

## 7. The displaced as victims of organised crime: Mexico and Colombia compared

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The status of ‘victim’ of human rights violations carries considerable moral, political and legal implications for the individual and society at large while the status of ‘displaced person’, even though it also implies loss of choice in relation to residence and mobility, is usually responded to from operational and legal standpoints. As a result, the confluence of both statuses in the same person gives rise to a number of interesting legal and operational questions regarding State duties towards his or her protection, particularly when the cause of displacement challenges long-held assumptions, such as the involvement of criminal groups. This chapter seeks to explore the interplay between victimhood and displacement caused by criminal groups through Mexico’s General Victims’ Law [*Ley General de Víctimas*]<sup>1</sup> while drawing parallels from Colombia’s experience with individuals displaced by criminal bands (the so-called BACRIM or *bandas criminales*), through its Victims’ Law [*Ley de Víctimas*].<sup>2</sup>

### The status of ‘victim’

Distinct and important factors fall within the wider issue of victimhood. Although this chapter focuses on the legal issues, these are permeated by extraneous factors, as in each society the identification and construction of the ‘victim’ concept is a social process reflecting its particularities.<sup>3</sup> At the same time, this socially constructed image, which often corresponds to the concept of a ‘pure victim’ deserving of protection and assistance, rarely reflects the

- 1 *Ley General de Víctimas*, Diario Oficial de la Federación, 9 Jan. 2013, amended on 3 May 2013.
- 2 *Ley 1148* of 2011, Por la cual se Dictan Medidas de Atención, Asistencia y Reparación Integral a las Víctimas del Conflicto Armado Interno y se Dictan otras Disposiciones, Diario Oficial no. 48.096, 10 June 2011, as last amended through Presidential Decree 4158 of 2011, Diario Oficial no. 4.242 (3 Nov. 2011). A concise overview of the law is available in English in L. Forero-Niño, ‘Colombia’s historic victims and land restitution law’, *Law and Business Review of the Americas*, 18 (2012), 97.
- 3 For more information on this discussion, see the excellent paper in A.A. Marín, ‘Teoría crítica y derechos humanos: Hacia un concepto crítico de víctima’, *Nómadas*, 36 (2012).

N. Rodríguez Serna and J.-F. Durieux, ‘The displaced as victims of organised crime: Mexico and Colombia compared’, in D.J. Cantor and N. Rodríguez Serna (eds.), *The New Refugees: Crime and Forced Displacement in Latin America* (University of London, 2016), pp. 109–27

complexity and diversity of victim-perpetrator relationships during situations of conflict and strife. As a consequence, defining victimhood is an inherently complex and contentious process.<sup>4</sup>

The international legal regime, which is not impervious to these tensions,<sup>5</sup> has developed two core documents on victims' rights, namely: the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;<sup>6</sup> and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>7</sup> Despite their non-binding nature, these instruments have been central to the recognition of the special protection needs of victims of human rights violations and have influenced both domestic and international responses to this phenomenon.<sup>8</sup> The Inter-American Human Rights regime, applicable in equal measure to Mexico and Colombia, has also made considerable strides in pushing the borders of victim protection in the Americas. Its specific input on this issue will be studied in the following sections.

## Context

In Mexico, internal displacement is caused mainly by violence between cartels, between cartel and government forces, and by the intimidation, land appropriation and violence inflicted directly and indirectly on the remaining population by these groups.<sup>9</sup> As the situation of internal displacement has not been publicly acknowledged by the higher echelons of the federal government, precise data on its magnitude and the trends leading to it is fragmented and often imprecise. As individuals are displaced frequently but in small numbers per incident, and they join the rest of the country's considerable internal

4 E. Bouris, *Complex Political Victims* (Boulder, CO: Kumarian Press, 2007) and C. Hoyle and R. Young (eds.), *New Visions of Crime Victims* (Oxford: Hart 2002).

5 K. Bergtora Sandvik, 'The politics and possibilities of victim-making in international law', *Revista da Faculdade de Direito do Sul de Minas*, 27 (2012), 237.

6 UNGA, Resolution 40/34: 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' (1985) UN Doc A/RES/40/34.

7 UNGA, Resolution 60/147: 'Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law' (2006) UN Doc A/RES/60/147.

8 M. Cherif Bassiouni, 'International recognition of victims' rights', *Human Rights Law Review*, vol. 6, no. 2 (2006), p. 203; see further UN Commission on Human Rights, 'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, final report submitted by Mr Theo van Boven, Special Rapporteur' (1993) UN Doc E/CN.4/Sub.2/1993/8.

9 For a detailed overview of the situation in Mexico, see IDMC/NRC, 'Forced displacement linked to transnational organised crime in Mexico' (2012).

migratory flows, their particular situation remains invisible in most cases.<sup>10</sup> However, academia and civil society organisations have sought to document this phenomenon, estimating a total number of at least 281,400 internally displaced persons (IDPs) in 2014.<sup>11</sup>

Although other estimates vary widely, these measurements appear to be quite conservative in light of particular periods of violence in the last decade. The Inter-American Commission on Human Rights has published a report on migration in Mexico and noted the difficulties in measuring internal displacement there, as well as harshly criticising the State for failing to enact legislation and take measures to address it directly.<sup>12</sup> This opinion is shared by experts in the country,<sup>13</sup> including one of the ministers (magistrates) of the Mexican Supreme Court.<sup>14</sup> Despite this lack of regulation at the federal level, individual states have designed IDP assistance systems of their own, such as Chiapas,<sup>15</sup> or have discussed them, as in the case of Sinaloa.<sup>16</sup>

In Colombia, understanding the agents behind internal displacement is even more complicated. The government has been engaged in a long-running, non-international armed conflict with the Fuerzas Armadas Revolucionarias de Colombia (FARC), which also clashed occasionally with other guerrilla groups and with paramilitary forces created by landlords and local politicians to defend themselves against guerrilla attacks. In time, more complex patterns of cooperation and confrontation between these actors emerged, depending

10 S. Reynolds, 'Las víctimas ocultas de México', Refugees International Field Report, 2 July 2014.

11 Internal Displacement Monitoring Centre, 'Global overview 2015: people internally displaced by conflict and violence' (2015) and Comisión Mexicana de Defensa y Promoción de los Derechos Humanos (CMDPDH), 'En México 281 mil 418 personas son víctimas del desplazamiento interno forzado por la violencia', 26 Feb. 2015, available at <http://cmdpdh.org/2015/02/en-mexico-281-mil-418-personas-son-victimas-del-desplazamiento-interno-forzado-por-la-violencia/> (accessed 15 March 2016).

12 Inter-American Commission on Human Rights, 'Human rights of migrants and other persons in the context of human mobility in Mexico', OEA/Ser.L/V/II Doc. 48/13 (2013), pp. 102–5.

13 J.A. Guevara Bermúdez and M. Peguero, 'La Comisión de Atención a Víctimas y el desplazamiento interno forzado', 1 Dec. 2014, *Animal Político*, available at [www.animalpolitico.com/blogueros-verdad-justicia-reparacion/2014/12/01/la-comision-de-atencion-victimas-y-el-desplazamiento-interno-forzado/](http://www.animalpolitico.com/blogueros-verdad-justicia-reparacion/2014/12/01/la-comision-de-atencion-victimas-y-el-desplazamiento-interno-forzado/) (accessed 15 March 2016).

14 J.R. Cossío Díaz, 'Public policy to address displacement in Mexico', *Forced Migration Review*, 48 (2014), 79.

15 *Ley para la Prevención y Atención del Desplazamiento Interno en el Estado de Chiapas*, Decreto Número 158, Periódico Oficial del Estado Número 355, 22 Feb. 2012.

16 Senador Zoé Robledo Aburto, 'Proposición con Punto de Acuerdo por el que se Exhorta a la Secretaría de Gobernación y al Gobierno del Estado de Sinaloa a Impulsar Políticas para Atender a los Desplazados Internos Forzados en ese Estado, así como el Caso de la Defensora Esperanza Hernández', 28 April 2015.

on local circumstances and on their power to corrupt and invade government institutions.

Eventually the largest paramilitary group, the Autodefensas Unidas de Colombia (AUC) negotiated a demobilisation agreement with the government and laid down its arms, pledging to collaborate in truth-seeking and reparation mechanisms in exchange for reduced sentences for its members. However, not all paramilitary cells demobilised, and the sudden disappearance of some of them led to the creation and expansion of neo-paramilitary groups, which in most instances maintain the personnel, structure and business activities of their forebears.

Dubbed BACRIM by the government (see opening paragraph), which placed them at the same level as other forms of organised crime, they were effectively excluded from the application of international humanitarian law and all other regulations relating to the armed conflict. This included the reparations for its victims provided by the Victims' Law, despite the fact that they were and often still are pursued by military forces. Through this evolution of the armed conflict, the magnitude of internal displacement in Colombia is second only to war-torn Syria, reaching 6,044,200 IDPs in 2014<sup>17</sup> and with some sources attributing the majority of massive new displacements to these post-demobilisation groups.<sup>18</sup> The consequences of this decision vis-à-vis victims' rights will be explored in the next section.

## **The victims' laws**

In contrast with the process in Colombia, which has been several years in the making, the discussion in Mexico is largely forward-looking. In its current version, which incorporates amendments passed in May 2013, its victims' law has been in force for just over two years. In fact, the government works constantly to develop the parameters and operational structures so that the goals set out in the law can materialise. Within a National System of Care for Victims, chaired by the President of the Republic, these implementing tools include an Executive Commission for Victims' Care (Comisión Ejecutiva de Atención a Víctimas – CEAV) that, among other duties, manages a National Registry of Victims [*Registro*], a special fund [Fondo] for relief, assistance and reparations, and an office to provide legal advice to victims. To complicate matters further, some of these federal tools and institutions are mirrored in diverse forms at the state level.

17 IDMC 2015.

18 See chapter 5 by Gabriel Rojas.

As noted above, the value of a parallel between the Mexican and Colombian regulations is limited by the fact that the ‘armed conflict’ context is absent from Mexico’s analysis of the problem at hand. However, the fact that BACRIM are considered criminal and not armed groups paves the way for meaningful parallels. If it is true – and a challenge – that the Colombian victims’ law introduces traditional ingredients of transitional justice before the armed conflict has ended,<sup>19</sup> the case of Mexico arguably presents a model of transitional justice outside any acknowledgement that a conflict exists.

The original goal when the legislative proposal was presented was to aggressively repress organised crime and attend to its victims’ needs; the ‘war on drugs’ rhetoric never implied that the laws of war were to apply, even when this ‘war’ was often fought with military units on the frontline. The original proposal for a victims’ law identified a number of crimes generally attributed to cartel and connected gang members, such as murder, torture, kidnapping, disappearance, extortion and assault, and offered victims of those crimes monetary compensation in cases where the perpetrator could not be found or convicted, as well as symbolic recognition of their status as victims.

The law that was eventually adopted, under the next presidential administration, takes a much broader approach to the concept of ‘victim’, victims’ rights, and to the State’s responsibilities. This results from continued advocacy by civil society and human rights groups, who insisted that the ‘true’ ailments of the Mexican system be recognised, including not only abuse by State and non-State actors in the ‘war on drugs’, but also impunity and corruption.

In fact, the law’s scope is so wide that it transcends the context within which it was conceived. Not only is there no reference to the ‘war on drugs’, but it is not even clear that the victims of organised crime – as opposed to crime *tout court* – are meant to be the prime beneficiaries. It is only in the opening paragraph of the explanatory memorandum that mention is made in passing to the ‘increasing public insecurity and expansion of organised crime’ the country is undergoing. In contrast, the Colombian law, rejecting more comprehensive standards in previous legislation,<sup>20</sup> strove to draw the boundaries of victimhood carefully, defining victims for its own purposes as those adversely affected by the armed conflict since 1 January 1985.

The Mexican victim law’s objective is, consequently, set as broadly as possible, namely ‘to recognize and guarantee the rights of victims of crime and human

19 R. Uprimny Yepes, M.P. Saffón Sanín, C. Botero Marino and E. Restrepo Saldarriaga, *¿Justicia transicional sin transición? Verdad, justicia y reparación para Colombia* (DeJuSticia 2006); J. García-Godos and K. Andreas O. Lid, ‘Transitional justice and victims’ rights before the end of a conflict: the unusual case of Colombia’, *Journal of Latin American Studies*, 42 (2010), 487; and N. Summers, ‘Colombia’s victims’ law: transitional justice in a time of violence conflict?’, *Harvard Human Rights Journal*, 25 (2012), 219.

20 Such as those in *Leyes* 387 of 1997, 418 of 1997, 548 of 1999, 782 of 2002, 1421 of 2010.

rights violations'. Crime [*delito*] is defined as any 'act or omission sanctioned by criminal law', whereas 'human rights violation' is 'any act or omission that may affect the human rights recognized in the Constitution or in international treaties'.<sup>21</sup> In this last case, the agent must be either a government official, a private person exercising public functions, or a private person induced or authorised by an official or acting with his or her consent or cooperation.<sup>22</sup> In regard to this classification, it is also important to note that the Inter-American Court has stated that violations to freedom of movement can also occur when the State does not provide the means to ensure its exercise,<sup>23</sup> even when threats to this exercise come from non-State actors.<sup>24</sup> Likewise, the Court has also highlighted the State's duty to take measures to prevent displacement<sup>25</sup> when there are indications that it could occur.<sup>26</sup>

### *The status of victim under national legislation*

There are thus two opposites: a broad definition of victim in Mexico and a restrictive definition in Colombia. Both approaches are complicated. Creating too wide a definition risks including even individuals who are victims of petty crimes and introduces insurmountable budgetary and institutional challenges, while too narrow a definition raises issues of arbitrariness. Therefore, it is probably impossible to achieve 'fairness' in every case, so perhaps 'reasonableness' is what definitions should aim for.

In this respect, although the Mexican law sets no time limit for awarding compensation for past violations or crimes, the artificial limit of 1985 set by the Colombian law seems far too restrictive in the context of a conflict that has lasted over half a century. The Colombian Constitutional Court has, however, defended this limitation, stating that in setting these restrictions Congress had reasonably and proportionately exercised its authority to establish a *particular group* of victims that would benefit from a *special* set of measures. This did not imply that individuals falling outside the scope of the law were not victims

21 Article 6.

22 Ibid.

23 *Case of Valle Jaramillo et al. v. Colombia* (merits, reparations and costs), IACtHR series C no. 192 (27 Nov. 2008), para. 139; *Case of the Río Negro Massacres v. Guatemala* (preliminary objections, merits, reparations and costs), IACtHR series C no. 250, 4 Sept. 2012, para. 175 and *Case of Manuel Cepeda Vargas v. Colombia* (Merits, reparation and costs), IACtHR series C no. 213 (26 May 2010), para. 197.

24 *Case of the Barrios Family v. Venezuela* (merits, reparations and costs), IACtHR series C no. 237 (24 Nov. 2011), para. 162; *Case of Lysias Fleury et al. v. Haiti* (merits and reparations), IACtHR series C no. 236 (23 Nov. 2011), para. 93 and *Cepeda Vargas* para. 197.

25 *Case of the Human Rights Defender et al. v. Guatemala* (preliminary objections, merits, reparations and costs), IACtHR series C no. 284 (28 Aug. 2014), para. 167.

26 *Case of Castillo González et al. v. Venezuela* (merits), IACtHR series C no. 256, 27 Nov. 2012, para. 131.

retaining a right to pursue reparations through ordinary channels.<sup>27</sup> Whereas it is indeed true that ordinary justice mechanisms exist for this purpose, their ability to respond effectively to the enormous number of victims must be seen against the backdrop of the country's systematic failure to ensure consistent and efficient access to justice.<sup>28</sup>

Having established these general boundaries, it is important to understand if and how the displaced fit within these concepts. In the case of Mexico and its broad definition of 'victim of crime or human rights violation', it appears that the law offers several 'entry points' – some relatively straightforward, others requiring a more creative interpretation. The law defines a 'direct victim' as a person who has suffered economic, physical, mental or emotional harm/impairment, or any endangerment of or damage to his or her legal assets or rights in general, as a consequence of a crime or violations of his or her human rights having been committed, as recognised in the constitution and in those international treaties to which Mexico is a party. 'Indirect victims' are their family members and dependants while 'potential victims' are those who are victimised because they have assisted a victim or attempted to prevent or stop the crime or violation.

What the law does not specify is whether such 'potential victims' would also be entitled to reparation in cases where their protection requires them to be evacuated in some way. This would arguably be a 'displacement' scenario that could be extrapolated to the probably more common situation when persons under threat flee preemptively before the feared encounter happens. In this context, although the question of whether this sort of flight should be recompensed remains open, the CEAV has recently developed guidelines to pay for the transportation costs of victims when they face a risk to their life or integrity, or need to access the authorities to file a complaint or receive treatment.<sup>29</sup>

27 Corte Constitucional, C-253A/12 (2012).

28 If smaller groups of victims of events that happened many years ago failed to receive justice at the domestic level (see the Inter-American Court's judgement on the 1985 Palacio de Justicia attack: *Case of Rodríguez Vera et al. (Persons Disappeared from the Palace of Justice) v. Colombia* (preliminary objections, merits, reparations and costs), IACtHR series C no. 287, 14 Nov. 2014, is it reasonable to expect swift access to justice and reparation for the millions of victims of the armed conflict? A similar problem has occurred in executing the justice mechanism for victims of the original paramilitary groups during the implementation of the *Justicia y Paz* [Justice and Peace] law, whereby perpetrator conviction and the reparation made have benefited only a minuscule percentage of all cases (International Crisis Group, 'Transitional justice and Colombia's peace talks', Latin America Report no. 49 (2013), pp. 3–6).

29 CEAV, 'Acuerdo del Pleno por el que se instruye a los titulares de las unidades administrativas de la asesoría jurídica federal, de administración y finanzas y de atención inmediata y primer contacto de la Comisión Ejecutiva de Atención a Víctimas para brindar a las víctimas los apoyos necesarios para su traslado', 18 Sept. 2014.

A similar categorisation between different classes of victims was also included in the Colombian law and its regulatory decrees, with the additional concept of a 'collective victim' in the case of indigenous, Afro-descendant and Roma groups.<sup>30</sup> A parallel concept of collective victims exists in the Mexican law,<sup>31</sup> but it remains unregulated and vague, and in that respect a local adaptation of the Colombian example might help to enhance protection to Mexican indigenous communities that the cartels have expelled from their territories in order to appropriate the land.<sup>32</sup>

### *The displaced as victims of human rights violations*

Beyond these potential 'entry points' in the general definition of 'victim' in the existing legislation, it is appropriate to consider the specific type and characteristics of victimhood that displacement can entail. This section considers three approaches to displacement: 1) as a human rights violation in and of itself; 2) as an aggravating circumstance; and 3) as a consequential violation.

### Displacement as an independent human rights violation

Displacement per se is not a crime under Mexican law, although in some cases it may fit within the wider definition of 'threat' or 'extortion', and as such the 'crime' entry point cannot be used to include the displaced within the law's parameters. This is likely the reason why the CEAV has been outspoken in publicly recognising forced displacement and calling for its criminalisation,<sup>33</sup> as that would offer a straightforward entry point for the displaced into the reparation programme. However desirable this might be in practice, the human rights dimensions of displacement should not be ignored, as they are not only central to the dignity of its victims but also reflect the State's international obligations.

Beyond the criminal perspective, it is clear that displacement is a violation of the connected human rights to choice of residence and freedom of movement contained both in the constitution<sup>34</sup> and in international treaties to which

30 Decrees 4633 of 2011, 4635 of 2011 and 5634 of 2011, respectively.

31 Article 4.

32 D.J. Cantor, 'The new wave: forced displacement caused by organized crime in Central America and Mexico', *Refugee Survey Quarterly*, 33 (2014), 34; and Prisma, *Pueblos indígenas y comunidades rurales defendiendo derechos territoriales* (2014).

33 Q. Morelos, 'Piden tipificar como delito el desplazamiento forzado por violencia', 8 July 2014, available at [www.jornada.unam.mx/ultimas/2014/07/17/victimas-piden-tipificar-como-delito-el-desplazamiento-forzado-frente-a-violencia-en-el-pais-4683.html](http://www.jornada.unam.mx/ultimas/2014/07/17/victimas-piden-tipificar-como-delito-el-desplazamiento-forzado-frente-a-violencia-en-el-pais-4683.html) (accessed 16 March 2016).

34 Constitución Política de los Estados Unidos Mexicanos, Diario Oficial de la Federación, Diario Oficial de la Federación 5 Feb. 1917 (amended), Article 11.



Mexico is a party.<sup>35</sup> These imply among other things the right to choose the place of residence within one's country and not to be forcibly displaced within or from it.<sup>36</sup> Likewise, involuntary exile may implicate the State in a violation of the right to choice of residence, as the Human Rights Committee has found on other occasions.<sup>37</sup> A 'right not to be displaced' can thus be read into the right to freedom of movement and residence in both the universal and Inter-American human rights regimes.

This stand-alone approach has long been standard in Colombia. The rights to freedom of movement and choice of residence are also enshrined in the constitution,<sup>38</sup> and IDPs were recognised as such in Law 387 of 1997, with an extensive definition covering different causes for said displacement that is, importantly, not limited to armed conflict, and recognising a 'right not to be forcibly displaced'.<sup>39</sup> This legislative process interacted substantially with the Constitutional Court's 2004 landmark T-025/04 judgment, where it declared the massive level of forced displacement an 'unconstitutional state of affairs' and ordered strong State actions to protect this population, an order which it has overseen periodically ever since.

### Displacement as an aggravating circumstance

Even if displacement is not regarded as a violation or crime in and by itself, it may be found to aggravate the situation of individuals who faced a different violation, such as torture or assassination attempts, and subsequently fled. This position has been particularly common in the Inter-American Court's jurisprudence in cases of transboundary displacement.<sup>40</sup>

35 Article 22 of the Inter-American Convention and Article 12.1 of the International Covenant of Civil and Political Rights (adopted 16 Dec. 1966, entered into force 23 March 1976) 999 UNTS 171. See further Human Rights Committee, 'General Comment 27: Freedom of Movement' (Art.12), UN Doc CCPR/C/21/Rev.1/Add.9 (1999). It should be noted further that Article 1 of the Mexican Constitution established that human rights dispositions should be interpreted in accordance with the constitution and international treaties and through the *pro persona* principle.

36 *Case of Ricardo Canese v. Paraguay* (merits, reparations and costs), IACtHR series C no. 111, 31 Aug. 2004, para. 115; *Case of the Moiwana Community v. Suriname* (preliminary objections, merits, reparations and costs), IACtHR series C no. 124, 15 June 2005, para. 110; *Case of the Mapiripán Massacre v. Colombia* (merits, reparations and costs), IACtHR series C no. 134 (15 Sept. 2005), para. 188; *Case of the Afro-Descendant Communities Displaced from the Cacarcica River Basin (Operation Genesis) v. Colombia* (preliminary objections, merits, reparations and costs), IACtHR series C no. 270, 20 Nov. 2013, para. 219 and *Human Rights Defender* para. 165.

37 Human Rights Committee, *Jiménez Vaca v. Colombia*, Communication no. 859/1999, 25 March 2002, UN Doc CCPR/C/74/D/859/1999 and HRC General Comment no. 27.

38 Constitución Política de 1991 (1991), Article 24.

39 Article 2.

40 *Case of Juan Humberto Sánchez v. Honduras* (preliminary objection, merits, reparations and costs), IACtHR series C no. 99, 7 June 2003, paras. 127 and 132; *Case of Maritza Urrutia v.*

The list of ‘general victims’ rights’ in Article 7 of the law suggests that such an approach is possible in the case of displaced Mexicans, since it includes both the right to family reunification and the right ‘to return to one’s place of origin or to relocate in conditions of voluntariness, safety and dignity’. Another relevant reference is to be found in the principles contained in Article 5 through the principle of ‘differential and specialised focus’, according to which certain harms require specialised care in response to the peculiarities and vulnerabilities of the victims.

In application of this principle, all competent authorities are required to offer special guarantees and protection measures to categories of people who are exposed to a greater risk of violations, including migrants and IDPs. In fact, Article 38 explicitly directs the National Family Protection System (Sistema Nacional para el Desarrollo Integral de la Familia – DIF) and its local counterparts to provide shelter to individuals who are displaced from their place of residence for as long as is needed for them to overcome the emergency and return to their homes freely and in safety and dignity. These references are in fact the only instances in which displacement is included in the law itself.

### Displacement as a consequential violation

In July 2014 the CEAV adopted a third approach, which appears to be a middle path between the previous two. This approach is laid out in a recognition that displacement is an ‘additional victimising fact beyond that which originally caused the inscription of the individual as victim’.<sup>41</sup> In this groundbreaking document, the Commission further noted that internal displacement is a complex phenomenon that has three main effects: 1) a break with life before displacement, causing harm to personal and family life; 2) a loss or endangerment of access to the rights that constitute a dignified life; and 3)

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*Guatemala* (merits, reparations and costs), IACtHR series C no. 103, 27 Nov. 2003, paras. 159–60; *Case of Chitay Nech et al. v. Guatemala* (preliminary objections, merits, reparations and costs), IACtHR series C no. 212, 25 May 2010, para. 278; *Case of Barbani Duarte et al. v. Uruguay* (merits, reparations and costs), IACtHR series C no. 234, 13 Oct. 2011, paras. 248–9; *Case of García Lucero et al. v. Chile* (preliminary objections, merits and reparations), IACtHR series C no. 267, 28 Aug. 2013; *Case of Expelled Dominicans and Haitians v. Dominican Republic* (preliminary objections, merits, reparations and costs), IACtHR series C no. 282, 28 Aug. 2014, paras. 479–82; *Moiwana* paras. 195–6; *Castillo González v. Venezuela* para. 131; *Fleury* para. 137–46.

41 CEAV, ‘Acuerdo del pleno por el que se reconoce que la situación de desplazamiento interno focalizado por actos de violencia debe ser, primero, reconocida por la Comisión Ejecutiva de Atención a Víctimas como un hecho victimizante adicional al que originalmente haya motivado la solicitud de inscripción de una persona en el Registro Nacional de Víctimas, y, segundo, atendida con un enfoque diferencial y especializado’, 29 July 2014.

the occurrence of situations of special vulnerability that place victims at risk of further violations of their rights.<sup>42</sup>

Interestingly, the discussions between commissioners during the formulation and approval of the recognition document are also included in its minutes, shedding some light upon the evolution and theoretical construction of this response to displacement. One commissioner's main objection was that since Mexico was not undergoing an armed conflict, the UN Guiding Principles on Internal Displacement<sup>43</sup> were not applicable, and as a result the situation in Mexico could not be characterised as internal displacement. This position was turned down by the majority, but the discussion itself is important for what it represents in the process of identifying internal displacement in the country.

Firstly, the fact that the discussion hinged around what is or is not included in the Guiding Principles recognises their importance and is in itself a positive development, as it reflects the Inter-American Court's position on the Guiding Principles' centrality in interpreting States' international obligations in displacement situations,<sup>44</sup> particularly Article 22 of the Inter-American Convention.<sup>45</sup> At the same time, a clear thread is revealed between these international standards and the construction of a national response to the issue. Beyond this, the CEAV's final position on whether the Principles were applicable to displacement patterns in Mexico does indeed reflect international standards, as both the Principles' authoritative annotations<sup>46</sup> and the interpretative labour of the Inter-American Commission<sup>47</sup> underpin the fact that using the term 'in particular' when listing situations in their preamble that cause internal displacement indicates that it is not a closed list but rather a list of examples of such scenarios. As such, the application of the *ejusdem generis* rule indicates that other situations sharing common characteristics with

42 The issue of the complex nature of displacement and how it implies the creation of this special situation of vulnerability to further violations has been highlighted by the Inter-American Court. *Case of the Ituango Massacres v. Colombia* (preliminary objections, merits, reparations and costs), IACtHR series C no. 148, 1 July 2006, para. 209 and *Case of the Massacres of El Mozote and Nearby Places v. El Salvador* (merits, reparations and costs), IACtHR series C no. 252, 25 Oct. 2012, para. 195.

43 United Nations Guiding Principles on Internal Displacements (1998) UN Doc. E/CN.4/1998/53/Add.2, 11 Feb.

44 See, inter alia, *Moiwana* para. 111; *Chitay Nech* para. 140; *Ituango* para. 209. See further *Case of the Santo Domingo Massacre v. Colombia* (preliminary objections and reparations), IACtHR Series C no. 259, 30 Nov. 2012, paras. 255–82.

45 *Santo Domingo Massacre* para. 256; *Río Negro Massacres* para. 173; *Moiwana* para. 111 and *Chitay Nech* para. 140.

46 W. Kälin, *Guiding principles on internal displacement: annotations* (Washington, DC: Brookings Institution Press, 2008), p. 4.

47 Inter-American Commission on Human Rights, 'Human rights of migrants and other persons in the context of human mobility in Mexico', OEA/Ser.L/V/II Doc. 48/13 (2013), 36.

those described in this list should also be covered by its provisions, including forms of violence that cannot be characterised as armed conflict.

Although this development has not been followed by a formal acknowledgment of internal displacement by the higher branches of the federal government, this breakthrough, as well as cases currently before the Inter-American Commission,<sup>48</sup> make ignoring internal displacement increasingly untenable for the State as a whole. On the other hand, the CEAV's position can also be a tacit technical recognition of internal displacement, avoiding a politically sensitive high-level declaration to that effect.

Despite the considerable advances reflected in this document, there is a considerable flaw in its approach. Since displacement is considered a *consequential* 'victimising fact', a displaced person would not be able to gain recognition as a victim if a previous victimising fact did not exist. For instance, individuals who flee preemptively due to fear of suffering the side effects of violence in their home areas could be excluded from the benefits of the law, as they would not yet have been victimised. This would create a considerable protection gap, which should have been foreseen. Experience in the parallel field of refugee law, for instance, highlights the preventive aspects of displacement itself, with the 1951 Convention<sup>49</sup> recognising the protection needs of individuals who flee due to a 'well-founded fear' of persecution and not only those fleeing *actual* past persecution. This underscores the importance of acknowledging that individuals need not and should not be expected to wait until they have been harmed before fleeing to seek protection elsewhere.

## **Displacement as a source of particular protection needs**

Beyond the definitional aspects of the victim/displaced debate, the particular situation of displaced individuals also affects the implementation of Mexico's Law in other respects.

Firstly, the circumstance of displacement should be recognised as complicating the victim's access to protection and assistance measures, starting with registration itself. Had the possibility for IDPs to be registered as such been in place since the beginning of Mexico's 'war on drugs', this documentation would constitute a significant input into the new national registry. Regrettably, no such registry exists.

48 Inter-American Commission on Human Rights, Resolution 14/2015: Precautionary Measure no. 77-15, Defenders E. and K. and their relatives, Mexico, 27 April 2015, and Resolution 15/2015, Precautionary Measure no. 106-15, Cruz Sánchez Lagarda and others, Mexico, 27 April 2015.

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

Instead, there is a risk that the displaced's historical 'invisibility' might add to their burden of proof. Since in the case of late registrations the authorities should investigate why they were not made sooner with applicants being required to show 'good cause'<sup>50</sup> for any delay, this can complicate access to protection, assistance and reparation measures. However, the situation of displaced individuals with particular vulnerability, which the CEAV has recognised,<sup>51</sup> and the lack of a previous registry should be considered good cause in these cases. Unless these circumstances are considered to constitute extenuating circumstances *prima facie*, the displaced may end up being discriminated against in their access to registration and hence to the protection of the law.

Secondly, these particular circumstances and vulnerability are also reflected in a needs-oriented approach towards protection and assistance. The CEAV's document on displacement and the Law's Regulation [*Reglamento*]<sup>52</sup> have recognised that internal displacement places its victims in a situation where they frequently lack documentation, have difficulties in exercising their rights and may have special medical, psychological, legal and social welfare needs. The Law's Regulation also establishes that committees within the CEAV, including one on (among other topics) displacement,<sup>53</sup> are obliged to design a wide array of measures to promote prevention, attention and reparation of victims in their respective areas of competence.<sup>54</sup>

Other documents have also highlighted this shift in the Commission's approach to the particularities of internal displacement. In its protocol for health services the Commission included, among other groups, the 'victims of internal displacement', quoting the Guiding Principles' definition, reiterating the special needs deriving from their particular situation and establishing that attending to their needs requires a specialised approach.<sup>55</sup> This particular protocol is part of the larger 'Comprehensive Model of Support for Victims' [*Modelo Integral de Atención a Víctimas*]<sup>56</sup> frequently mentioning displaced individuals and mostly highlighting their particular needs as a group.<sup>57</sup>

50 Article 100 (VII).

51 See the previous section.

52 *Reglamento de la Ley General de Víctimas*, *Diario Oficial de la Federación*, 28 Nov. 2014.

53 'Comité sobre Derechos Económicos, Sociales, Culturales y Ambientales, y Tema de Desplazados' (Committee on Economic, Social, Cultural and Environmental Rights and Displacement Affairs), as established in the Acuerdo CEAV/PLENO/2014/028/05 of 15 April 2014.

54 Article 39.

55 CEAV, '*Modelo de Atención Integral en Salud*' (2014).

56 CEAV, '*Modelo Integral de Atención a Víctimas*' (2014).

57 See, e.g., under the topics of restitution on p. 34 and the discrimination and poverty section on p. 18.

Likewise, Annex 3 of the Model, which establishes the registration form to be used during the Commission's first contact with the alleged victim, includes in its general information section a checkbox so that the individuals may indicate whether they have been displaced by violence.<sup>58</sup>

Thirdly, the externally displaced, who may or may not be refugees, will face the additional obstacle of physical distance from the national registration process, even though they are entitled to declare themselves before any embassy or consulate abroad if other authorities are inaccessible, or if they are domiciled in a foreign country.<sup>59</sup> In such cases, they should register through a Mexican diplomatic representation, which will not necessarily exist close to their place of residence. However, it looks as if future regulations will help improve implementation in this area. For instance, the Law's Regulation has established a coordination mechanism between the CEAV and the Ministries of Government (Interior) and Foreign Affairs for the 'attention, assistance and opportune, quick and effective protection of foreign victims or Mexican victims abroad', including measures for repatriation of corpses if the victims die abroad.<sup>60</sup> This new push for coordination between the three institutions can potentially open the door for further advancement in creating standards that will adequately take into account the particular situation of Mexican victims abroad.

In Colombia, policymakers have hardly focused on the plight of the externally displaced, but State obligations towards them under human rights law are clear<sup>61</sup> and can be accommodated under the Victims' Law, although host governments could raise questions of cessation of refugee status.<sup>62</sup> Ideally, however, these individuals would also be classified into a distinct category of their own as forcibly displaced individuals. They would then benefit from measures especially tailored to their needs *both* as displaced *and* as victims, since an approach denying either category would be unequivocally short-sighted.

Lastly, the Mexican Victims' Law creates an avenue for input from international fora and organisations which can impact on the determination of victimhood within the CEAV through a two-tier system.<sup>63</sup> In the first case, a decision on victim status made by an 'international jurisdictional organ for the protection of human rights whose competence is recognized by Mexico', such as

58 CEAV, '*Modelo Integral de Atención a Víctimas*' (2014), p. 194.

59 Articles 98 and 107.

60 Articles 16 and 17.

61 D.J. Cantor, 'Restitution, compensation, satisfaction: transnational reparations and Colombia's victims' law', *UNHCR New Issues in Refugee Research*, research paper no. 215 (2011).

62 *Ibid.* In fact, the beginning of the peace process in the country has seen refugee recognition rates for Colombian asylum-seekers plummet.

63 Article 110.

the Inter-American Commission and Court or the Human Rights Committee, leads to an automatic determination of victim status by the CEAV, which is evidently a practical way to streamline Mexico's international commitments through its national mechanisms.

In the second case, the determination made by an 'international organisation for the protection of human rights whose competence is recognized by Mexico' may be taken into consideration by the Commission. In the case of displacement, this leaves an open door for the Offices of the UN High Commissioners for Refugees (UNHCR) and for Human Rights (OHCHR) to advocate and be actively involved. Additionally, although it seems unlikely to happen in practice due to most destination countries for Mexican asylum-seekers having their own refugee status determination (RSD) systems, it is possible to consider that, in countries without their own RSD systems, UNHCR's mandate RSD of Mexican nationals might functionally make it a 'jurisdictional organ' for the purposes of Article 110.

### **Displacement status versus victim status**

Having seen that the relationship between the 'victim' and 'displaced' labels is fluid, it is important to consider the practical implications of the discussion on the merits and perils of categorisation. The Colombian practice of recognising that BACRIM cause displacement<sup>64</sup> and simultaneously considering whether and how to fit their actions into the Victims' Law is a perfect example of what can happen in these circumstances.

As mentioned earlier, the Victims' Law was specifically directed at the victims of the armed conflict after 1 January 1985. Since BACRIM are considered criminal groups and not parties to the armed conflict, this meant that their victims could not receive the benefits that law provided. Attempts to challenge this exclusion judicially by reference to the BACRIM's criminal nature failed,<sup>65</sup> but unexpected results came from the institutional gaps that the Victims' Law created on its own.

One of the changes provided by the law was the elimination of the previous IDP registry (*Registro Único de Población Desplazada*) and replace it with a new and wider victims' registry, the *Registro Único de Víctimas*, which would, in theory, recognise IDPs' status as a particular group of victims within the larger group of all victims of the armed conflict. However, as this new mechanism linked registration to the fulfilment of the law's definition of victim, individuals displaced by groups not considered to be armed groups taking part in the conflict – in this case, BACRIM – could not be registered and were therefore

64 Corte Constitucional, Auto 098 (2013) and Auto 112 (2013).

65 For instance, on the 'armed conflict' requirement, see Corte Constitucional, C-781/12 (2012), C-280/13 (2013) and C-462/13 (2013).

excluded from the programme. As a result, these particular IDPs had nowhere to register their need for protection since the old IDP registry, which would have been able to accommodate them, had been eliminated. The ensuing chaos and deficiencies should have been foreseen, as the UN Secretary-General's Representative on the Human Rights of Internally Displaced Persons had warned about the effects of differentiation between IDPs several years prior to that,<sup>66</sup> reiterated by the UNHCR after the reform.<sup>67</sup>

Trying to solve the problem in a careful balancing act, the Constitutional Court's Special Chamber on Internal Displacement ruled that, under the principle of equality, those displaced by BACRIM should be included in the registry and obtain its benefits regarding assistance, attention and protection, even though they were materially outside the scope of the law,<sup>68</sup> a decision welcomed by the OHCHR.<sup>69</sup> This represented a correction of a legislative mistake that had left a particular group of IDPs with no recourse to assistance measures under the concept of a 'deficit of protection'. Individual judgments by the Court in '*tutela*' suits<sup>70</sup> since then have reconfirmed that these IDPs should be recorded in the victims' registry regardless of the nature of the actor which caused displacement.<sup>71</sup>

This positive advance, which has been applauded by public opinion, is not as generous as it seems. In its interpretation of that ruling, the Special Chamber went to great lengths to clarify its position, noting that individuals displaced by BACRIM do indeed have to be included in the victims' registry but not with the full breadth of rights as conflict victims. They are classified in a specific second tier, within which they are entitled to 'assistance, care and protection' like all other IDPs, but not to the 'truth, justice and reparation' to which victims who can prove a nexus to the armed conflict are entitled.<sup>72</sup> This means that although they can access assistance mechanisms through the registry, they cannot obtain the full protection of their basic rights as victims.

66 UN Human Rights Council, 'Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin, Addendum: Mission to Colombia' (2007) UN Doc A/HRC/4/38/Add.3, para. 77.

67 UNHCR, 'Submission by the United Nations High Commissioner for Refugees (UNHCR) for the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: Colombia' (2013), p. 5.

68 Corte Constitucional, Auto 119 (2013).

69 UN Human Rights Council, 'Annual Report of the United Nations High Commissioner for Human Rights, Addendum: Situation of Human Rights in Colombia' (2014) UN Doc A/HRC/25/19/Add.3, para. 28

70 The *tutela* is a type of judicial petition that can be presented to any judge to address a violation of fundamental rights in an extremely short time, following the wider tradition of *amparo* writs in the Spanish-speaking world.

71 Corte Constitucional, T-006/14 (2014) and T-834/14 (2014).

72 Corte Constitucional, Auto 206 (2013).



The sole exception to this general rule is in the case where the BACRIM actions causing displacement occur ‘in the context of the armed conflict’ and have a sufficient link to it.<sup>73</sup> This means that in each individual case the adjudicator must examine whether there is a close and sufficient relationship between the particular displacement by BACRIM and the armed conflict.<sup>74</sup> Besides the logistical challenge derived from applying this sub-rule to hundreds of thousands of individual IDP cases, it is not even clear what exactly these judicially constructed concepts mean.

Due to all of the above, it is clear that although there is indeed a well-intentioned State effort in Colombia to create fair standards for inclusion and provide protection measures, those affected by criminal groups have effectively been made second-class victims, and this can be attributed in equal measure to a poor institutional design and an unwillingness to recognise the true nature of BACRIM groups. Their power structures, sophisticated forms of territorial control, comprehensive use of means and methods of combat, and, above all, their direct links to the old paramilitary groups, indicate that they are new manifestations of old phenomena.<sup>75</sup> In that respect, BACRIM are indeed parties to the armed conflict and cause civilian displacement in much the same way their forebears did. In fact, as noted at the beginning of this chapter, research indicates that these groups were responsible for the lion’s share of mass displacements in the country in 2013. What this means, in practice, is that if these trends continue, most of the newly displaced individuals will continue to be unable to access the Victims’ Law as true victims and will be relegated to receiving some of the available forms of assistance and protection only.

This cautionary tale brings us back to the central question behind the interplay between displacement and victimhood: is the condition of victim an adequate, or at least an acceptable, proxy for the condition of IDP or refugee? It is not. This chapter makes it clear that, in an ideal world, the ‘smoke screen’ obfuscating the phenomenon of forced migration in and from Mexico would be confronted head-on. The objective should not be to circumvent, but rather to remove, the political and legal obstacles to recognition. In this respect, the CEAV’s new approach to the subject, although still work in progress, is a commendable step with considerable potential to address the needs of displaced individuals, as well as the potential for future evolution. In this process, the Colombian example clearly shows that including displaced individuals as a particular group of victims with special needs and rights within the larger universe of victims is good practice, and at the same time highlights the perils

73 Corte Constitucional, T-129/12 (2012), C-781/12 (2012) and Auto 052/13 (2013).

74 Corte Constitucional, C-781/12 (2012).

75 The Inter-American Commission has analysed the issue of continuity between paramilitary groups and BACRIM in IACmHR, ‘Truth, justice and reparation: report on the situation of human rights in Colombia’ (2013) OEA/Ser.L/V/II Doc.49/13, Chapter 1 B.

of politicising the definitions that allow or bar these individuals from enjoying the full array of rights to be derived from victim status.

## Conclusion

From this analysis it is clear that, in the case of Colombia, although there is indeed a well-intentioned State effort to create fair protection standards, those affected by criminal groups have effectively been made second-rate victims, even though the former are arguably new manifestations of old paramilitary groups. Therefore, the research demonstrates that the label of 'non-conflict IDP/victim', with the right to 'assistance, care and protection', unfairly discriminates against BACRIM victims and limits their access to possibly the only working mechanisms to seek 'truth, justice and reparations'. The Colombian experience indicates that a dual approach clearly recognising and protecting displaced persons as a particular and differentiated species within the wider genus of victims is probably the best strategy to account for the complex and diverse profiles of those affected by criminal violence. This is because it can help to streamline processes which consider both the overall needs of all victims and the specific needs of particular groups.<sup>76</sup>

In Mexico's case, although real results still remain to be seen, recent developments seem to indicate that the CEAV is either taking up a groundbreaking role of its own or quietly reflecting a governmental position that is not as closed to the internal displacement issue as it would appear at first sight. In either case, the Commission's work holds considerable promise for a new, comprehensive approach to displacement in Mexico that will undoubtedly merit future observation. For now, there being little or no recognition that displacement can be an independent human rights violation is still a considerable barrier to protecting individuals who flee their homes in a preemptive effort to escape contexts of indiscriminate violence or insecurity caused by cartel activity. However, the Commission's continuing process of evolution and introspection on the displacement issue elicits some hope that, with the right direction and incentives, a more complete and systematic approach to it may be on the horizon.

This critique is not intended to denigrate the fact that the Colombian and Mexican laws represent extraordinary and commendable steps; they certainly are. In different ways, they are both treading new paths in the protection of displaced individuals in extremely complex scenarios, and challenges are to be expected. What this means is that civil society, academia and international organisations now have an opportunity to find ways of fostering a technical and apolitical dialogue with these governments in order to maximise these laws' strengths and address their shortcomings.

<sup>76</sup> UNGA, 'Protection of and assistance to internally displaced persons' (2012), UN Doc A/67/289, para. 61.

## **Note**

In the months after the publication of the Spanish version of this volume, the Colombian Ministry of Defence adopted Permanent Directive 0015 of 2016, which eliminated the category of 'BACRIM' and replaced it with a process to determine if a group was an 'Organized Armed Group' (GAO) or an 'Organized Criminal Group' (GCO). This depends on whether each group fulfils the criteria set out under the Directive, which reference International Humanitarian Law in the case of GAOs. As a result, GAOs can now be subject to the full use of military force and the laws of war. This development, however, has not yet translated into a recognition that the Colombian State is in an armed conflict with them – or that their victims should be included in the framework set out under the Victims' Law, which would be the logical conclusion. Whether this will change in the near future remains to be seen.