legal instrument to assure their protection after they cross international borders due to environmental degradation, famine, extreme poverty, or flight from economic, social, and cultural violations. Dealing with this difficult topic, Goodwin-Gill summarises the concern of some scholars:

We turn to human rights doctrine for assistance in filling out the grey areas. In doing so, we may wonder why it is permissible to distinguish in favour of Convention refugees, when other violations of rights seem no less serious. Why do some types of harm carry more ‘value’ than others?<sup>6</sup>

The objective of this article is to illustrate how international refugee law functions within this legal sphere to create a particular identity, that of the ‘Convention refugee’. The law of refugee status will only protect persons that fit the authentic refugee image. In this sense, international refugee law appears not to recognise its own limitations when it portrays the refugee flow phenomena as reducible to a strict legal definition, specifically the definition of refugee under article 1 of the 1951 Refugee Convention.<sup>7</sup> This denial has halted the

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<sup>5</sup> Commission on Human Security, *Final Report of the Commission on Human Security presented to the UN Secretary-General* (1 May 2003) <[http://www.un.org/humansecurity/sites/www.un.org.humansecurity/files/chs\\_final\\_report\\_-\\_english.pdf](http://www.un.org/humansecurity/sites/www.un.org.humansecurity/files/chs_final_report_-_english.pdf)> accessed 29 August 2015.

<sup>6</sup> Guy Goodwin-Gill, ‘Asylum 2001: A Convention and a Purpose’ (2001) 13 *International Journal of Refugee Law* 1.

<sup>7</sup> Tuitt (n 2) 2.

search for an appropriate solution to the rapidly increasing number of asylum-seekers.

It is relevant at this point to explain the distinction between an asylum-seeker and a refugee. An asylum-seeker is someone who claims to be a refugee but whose application has not been conclusively reviewed. States have the primary responsibility to protect refugees and have established national asylum systems to decide which asylum claims qualify for international protection. After being judged through the proper legal procedures and not granted asylum, asylum-seekers can be sent back to their home countries. Because of this decision, many displaced lives are in danger, as they have no access to a safe protection regime. A notable example is the indigenous population living in a refugee-like situation on the border between Colombia and Brazil. This problem puts into question not only the relation between the nation-state and colonialism, but the very limit of democracy: according to Étienne Balibar, borders are its non-democratic principle.<sup>8</sup>

This article relies on the review of legal<sup>9</sup> and anthropological<sup>10</sup> narratives on the refugee condition and on the assessment of internal United Nations<sup>11</sup> reports highlighting the situation of indigenous peoples in a refugee-like situation. The bibliography is inspired by the intent to portray law *in* society,<sup>12</sup> and to show how international refugee law constructs the refugee identity in Europe and reconstructs it in Latin America. Here the paper follows Tuitt, who has studied ‘what has become of the refugee, both as a broadly constructed individual and as a Western European legal construction’.<sup>13</sup>

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<sup>8</sup> Étienne Balibar, *Politics and the Other Scene* (Christine Jones, James Swenson and Chris Turner trs, Verso 2002) 75.

<sup>9</sup> James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 154; Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3<sup>rd</sup> edn, Oxford University Press 2007) 51.

<sup>10</sup> Michel Agier, *On the Margins of the World: The Refugee Experience Today* (David Fernbach tr, Polity Press 2008) 34; Tuitt (n 2) 155.

<sup>11</sup> Erica Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press; UNHCR 2003) 613.

<sup>12</sup> Martha Mundy and Alain Pottage, *Law, Anthropology and the Constitution of the Social: Making Persons and Things* (Cambridge University Press 2004) 6.

<sup>13</sup> Tuitt (n 2) 2.

This theoretical perspective critically portrays law in practice, or law as a discursive technology,<sup>14</sup> intervening in reality to the point of building the authentic victim subject,<sup>15</sup> and designing the frontiers of democracy.

The structure of this article is divided into three main parts. First, is a brief history of the modern response to forced displacement, exploring the argument of the legal fabrication of the refugee. Forced displacement is affecting millions of people, including indigenous peoples in Latin America, compelling them to flee and to seek asylum in a safe place. The modern concept of ‘refugee’ only applies to the displaced lives of those that fit the Western European legal definition as determined by the 1951 United Nations Convention relating to the status of Refugees. The second part offers a short glance at how forced displacement in Colombia has pushed indigenous peoples into a refugee-like situation. The third part is a description of refugee protection strategies in Brazil and the limits within the law of refugee status for those indigenous peoples in a refugee-like situation in the Amazon region, on the border between Colombia and Brazil, who do not have access to a legal protection regime. In conclusion, the paper argues that, in the Latin American context, the law has recreated the refugee identity, but its potential and the role of the international community remains ambiguous. On the margins of the nation-states, indigenous peoples put into question the violence of the border and the experience of dispossession. The line they traditionally ignore may be critically exposed as the antidemocratic condition of democracy itself.<sup>16</sup> As Costas Douzinas has explained, the refugee ‘represents in an extreme way the trauma that marks the genesis of state and self and puts to the test the claims of universalisation of human rights.’<sup>17</sup>

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<sup>14</sup> Mundy and Pottage (n 12).

<sup>15</sup> Elizabeth A Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Duke University Press 2002) 6.

<sup>16</sup> Balibar (n 8) 85.

<sup>17</sup> Costas Douzinas, *The End of Human Rights* (Hart Publishing 2000) 358.

## A Brief History of the Modern Response to Forced Displacement: The Legal Fabrication of the Refugee

Agamben offers a powerful genealogy of the contemporary humanitarian regime. For him, the violence of the border is the effect of the operative paradox of state sovereignty. His analysis is particularly interesting in its portrayal of the refugee as a key figure of contemporary politics. According to Agamben, it was never simple to distinguish between stateless persons and refugees:

From the beginning, many refugees who technically were not stateless preferred to become so rather than to return to their homeland (this is the case of Polish and Roman Jews who were in France or Germany at the end of the war, or today of victims of political persecution as well as of those for whom returning to their homeland would mean the impossibility of survival). On the other hand, the Russian, Armenian and Hungarian refugees were promptly denationalized by the new Soviet or Turkish governments, etc. It is important to note that starting with the period of World War I, many European states began to introduce laws which permitted their own citizens to be denaturalized or denationalized.<sup>18</sup>

The modern history of systematic international protection of displaced persons is a reaction to the context described above and it starts with the League of Nations. Analysing history and law will provide a clearer picture of the genealogies of how particular movements of persons have been interpreted in different ways over time.

In 1921, the Office of the High Commissioner for Russian Refugees was created to deal with the problem of the Russian exodus. Its main task was to define the legal status of one to two million Russians that had fled due to famine, armed conflict or for political reasons. It was also responsible for organising repatriation or resettlement and for providing work and assistance for the displaced Russians.<sup>19</sup>

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<sup>18</sup> Agamben (n 4) 17.

<sup>19</sup> Hathaway (n 9) 83.

Due to the collapse of the Ottoman Empire and the beginning of World War I, many persecuted ethnic groups, such as Assyrians, Jews, and Serbs, fled from their territories and became displaced. For the first time, the international community had to deal with numerous mass movements of people and their vulnerable and urgent humanitarian situations.<sup>20</sup>

The period between World War I and II was extremely turbulent. The economic crisis of 1929 and its harsh consequences caused countries to react with nationalistic and protectionist policies that imposed restrictions on the free movement of people. With the Soviet Union's entrance into The League of Nations, the League was losing its leadership, which worsened the problem of refugee protection because of the belief that refugees were conspiring against the Communist ideal. In 1933, the rise of Hitler generated an even greater tide of displacement. In a strong critique of this episode, Zygmunt Bauman states that what the European Christian bourgeoisie could never forgive Hitler for was 'not the crime of genocide, but the crime of having applied to Europe the colonialist actions'.<sup>21</sup>

Faced with the difficulties of ensuring assistance, the League of Nations recognised the need for a conventional instrument that granted protection to those considered refugees. Thus, in 1933, the Convention on the International Status of Refugees was adopted. Refugee status was granted to specific groups that had emigrated and only for those without any government protection.

From 1935 until 1938, new instruments of protection were designed to encompass victims adversely affected by a specific social or political event, dependent upon whether or not this was a problem of international legal status.<sup>22</sup> This fact reflected the change in the nature of conflicts and of the causes of mass displacement.

As World War II progressed, the volume of displaced persons swelled to an unprecedented amount. Hence, in 1943 the United Nations Relief and Rehabilitation Agency (UNRRA) was founded with resettlement as its primary task. In 1947, UNRRA was replaced by the International Refugee Organisation, which was subsequently

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<sup>20</sup> Agamben (n 4) 18.

<sup>21</sup> Zygmunt Bauman, *Society under Siege* (Polity 2002) 109.

<sup>22</sup> Agamben (n 4) 20.

replaced in 1950 by the Office of the High Commissioner for Refugees. Previously, in 1949, the United Nations Relief and Works Agency for Palestine Refugees in the Middle East was founded to care for displaced Palestinians. Two years later, the United Nations Convention Relating to the Status of Refugees was adopted and a new regime of international protection was established.<sup>23</sup>

Resolution 319 (IV) of the UN General Assembly of December 1949 established the UNHCR and stated that the agency would operate for a period of 3 years from January 1951.<sup>24</sup> Its core mandate was to give safe haven to asylum-seekers and to protect them from *refoulement*, which is protection against expulsion or return to the frontiers of territories where the life or freedom of the refugee would be threatened.

Article 1.A(2) of the 1951 Convention contains the internationally binding definition of the term refugee, which is applicable to any person who:

As a result of events occurring before 1 January 1951 and 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.<sup>25</sup>

As article 1.A shows, the 1951 Geneva Convention was limited in scope to people who became refugees as a result of events occurring prior to 1951, particularly referring to two million Europeans. In this sense, the international law on refugee status is a by-product of historical and contemporary Western European ideologies, functioning 'at the very margin of most refugees' lives'.<sup>26</sup> Article 1.D also states, 'This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance'. Tuitt's conclusion is that refugee law has proven to be

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<sup>23</sup> Goodwin-Gill and McAdam (n 9) 16.

<sup>24</sup> Refugees and Stateless Persons, UNGA Res 319 (IV) (3 December 1949) UN Doc A/RES/319.

<sup>25</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

<sup>26</sup> Tuitt (n 2) 23.



resistant to more expansive ideologies concerning the protection of refugees themselves.<sup>27</sup>

Crossing borders can change someone's status under international law. It is this that makes an authentic refugee, separating it from other figures like the immigrant or the stateless person. From that moment on, under international refugee law, a person may have access to different protection regimes dependent upon their location in the world.

As Costas Douzinas has explained, 'the law divides inside from outside and is then asked to heal the scar or bandage it by offering limited protection to its own creations'.<sup>28</sup> Everything happens as if indigenous peoples have survived the end of their world. The dramatic situation faced by them in contemporary capitalism is being dispossessed up to a point of non-return at the same time as they are considered protected by the state. That is precisely the violent structure of the contemporary protection regime available for indigenous peoples.

Tuitt argues that the refugee identity differs from region to region and it encompasses known refugee phenomena to varying degrees. For her, 'One of the main functions of refugee law has been to shape or construct an official or formal identity of refugee',<sup>29</sup> meaning that international refugee law literally makes the difference. Following Tuitt, it is possible to argue that the legal form itself is a discursive technology. The refugee status determination procedure will be the file that 'constructs' the refugee.<sup>30</sup> According to Bruno Latour, this happens 'when law itself secretes an original form of contextual networking of people, acts and texts, so that it would be very difficult to define the notion of social context without resorting to legal concepts'.<sup>31</sup> However, the law's construction of the refugee might lead to a false image or to competing images. Therefore, it is interesting to try to understand how other constructions of the refugee have sought to compete with the 'Convention refugee'.

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<sup>27</sup> *ibid* 6.

<sup>28</sup> Douzinas (n 17) 358.

<sup>29</sup> Tuitt (n 2) 14.

<sup>30</sup> Mundy and Pottage (n 12).

<sup>31</sup> Bruno Latour, *The Making of Law: An Ethnography of the Conseil D'Etat* (Polity 2010) 260.

Until the 1960s and 1970s, the international community was concerned with displacements occurring mainly in Europe. As the process of decolonisation and independency conflicts increased in Africa, the UNHCR had to address new displacement problems arising in that region. Due to the limitations of the 1951 Convention definition, a Protocol Relating to the Status of Refugee of 1967 was added to remove the time limit from the requirements for eligibility. Law as a discursive technology was able to transform the way people were perceived to be refugees or not.

The 1967 Protocol reflected historical developments in the 'Third World' resulting from a combination of causes including decolonisation, the formation of new states, underdevelopment, class and ethnic conflicts, superpower rivalries, revolutions, and dictatorships. As a result of those changes, the Organisation of African Unity decided to draft a Convention for the protection of those they realistically considered to be refugees. In 1969, the Convention Governing the Specific Aspects of Refugee Problems in Africa was adopted. This expanded the definition of refugee applying it 'to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order ... is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.'<sup>32</sup>

At the regional level, the Organisation of American States considered a broadening of the 1951 refugee definition to be necessary in view of the experiences of displacement in the region. Therefore, in 1984, the Cartagena Declaration on Refugees recommended to protect victims of serious civil violations of human rights as refugees.<sup>33</sup>

The modern concept of refugee applied to those displaced lives that fit the Western European legal definition, as determined by the 1951 United Nations Convention Relating to the Status of Refugees, had to be expanded. In this sense, international refugee law const-

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<sup>32</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, (adopted in Addis Ababa 10 September 1969, entered into force 20 June 1974) 1001 UNTS 14691, art 1.2.

<sup>33</sup> Cartagena Declaration on Refugees (adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984) OAS Doc OEA/Ser.L/V/II.66/doc.10, rev 1, 190-93.

ructed the refugee identity in Europe and reconstructed it in Latin America. After the Cartagena Declaration, Latin American countries started adopting a refugee definition that also protects victims of serious violations of human rights in a broader sense.

However, an additional issue taken into consideration when troubleshooting the contemporary response to forced displacement is the will to preserve national security. Even Latin American countries that have included in their legal regime a broad refugee definition may end up not applying it. More than refraining from granting asylum, states are increasingly tolerating desubjectivation processes by allowing the arbitrary detention of refugees without due process.<sup>34</sup> As a consequence, people are often turned back by force at border points, indiscriminately detained, and returned to countries where their human rights may be at risk, all of which are violations of the principle of *non-refoulement*, according to article 33 of the 1951 Convention.

There is therefore sufficient evidence to support the belief that persons that would have a perfectly good claim to refugee status (in the broad sense) might no longer bother to submit asylum applications, fearing they may be apprehended, detained and ultimately deported. Somehow the law that was constructed to protect the victim might end up producing new victims of law itself.

Following Arendt, Agamben reached a critical conclusion regarding the institutional response to this tide of refugees:

these organisations and the single states have proven, despite the solemn evocations of the inalienable rights of man, to be absolutely incapable not only of resolving the problem but also simply of dealing with it adequately. In this way the entire question was transferred into the hands of the police and of humanitarian organisations.<sup>35</sup>

Arendt wrote that the refugees, ‘driven from country to country represent the vanguard of their peoples—if they keep their identity’.<sup>36</sup>

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<sup>34</sup> UNHCR, Detention of Refugees and Asylum-Seekers (13 October 1986) No.44 (XXXVII) - 1986.

<sup>35</sup> Agamben (n 4) 19.

<sup>36</sup> Hannah Arendt, ‘We Refugees’ in Marc Robinson (ed), *Altogether Elsewhere: Writers on Exile* (Faber and Faber 1996) 119.

In a similar way, Agamben sees the refugee as ‘perhaps the only imaginable figure of the people in our day’.<sup>37</sup> If the nation-state and traditional legal-political categories are declining, the refugee appears as ‘the sole category in which it is possible today to perceive the forms and limits of a political community to come’.<sup>38</sup> Indigenous peoples and refugees have something in common: their bodies and their mode of being in the world represent a political resistance. Costas Douzinas explores the idea of the refugee as the representative not only of total otherness, but also of our own exile.<sup>39</sup> In this sense, we are strangers, or refugees, ourselves. Indigenous refugees are not only the absolute other, but also as a reminder that our protected identity, our peace, and security may be also fragile and at risk.

### **Forced Displacement in Colombia: Indigenous Peoples in a Refugee-Like Situation**

For over fifty years, the civilian population in Colombia has been suffering the effects of an internal armed conflict between guerrilla groups, mainly the Fuerzas Armadas Revolucionarias de Colombia (FARC), the Ejército de Liberación Nacional (ELN), paramilitary forces, the Autodefensas Unidas de Colombia (AUC), and the Colombian army.<sup>40</sup>

Colombia has been described as a country divided into three parts: the south, dominated by Marxist guerrillas; the centre and the big cities, controlled by the government; and the north, where the

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<sup>37</sup> Agamben (n 4) 16.

<sup>38</sup> *ibid* 16.

<sup>39</sup> Douzinas (n 17) 358.

<sup>40</sup> International Committee of the Red Cross, ‘Colombia: Plight of Conflict Victims Mostly Unreported’ (*ICRC Resource Centre*, 26 April 2010) <<https://www.icrc.org/eng/resources/documents/news-release/2010/colombia-news-260410.htm>> accessed 22 December 2015; UNSC, ‘Report of the Secretary-General on Children and Armed Conflict in Colombia’ (28 August 2009) S/2009/434; Amnesty International, “¡Déjennos en paz!” La población civil, víctima del conflicto armado interno de Colombia’ (2008) <<http://www.acnur.org/biblioteca/pdf/6736.pdf>> accessed 29 August 2015.

rightist paramilitaries prevail.<sup>41</sup> However, the country described by Michel Agier is far more complex. Besides the well-known historical struggle for land reform, the anthropologist portrays a contradictory place where murderers and victims rub shoulders:

In Colombia, the heterogeneity of the category of displaced persons reflects the character of the violence itself. Among them can be found *ex-guerrilleros* as well as paramilitaries and their sympathisers, both sides still occasionally active in urban groups; criminals fleeing their former accomplices and ‘social cleansing’ militias who have been temporarily recruited from criminal elements; peasants terrified by news of the arrival of guerrilla war, who have abandoned house and land, and those who have fled the repression of the army because they gave in to the brutal orders of the drug traffickers to grow coca on their fields.<sup>42</sup>

It does not help to think of Colombia as a country that has *violencia* as its unifying myth. As suggested by Marco Palacios, ‘We can understand this chaotic hodgepodge only by investigating what goes on in local societies’. The historian ended his book having to admit ‘the impossibility of a military solution to the conflict’, ‘even under the auspices of the US-sponsored Plan Colombia’.<sup>43</sup>

Nevertheless, Colombia continues to be trapped in a multifaceted conflict. The number of internally displaced persons has increased from 2004 to 2009 by an average of 250,000 people per year. According to the 2010 UNHCR country operations profile, there were 3,303,979 IDP in Colombia.<sup>44</sup> The situation is at its worst in rural areas where the conflict has shifted towards the frontiers, mainly: Putumayo and Nariño, near Ecuador; Catatumbo, near Venezuela; and Chocó, near Panama. According to official figures of

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<sup>41</sup> Marco Palacios, *Between Legitimacy and Violence: A History of Colombia (1875-2002)* (Richard Stoller tr, Duke University Press 2006) 260.

<sup>42</sup> Agier (n 10) 31-32.

<sup>43</sup> Palacios (n 41) 267.

<sup>44</sup> Report of the National Government to the Constitutional, see Constitutional Court, Sentencia T-025/04

<<http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm>> accessed 29 August 2015.

30 June 2014, more than 5.7 million people have been internally displaced in Colombia since the start of recording official cumulative registration figures; more than 64,500 people were officially declared displaced during the first half of 2014 and were awaiting registration; the national Victims Unit officially registered almost 24,000 people.<sup>45</sup>

In this context, ethnic minorities have become increasingly vulnerable to violence and to the threat of displacement. During the period of 1996 to 2002, almost 1,000 indigenous individuals were victims of murder and around 13,000 displaced from their territories. During the same period in Colombia, 19,000 people were kidnapped, 6,000 were murdered in massacres, and 182,000 through violent murders. Those violent killings have affected at least 21 indigenous ethnic groups.<sup>46</sup> The 94 indigenous communities living in Colombia are vulnerable to the worst displacement crisis in the Americas. Due to the precarious situation of the Colombian Unified Registry System, it can be inferred that many displaced persons have not been registered and, therefore, are not part of the official statistics. In the decade of 1995 to 2005, indigenous groups represented two to three per cent of the total amount of displaced persons in Colombia. In 2009, Afro-Colombians and indigenous peoples estimated to have represented between 17 and 30 per cent of Colombian IDPs.<sup>47</sup>

Indigenous lands have become the scene of confrontation between armed guerrillas, paramilitary groups, and the army. Many circumstances have had a strong influence on this phenomenon, including the growing militarisation of the borders, where many native communities are located, and the expansion of the conflict

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<sup>45</sup> See UNHCR, 'Country Operations Profile—Colombia' (2015) <<http://www.unhcr.org/pages/49e492ad6.html>> accessed 29 August 2015.

<sup>46</sup> UNHCR country of origin information: <<http://www.acnur.org/t3/recursos/informacion-sobre-pais-de-origen/busqueda>> accessed 29 August 2015.

<sup>47</sup> *Comisión de Seguimiento a la Política Pública sobre el Desplazamiento Forzado, Garantizar la Observancia de los Derechos de la Población Desplazada* <[http://www.internaldisplacement.org/8025708F004CE90B/\(httpDocuments\)/73C67C3F2B667C88C12575E00041A054/\\$file/VOL\\_2\\_DH.pdf](http://www.internaldisplacement.org/8025708F004CE90B/(httpDocuments)/73C67C3F2B667C88C12575E00041A054/$file/VOL_2_DH.pdf)>; Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples 2009: Colombia* <[http://www.oei.es/pdf2/estado\\_mundial\\_minorias\\_unicf\\_2009.pdf](http://www.oei.es/pdf2/estado_mundial_minorias_unicf_2009.pdf)> accessed 22 December 2015.

towards the east side of the country.<sup>48</sup> The freedom to choose to remain in their places of origin under international human rights law has encouraged the indigenous peoples to create strategies for safeguarding their autonomy and authority, even in a situation of displacement. This objective stimulates these groups to establish themselves in neighbouring areas and in the interior. They retreat demographically and seek to protect themselves in what they call *zonas internas de asilo*.<sup>49</sup> In these 'internal asylum zones', the displaced people have an opportunity to continue to access their family, social authorities, as well as other members of their community who have not departed from their original land. This is a particular ethics of hospitality to resist the threat to dispossession.

Some displaced indigenous individuals migrate to the big cities, where they commonly suffer from poverty, drug addiction, criminality, or sexual abuse. For others, this forced migratory cycle will only end in neighbouring countries where they seek asylum. In this situation, a different legal regime applies to the international law of refugee status. According to the UNHCR, between 1994 and 2004, 45,792 Colombians sought asylum in Venezuela, Ecuador and Panama.<sup>50</sup> Mass displacements of indigenous peoples and their families were reported in 2009 and in 2010.<sup>51</sup>

The UN Office for the Coordination of Humanitarian Affairs (OCHA) reported that, on 10 October 2009, in rural areas of the township of Olaya Herrera, a group of approximately 940 Afro-Colombian and indigenous persons (Eperara Siapidara indigenous group) were forced to flee the region. Their flight was due to recurring violent confrontations between the national army and illegal

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<sup>48</sup> UNHCR Colombia, *Indigenous Displacement and Public Policies*, Report Presented at the Inter-American Human Rights Institute, on 17 May 2006, in San José de Costa Rica, for the Regional Specialized Consultation on Indigenous Migrations  
<<http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=t3/fileadmin/Documentos/BDL/2006/4553>> accessed 29 August 2015.

<sup>49</sup> *ibid.*

<sup>50</sup> *ibid.* 8.

<sup>51</sup> UNHCR, 'UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Colombia' (27 May 2010) HCR/EG/COL/10/2.

armed groups in the Pacific Coast department of Nariño.<sup>52</sup> On 12 March 2010, 209 indigenous and Afro-Colombians (40 women, 48 men and 121 children) in the rural area of Santa Barbara, Iscuandé Municipality (Pacific coast of Nariño Department) were forcibly displaced as a consequence of the arrival of approximately 300 men from an illegal armed group in the area.<sup>53</sup>

In 2004, on the 20<sup>th</sup> anniversary of the Cartagena Declaration, the Mexican Declaration and Plan of Action recognised the link between the internal displacement in Colombia and the search for asylum in other countries.<sup>54</sup> However, the situation of indigenous peoples in a refugee-like situation on the border between Colombia and Brazil is still a challenge. The extended Latin American refugee definition has an ambivalent effect: the traditional normative-discursive apparatus of refugee law offers the classic image of the refugee; however, a broader definition may not solve the fundamental problem of constructing a particular identity for the refugee. Besides, this particular identity is precisely where the problem of recognition resides, since it is still complex for indigenous persons to be recognised as refugees. In order to apply the extended refugee definition, the state demands a double performance from the indigenous subject in accordance with an image of the authentic indigenous refugee. They have to perform their indigeneity as if they were still colonial refugees. They should be able to embody at the same time the stereo-

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<sup>52</sup> UN World Food Programme, 'Colombia: Humanitarian Situation Report (2009)' (*Relief Web*, 21 Oct 2009) <<http://reliefweb.int/report/colombia/colombia-wfp-humanitarian-situation-report-21-oct-2009>> accessed 29 August 2015; OCHA, 'Weekly Humanitarian Report' <[http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/MUMA-7X32L3full\\_report.pdf/\\$File/full\\_report.pdf](http://www.reliefweb.int/rw/RWFiles2009.nsf/FilesByRWDocUnidFilename/MUMA-7X32L3full_report.pdf/$File/full_report.pdf)> accessed 29 August 2015; Karmen Ramírez Boscán, 'Displacement of the Wayuu' (*Colombia Reports*, 28 January 2009) <<http://colombiareports.com/opinion/107-human-rights/2708-displacement-of-the-wayuu-one-of-colombias-long-lasting-tragedies.html>> accessed 29 August 2015.

<sup>53</sup> OCHA, 'Weekly Humanitarian Bulletin' (Issue 1, 8-14 March 2010) <[http://reliefweb.int/rw/RWFiles2010.nsf/FilesByRWDocUnidFilename/MINE-83TRWF-full\\_report.pdf/\\$File/full\\_report.pdf](http://reliefweb.int/rw/RWFiles2010.nsf/FilesByRWDocUnidFilename/MINE-83TRWF-full_report.pdf/$File/full_report.pdf)> accessed 29 August 2015.

<sup>54</sup> OAS, Mexico Declaration and Plan of Action to Strengthen International Protection of Refugees in Latin America (16 November 2004) <[http://www.oas.org/dil/mexico\\_declaration\\_plan\\_of\\_action\\_16nov2004.pdf](http://www.oas.org/dil/mexico_declaration_plan_of_action_16nov2004.pdf)> accessed 22 December 2015.



typical image of the native inhabitant and the stereotypical image of the war refugee to benefit from international protection.

To be attentive to indigenous forced relocation, the recognition of these peoples' displacement encompasses multiple actions, such as legal and institutional recognition, recognition of indigenous organisations and authorities, and the building up of their active role aiming for long lasting solutions. Nevertheless, formulating a public policy of prevention, protection, and attention towards this forced displacement is difficult to achieve. The encounter with the stranger represents the genesis of Latin American states. But, a policy of hospitality for indigenous peoples has not been approached in any systematic manner. On one hand, the rhetoric regarding the issue still relies on a restrictive legal approach to the refugee identity; on the other, the discourse relies on liberal multiculturalism,<sup>55</sup> which in the end is not a practice of respect, but a practice of abandonment. It means that refugee law and UNHCR regional strategies are enabling competing discourses regarding the protection of indigenous persons in a refugee-like situation. It seems that hospitality could always be converted into hostility and neglect. Besides, to be recognised as a legal subject may not implicate an automatic protection response by the state, but an automatic dispossession of one's prior image of oneself and one's desubjection. To better understand this ambivalence we will now focus on the Brazilian asylum system.

## Refugee Protection Strategies in Brazil and the Limits of the Law of Refugee Status

On 16 November 1960, Brazil ratified the 1951 Convention on the Status of Refugees, removing the geographical reservation on 9 December 1989. Brazil ratified the 1967 Protocol on 7 April 1972 and withdrew its reservations to Articles 15-17 on 3 December 1990.<sup>56</sup>

Brazil played a leading role in the adoption of the 2014 Brazil Declaration and Plan of Action and the extended refugee definition

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<sup>55</sup> Povinelli (n 15) 153.

<sup>56</sup> See Luiz Paulo Teles Ferreira Barreto, *Refúgio no Brasil: a proteção brasileira aos refugiados e seu impacto nas Américas* (ACNUR 2010) 89.

has an important role in the refugee status determination criteria of the Brazilian refugee act and the practices of the National Committee for Refugees (CONARE).<sup>57</sup> Regardless of this adoption, the broader definition is not being applied to protect indigenous peoples in a refugee-like situation in Brazil.

Brazilian refugee law established CONARE as the government body accountable for decision-making and responsible for eligibility and policies to promote refugees' integration in Brazil, as well as the coordination of government support to UNHCR initiatives. Under the presidency of the Ministry of Justice, CONARE is composed of representatives from the Ministries of Foreign Affairs, Labour, Health, Education, the Federal Police, one representative of civil society (Caritas, a Catholic NGO dedicated to the assistance of refugees), along with UNHCR, which has a voice, but does not have voting privileges. The Federal Police is responsible for border control and migration issues. Any foreign citizen or stateless person wishing to submit a refugee claim must complete a declaration at any border entry point or at a Federal Police station located in all Federal capitals and main cities. Brazil is a Federal State, therefore administrative institutions may vary dependent upon location.

Migration legislation in Brazil is very restrictive due to out of date legislation enacted during the Cold War in the period of military rule in Brazil, and inspired by the doctrine of national security. Law 6815 from 1980,<sup>58</sup> conceived with a rather xenophobic focus, is called the 'Foreigners' Law' (not an immigration law), and bars possibilities for regular migration to Brazil if an employer is not supporting the application. Even provisions for family reunification are very restricted. With the end of the dictatorship, successive civilian governments had to issue amnesties to legalise the growing irregular immigrant population. The lack of means to legalise their stay on migratory grounds leads many migrants to submit false asylum claims to avoid deportation and remain in search of a better solution,

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<sup>57</sup> See CONARE's statistics and information regarding the Brazilian asylum policy: Ministério da Justiça, 'Lançada campanha de conscientização sobre refugiados' (19 August 2015) <<http://www.brasil.gov.br/cidadania-e-justica/2015/08/lancada-campanha-de-conscientizacao-sobre-refugiados-1>> accessed 29 August 2015.

<sup>58</sup> Law 6815 1980 <[http://www.planalto.gov.br/ccivil\\_03/leis/L6815.htm](http://www.planalto.gov.br/ccivil_03/leis/L6815.htm)> accessed 22 December 2015.

which has an impact on the number of rejected claims and creates stigmas about certain nationalities.

In the Northern region of the state of Amazonas, the UNHCR concluded a joint project with the Rio Negro Indigenous Federation (FOIRN),<sup>59</sup> to identify and assess the indigenous population of concern in the Alto Rio Negro region.

In the Alto Solimões region, in the southwest of the State of Amazonas, UNHCR concluded another agreement to conduct a detailed survey to identify measures and assess protection needs of the indigenous population of concern in a large area, approximately 800 km along the Amazon River. The security situation at the border between Colombia and Brazil has deteriorated due to drug related criminality connected to the Colombian conflict. This situation may affect the reception of asylum-seekers but does not prevent access to Brazilian territory.

In the Alto Rio Negro, bordering the Colombian province of Valpés, the perception of insecurity has lead the Colombian indigenous population surveyed by the UNHCR to hide from government authorities and to seek asylum and protection in sister communities in Brazil. Indigenous organisations in the area report attempts of forced recruitment among indigenous youth in the border zone. According to UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Colombia,

The continuing clashes between armed actors and the fluctuating territorial control by armed groups and narco-traffickers, including the illegal occupation of lands and the exploitation of natural resources in reservations, has resulted in human rights violations of indigenous persons and Afro-Colombians. Such violations include individual and mass murders, torture, forced disappearances, death threats and forced displacement. ... Furthermore, in areas that are utilized for large economic projects, such as mineral and oil explorations, agro-industrial developments or

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<sup>59</sup> UNHCR and FOIRN showed concern with the situation of indigenous persons on the border between Brazil and Colombia: 'ONU critica impunidade no norte da Amazônia' (*Instituto Percepções de Responsabilidade Social*, undated) <<http://www.percepcoes.org.br/noticias.asp?idnoticia=831>> accessed 29 August 2015.

hydro-electric installations, the indigenous communities are at serious risk of eviction and displacement.<sup>60</sup>

In light of the above, the UNHCR has considered that Afro-Colombians and indigenous peoples are at particular risk for a number of reasons, such as their actual or imputed political opinion, their nationality or race. The security situation at the border area may require special security measures or government action within the framework of a working plan for the registration, assistance, and protection of refugees in the Amazon region.<sup>61</sup>

Nevertheless, with the indigenous refugee populations scattered along an extensive and remote territory, the normal refugee status determination procedure does not seem viable. The government does not have the capacity or the intention to make special arrangements for this population of concern and therefore the onus is on the UNHCR to inform would-be asylum-seekers about the options available to them. Until such time, and as the population of asylum-seekers in the Amazon region reaches a sizeable number, negotiations will continue with the government to study other alternatives for granting registration and documentation to this population in a more expeditious manner.

So far, the procedure for refugee status determination in Brazil works as follows: asylum-seekers apply for refugee status with the Federal Police, which is in charge of migration procedures. With the completed declaration form and questionnaire, the law authorises the Federal Police to provide asylum-seekers and their families with a temporary residency permit. This provisional document authorises the asylum-seeker to remain on Brazilian territory until the final decision is reached on his or her request.

CONARE eligibility officers then interview the asylum-seeker. However, CONARE's interview missions are usually only organised whenever there is a reasonable number of asylum applicants in one location. When this does not happen, it is common practice to conduct interviews by telephone, which is a reason for concern due to possible misunderstandings, inaccurate assessments or lack of

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<sup>60</sup> UNHCR, 'UNHCR Eligibility Guidelines' (n 51).

<sup>61</sup> Maria Muller, 'Displaced Indigenous Peoples in the Colombian Border Regions', *New Issues in Refugee Research*, Research Paper No 263 (UNHCR October 2013) <<http://www.unhcr.org/52710bf39.pdf>> accessed 29 August 2015.

translators. In such cases, the law clearly formulates the permissible conditions for its own application. The selectivity of this operation does not benefit the most vulnerable persons: those that arrive in the country via small cities in border areas. This is precisely the case of displaced indigenous persons. Once again, they are bodies out of place, excluded from country of origin protection and unable to access the country of asylum's international protection regime. It seems that dispossession, desubjectivation, and abandonment exposes the hostile mode of relationship between indigenous persons and the nation-state.

As of 31 July 2010, Brazil had hosted 4,305 recognised refugees, from 75 different countries, of which Africans represent approximately 65 per cent, Angolans being around 39 per cent of the total refugee population, living mostly in the cities of Rio de Janeiro and São Paulo. The second and third largest groups of refugees were, respectively, Colombians (589 persons), and Congolese from the Democratic Republic of Congo (DRC) (431 persons).<sup>62</sup>

Brazil has experienced a dramatic increase in total asylum requests in the past few years, and yet foreigners make up only 0.8 per cent of its total population of more than 200 million people.<sup>63</sup> The country has become the main recipient of extraterritorial asylum claims in the Americas region. Over 29,000 people applied for asylum in 2014, while in 2010 the total number of asylum-seekers was 550.<sup>64</sup>

The accession of Colombia to the MERCOSUR's Residence Agreement has also had an impact in the regional context and in the way its internal conflict is perceived abroad. According to this agreement, Colombian nationals may apply for temporary residence in Brazil, and after two years, they will be able to request permanent residency. Since Colombia's accession to the MERCOSUR Residence Agreement, the vast majority of Colombians prefer to apply for

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<sup>62</sup> 'Mini Feature: Brazil' in (July 2010) 35 *Forced Migration Review* 45-49 <<http://www.fmreview.org/disability/FMR35.pdf>> accessed 29 August 2015.

<sup>63</sup> According to the Ministry of Justice there are around 2 million foreigners living in Brazil.

<sup>64</sup> Statistics are available at UNHCR Brazil's website: 'Dados sobre refúgio no Brasil' (ACNUR 2014) <<http://www.acnur.org/t3/portugues/recursos/estatisticas/dados-sobre-refugio-no-brasil>> accessed 29 August 2015.

residency in Brazil instead of asylum. Indeed, there was a decrease of 60 per cent in the number of asylum claims by Colombians between 2012 and 2014. This decrease stands in stark contrast to the general rise in the number of asylum claims in Brazil: the general number has increased 363 per cent within the same period.<sup>65</sup>

By mid-2015, the total number of recognised refugees in Brazil was 7,700 (25 per cent of whom are women). Recognised refugees come from 81 different countries, mostly from Syria, Colombia, Angola, and the DRC. There are 1,300 refugees from Colombia, 1,072 from Angola, and 829 from the DRC. For the first time in years, Syrian refugees have recently become the largest population, surpassing both Colombian and Angolan refugees.<sup>66</sup>

Surveys conducted in the Amazon region during 2006 and 2007 estimated that persons in a refugee-like situation feel they are invisible and many lack access to asylum procedures due to the remoteness of the areas in which they have settled.<sup>67</sup> This population consists mainly of indigenous peoples who have settled in sister communities from the same ethnic groups located on both sides of the borders, farmers settled along the rivers, and urban populations living in irregular migratory situations due to lack of information and fear of deportation. The estimated data is disturbing. According to the 2008 UNHCR Brazil Country Operations Plan, there were approximately 17,000 persons of concern in the Amazon region.<sup>68</sup> If there were a way to verify this situation, the whole profile of the UNHCR's operation in the country would change.

The reality of the forced displacements in the Amazon region demanded a special strategy to be implemented by the UNHCR for the protection of indigenous refugees. In the Colombian conflict, several factors determine that indigenous people are particularly at risk. Indigenous youth are forcibly recruited due to their knowledge of remote regions and their ability to survive in jungle areas. Their lands are sought after for the cultivation of illicit substances, guerrilla training, and rest.

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<sup>65</sup> *ibid.*

<sup>66</sup> *ibid.*

<sup>67</sup> UNHCR Brazil, *Country Operations Plan 2008-2009*  
<<http://www.unhcr.org/470609532.html>> accessed 29 August 2015.

<sup>68</sup> *ibid.*

Since 2002, with the failure of the last peace process and the renewed offensive from successive Colombian governments against irregular armed participants, persecuted agents retreated to jungle areas. This strategy increased the impact of the *Plan Colombia* throughout the Amazonian region. Movements from irregular armed groups caused the displacement of thousands of Colombians, and many of them sought refuge in the city of Leticia. The number of formal asylum-seekers increased 300 per cent from 2005 to 2009 and 40 per cent of asylum applications from Colombian citizens were submitted in the Amazon region of Brazil.<sup>69</sup>

Several UNHCR missions were conducted to evaluate and survey refugees in the Amazon Region. A mission to the high Solimões River was undertaken, researching along 1,000 km of the river to 10 townships, 3 indigenous communities, and 3 entry points along the border with Colombia. A survey was also conducted in Manaus throughout the city, which is the main destination for asylum-seekers in that region, along with two missions to Tabatinga and Leticia, and a mission to the Alto Rio Negro region.<sup>70</sup>

In their activities in the border town of Tabatinga, the Federal Police reported that about 400 Colombians cross the border every month and 200 hundred potential asylum-seekers return to Colombia. Leticia and Tabatinga are twin cities isolated from the rest of the territory of Colombia and Brazil.<sup>71</sup> No visa, passport, or other documents are required in order to cross the same urban area that is located partly within Colombia and Brazil.

Many IDP from Leticia live on the Brazilian side of the border, in Tabatinga, because they feel safer and avoid migrating further due to the high cost of displacement in the Amazon region, the uncertainty of displacement to a new country, and the existence of a language barrier. The actual number of refugees in a questionable situation of border displacement may reach thousands. Many of the internally displaced refuse or are afraid to register; under-notification is already a widespread phenomenon in Colombia. Officially, there are just 417 internally displaced people in Leticia. Nevertheless, over the last

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<sup>69</sup> UNHCR Brazil (n 67).

<sup>70</sup> *ibid.*

<sup>71</sup> Rebeca Steiman, 'A geografia das cidades de fronteira: um estudo de caso de Leticia (Colômbia) e Tabatinga (Brasil)' (Master thesis, UFRJ 2002) 30.

10 years the population of Leticia increased from 10,000 to around 40,000 inhabitants, which is the estimated number today.<sup>72</sup>

The situation in Colombia is causing a rise in the flow of Colombian citizens to Brazil. As of 2000, there had been no asylum claims logged in Tabatinga, when two families became the first to apply for asylum at that border post. In 2003, there were four applications, with a similar number in 2004. The following year, 2005, twelve claims were logged comprising almost fifty people.<sup>73</sup> Other UNHCR regional partners detected the presence of Colombians in the cities of Tefé, Santo Antônio do Içá, São Gabriel da Cachoeira, Coari and São Paulo de Olivença. Columbians can also be found living in the border cities of Atalaia do Norte and Benjamin Constant, which is a preferred location because it shares a border with Peru. It is highly probable that Colombians can also be detected in the cities along the 1,500 km of the lower and medium Solimões River as far as Manaus.

The intensification of the conflict in the jungles bordering the Amazonian provinces of Colombia has caused an intense displacement of indigenous populations to Brazil. Notable examples are the Tikuna communities. There are around 30,000 Tikunas in Brazil, 7,500 in Colombia, and 5,500 in Peru.<sup>74</sup> All speak the Tikuna language and are usually received by their sister communities. In two communities visited by UNHCR between Benjamin Constant and Tabatinga, the presence of 30 Colombian Tikuna families was detected, approximately comprising 300 people. 3,800 indigenous persons live in these two communities, almost 8 per cent of the total population. On the Peruvian side, in the community of *Estrecho*, the Pastoral ecclesiastic authorities also determined the presence of 39 families, approximately 400 people.

According to the Coordination of Indigenous Organisations of the Brazilian Amazon (COIAB), there are several indigenous groups

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<sup>72</sup> UNHCR Brazil (n 67).

<sup>73</sup> *ibid.*

<sup>74</sup> Roberto Cardoso de Oliveira, 'Viagem ao território Tükúna' in *Os diários e suas margens: viagem aos territórios Terêna e Tükúna* (Universidade de Brasília 2002) 271-338; João Pacheco Oliveira, 'Ação indigenista e utopia milenarista: as múltiplas faces de um processo de territorialização entre os Ticuna' in Bruce Albert (ed), *Pacificando o branco: cosmologias do contato no Norte-Amazônico* (UNESP 2002) 277-310.



that have sister communities on the Colombian side, including: Tukano, Cocama, Cocawa, Desana, Baniwa, Wanãna and Tariana.<sup>75</sup> Many are deeply concerned about forced recruitment of indigenous youth by irregular armed groups. If this trend is repeated along the border area, we might estimate that there are over a thousand Colombian indigenous refugees displaced along the Brazilian border.

UNHCR supported a survey conducted by the Rio Negro Indigenous Federation (FOIRN). The report confirmed preliminary investigations as to the presence of a significant number of indigenous refugees in the Amazon region. 81 refugee families were visited in one location, comprising approximately 405 people; all identify as coming from Colombia, many forcibly displaced by violence and in need of international protection. Surveys are still pending in at least three more border regions which may host other important groups.

Under international human rights law, indigenous groups in the Amazon region have the right of free movement across borders in their traditional areas of occupation.<sup>76</sup> Nevertheless, many are settling on the Brazilian side due to a well-founded fear of persecution in their areas of residence on the Colombian side. The customary right to freedom of movement, enjoyed in times of peace, ceases to exist in situations of conflict. Dispossessed indigenous groups who were displaced can no longer return to their places of origin due to conflict and must therefore consider taking advantage of the opportunity availed to them of the protection granted by acquiring refugee status, the same as other non-indigenous refugees. Indigenous refugees also require assistance as they suffer loss of property and cannot prepare for their escape, the same as non-indigenous refugees. They need protection against the danger of becoming stateless and they therefore need proper documentation. Indigenous persons also have to be protected from *refoulement* once they are settled in the asylum country. In order to enjoy social rights such as health care, education, housing, social programmes and social security, they need to have the appropriate legal status. But, this inclusion is precisely the prob-

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<sup>75</sup> COIAB website <<http://www.coiab.com.br/site/pagina/quem-somos/como-surgiu>> accessed 29 August 2015.

<sup>76</sup> International Labour Organization, Convention 169/1989 (Convention Concerning Indigenous and Tribal Peoples in Independent Countries) <[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169)> accessed 22 December 2015.

lem, since the consequence is losing one's mode of existence, or being exposed to the violent experience of desubjectivation. The encounter with the stranger is still a disturbing experience because the nation-state had to invent hospitality and to forget it.

## Conclusion

The Colombian government announced in 2012 that it would commence peace talks with the Revolutionary Armed Forces of Colombia to put an end to the conflict that has lasted nearly 50 years. However, evidence shows that conflict persists among demobilised armed groups, particularly in northern Colombia and this has led to widespread displacement.<sup>77</sup> It seems that the peace agreement is preceding the end of the conflict, which is a dangerous inconsistency.

Among the displaced, indigenous peoples continue to be disproportionately affected. For instance, military interventions in September 2012 prompted approximately 580 indigenous and non-indigenous people to flee from their homes in Nariño Department.<sup>78</sup> Though some have returned due to inadequate humanitarian assistance in their destination location, it is expected that security instability and landmine contamination will hinder full return. Similarly, military activity in Putumayo Department forced about 70 indigenous Siona members to flee their homes and seek safety in Ecuador.<sup>79</sup>

State responsibility and UNHCR protection policies should be consistent with article 14 of the Universal Declaration of Human Rights regarding the right to seek asylum, along with article 22(7) of the American Convention on Human Rights for the right to seek and to be granted asylum. According to the UN refugee agency, there is no contradiction between refugee status and indigenous rights. As a consequence of the internal armed conflict in Colombia, indigenous persons on the border between Colombia and Brazil *de facto* cannot enjoy their human right to freedom of movement across borders due to a well-founded fear of persecution, which is the defining element of refugee status.

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<sup>77</sup> Muller (n 61).

<sup>78</sup> *ibid.*

<sup>79</sup> *ibid.*

It is important to highlight that borders do not delineate indigenous territories. Quite the opposite, borders may cut through them. The way we now deal with asylum is already mediated by legal categories and only after we relate that to social facts. The fabrication of the refugee identity in Latin America helped to mould a broader definition to the legal term refugee. However, regional initiatives to respond to the Colombia situation are still on hold in Brazil and many displaced lives lack access to the international protection regime. In this context, indigenous persons in a refugee-like situation are literally bodies out of place who have been dispossessed. They are legal subjects politically excluded from the humanitarian protection regime by both the country of origin and the country of asylum. It is important to notice that indigenous persons usually lack the ability to articulate their condition using refugee law vocabulary. Therefore, their right to asylum and their rights in asylum are only theoretically and formally available, but in practice they experience desubjectivation. Besides, the official governmental narrative is focusing on the peace process, not solving the internal armed conflict in Colombia. Apart from that, MERCOSUR's residency agreement is helping to keep out of the spotlight the consequences of forced displacement across Colombian borders. In this context, the naked native bodies represent the original violence of the nation-state form. They must be out of their country of origin if they want to fit the refugee definition. When they succeed, refugee law appears to be able to give them a voice against persecution; however, practice has shown how difficult it is for indigenous persons to negotiate protection by the state. It is relevant to highlight that for indigenous peoples the most common agent of persecution is precisely represented by the state. The majority of persons of concern to UNHCR in the Amazon region are being excluded both from the legal confines of citizenship and refugee status. In this context, international refugee law could have several adverse effects. It constructs a false image of the refugee, which might not be compatible with the actual persons forced out of their original places; it also has the political function to re-affirm the nation-state by playing the traditional refugee recognition game. While the law recognises the authentic refugee, it helps to celebrate a particular kind of nation—a humanitarian and unified nation committed to refugee protection in a broader sense. In Brazil, this

multicultural tolerance in the end serves only to abandon indigenous persons to their own devices. The refugee protection strategy accommodates uniqueness instead of experiencing diversity.<sup>80</sup> The suffering of indigenous persons still echoes the violent encounter that precedes the nation-state form.

The refugee system is the result of the recognition by the international community of their own deviations, which cyclically produce wars, genocide and violence. Nation-states have established a legal system to protect the survivors of their own flaws. The framework of the system has a name: border.

As the case of indigenous persons in a refugee-like situation on the border between Colombia and Brazil demonstrates, the legal fiction of borders divides not only nations, but also languages, livelihoods, and connected populations. Humanity ends up fragmented into artificial sovereignties designed arbitrarily by political actors that simply reflect a correlation of geopolitical forces at certain historical moments.

The refugee system is marked by the stinginess of nations and has always been partial, not only geographically but also temporally. The system was amended in 1967 with the Protocol, and in 1969 and 1984 with regionally extended refugee definitions that continue to remain restrictive. In spite of this, complementary forms of protection today prevail over the traditional definition of refugee,<sup>81</sup> and indigenous peoples on the border between Colombia and Brazil still do not benefit from access to fair state protection. Furthermore, using the expression 'refugee-like situation' may appear helpful to describe the lack of access to the refugee protection regime. However, at the same time, it points out the disrespect of states towards their obligations under the 1951 Convention and under Brazilian refugee law.

Internally displaced populations continue to lack an international legal protection instrument; there are still environmental displacements, situations of severe poverty and relocations caused by

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<sup>80</sup> Valerie Kerruish and Jeannine Purdy, 'He "Look" Honest—Big White Thief' (1998) 4(1) *Law Text Culture* 146.

<sup>81</sup> Ruma Mandal, 'Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")' (UNHCR Department of International Protection, June 2005) PPLA/2005/02.

post-war devastation. Nevertheless, the human experience of being uprooted is the same for all forced migrants. Unfortunately, hospitality as a condition of possibility for the encounter has been forgotten. Maybe this situation can be interpreted as a symptom of a biopolitical context, where bodies out of place are inscribed in the domain of power. Managing the population or abandoning it will be a task that interests power.<sup>82</sup> Human mobility and the encounter with the stranger is now a security concern. As Costas Douzinas has shown, ‘The strategies of rejection adopted by the receiving community offer a vivid case study into the consequences of identifying someone as the terrifying absolute, total Other’.<sup>83</sup> For dispossessed indigenous persons, worse than being the image of the total Other is to be subjected to the violence of the border: violence without borders, violence beyond borders.<sup>84</sup>

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<sup>82</sup> Agamben (n 4). See also Michel Foucault, *Society Must be Defended* (David Macey tr, Penguin Books 2003) 243-244.

<sup>83</sup> Douzinas (n 17) 358.

<sup>84</sup> Balibar (n 8) 85.