

CHAPTER 3

Protection of the Internally Displaced by Constitutional Justice: The Role of the Constitutional Court in Colombia

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Forced displacement temporarily prevents internally displaced persons (IDPs) from providing for themselves. Particularly in its initial stages, forced displacement jeopardizes the chances of a population's survival. This humanitarian emergency obliges certain authorities, whose primary responsibility is to meet the urgent needs of this population, to prevent the situation from deteriorating in the short-term, and to work with IDPs on achieving durable solutions. At the same time, all Colombians have a duty to respond with solidarity and humanity to the problems caused by forced displacement.¹ At the very least, the general population has a responsibility to encourage the State to respond.

Having suffered the original aggression that caused their displacement, IDPs must then face challenges resulting from their arrival in a new environment, in which social solidarity and institutional responses to their plight are limited. In Colombia, in spite of efforts by the State, the initial, short-term response to forced displacement is insufficient and does not generate the conditions necessary for durable solutions. Faced with a lack of prompt and persistent assistance to meet their needs, hundreds of IDPs have turned to constitutional protection to stop their situation from worsening.

Constitutional justice has not just protected the rights of individual applicants, but it has also prompted the authorities to make structural

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¹ Colombian Constitution. Article 95: "Every person must... 2) comply with the principle of social solidarity, responding with humanitarian actions to situations that place at risk the life or health of persons."

changes in public policy. The Colombian Constitutional Court (hereafter termed the “Court”) has set forth a series of guidelines that should be used when developing public policy, in order to ensure that the State’s response is consistent with Constitutional values and that the State effectively protects IDPs’ rights.

The purpose of this chapter is to review how the Court’s decisions have affected public policy. In particular, the chapter analyzes the reach and limitations of these decisions, taking into account that the decisions have been made against a background of internal armed conflict.

I. IDPs’ need for judicial protection

Faced with a large humanitarian crisis generated by forced displacement, the State and society in general have an ethical imperative to immediately and comprehensively protect IDPs, who represent one of the most vulnerable sectors of the population. The displaced population should not have to take direct action to be recognized by institutions, nor should they have to take legal action to demand that the authorities assist them effectively.

In Colombia, the gap between the imperative to act and the action taken is evident. Despite the fact that some sectors of society first drew attention to the humanitarian crisis of displacement over 20 years² ago, neither State action nor societal reaction has managed to assess how the conflict has affected the displaced population.

Public protests by the displaced population, reports from NGOs, Church reactions and court intervention resulted in the state policies and the legal framework contained in Law 387 of 1997.³ In 1995, the Episcopal Conference and the Consultancy for Human Rights and Displacement (CODHES) published *Human Rights: Displaced by Violence in Colombia*. In 1996, a displaced community occupied the buildings of various public institutions in an effort to draw attention to its

² Forced displacement in Colombia predates Law 387. Government records of displacement began in 1997 and NGO records began in 1985. Nevertheless, displacement has occurred in Colombia since the middle of the twentieth century.

³ Law 387 of July 18, 1997. This law establishes measures that are taken for the prevention of forced displacement, and the assistance, protection, consolidation and socio-economic stabilization of persons internally displaced by violence in the Republic of Colombia.

situation and try to obtain an effective response from the authorities.⁴ The community additionally sought judicial protection of its rights under the *tutela* action.⁵ The Court ruled in favor of the displaced community. It was the first court-ruling to do so.⁶ Four months later, Law 387 was passed.

Thus, it became apparent that displaced populations had to demonstrate the gravity of their situation to the State and civil society. To obtain a response from the State, these populations had to take legal action. Consequently, from their first contact with the authorities, displaced populations identified the Court as a key ally in the protection of their rights.

One would hope that the ethical imperative to act and the legal obligation to do so would mean that the authorities would effectively assist and protect the displaced. However this is not necessarily the case. Despite the fact that the authorities have adopted public policies and legal measures that address displacement, the displaced do not perceive these measures to translate into a significant, general improvement of their well-being.

The Executive branch has responded in reaction to judicial intervention, more than on its own initiatives. However, the Executive branch has not been consistent in its efforts to protect IDPs. As a result, the Court had to give follow-up orders for compliance to keep the Government committed to addressing IDP issues in a coherent and consistent way.

Several reasons could partially explain why it is so difficult to develop an adequate and sustained response in favor of the displaced population: ongoing conflict; the magnitude of the crisis of displacement (at least three million Colombians);⁷ the geographical dispersion of displacement; and the disparate capacities of the more than 980 affected municipalities.⁸

⁴ Between March and September 1996, the displaced communities from Hacienda Bellacruz occupied buildings of the Institute of Agrarian Reform (INCORA), the Ministry of the Interior and the Ombudsman's Office.

⁵ The *tutela* action is a constitutional action for immediate legal protection of human rights, a kind of writ of injunction.

⁶ Colombian Constitutional Court, Decision T-227 of 1997.

⁷ Constitutional Court Award 218 for compliance with Decision T-025 of 2004.

⁸ See Episcopal Conference & CODHES, 2006. This diversity is all the more important, given the decentralized model of political organization in Colombia.

Furthermore, the armed conflict generates other priorities for the State and civil society. The result is often that humanitarian issues and the duty of social solidarity are overlooked or, at best, relegated as secondary priorities. In other words, displacement is assumed to be a natural consequence of the conflict and thus an acceptable cost that does not cause surprise among the general population. Therefore, society tends not to pressure the State to take effective action. Furthermore, the effects of the conflict are felt only marginally in the centers of power, such as Bogotá and the other principal cities in the country.

Additionally, IDPs compete with other sectors of the population. IDPs are not the only people who need State support, nor are they the only ones affected by the conflict—though they may face the greatest difficulties in making their interests heard in the democratic debate.

Given the general scarcity of resources, social investment in favor of IDPs results in an opportunity cost for other sectors, which are better represented in Congress and other forums of public policy discussion. In this debate, it is assumed that the only way to assist the displaced population would be to reduce investment in other vulnerable sectors of the population. These other sectors may thus perceive assistance to IDPs as illegitimate and lobby against it, increasing the vulnerability of IDPs. Some local authorities also use the argument of opportunity costs to try to justify their lack of effective response to displacement.

There is no formula to tackle the aforementioned difficulties to develop an adequate and sustained response in favor of the displaced population. Furthermore while policymakers look for solutions and a number of well-intentioned measures are designed, these biased measures often adversely affect how IDPs' rights are protected. These intentions and measures include: (i) the wish to avoid creating an incentive to displace people; (ii) the desire to prevent a situation where people are able to effectively present themselves as displaced when in fact they are not displaced; (iii) the aim to facilitate social integration and to avoid "ghettoizing" IDPs, and (iv) the prioritization of IDP returns. These biased intentions and measures, however, tend to make the displacement crisis invisible, leading to a decline in the welfare of urban IDPs. This, in turn, often causes IDPs to consider returning to their original residence, even in the absence of the necessary conditions to facilitate their safe return.

All of this can explain, though not justify, the situation of thousands of displaced families. It is clear that this reality, and the response to it,

contradicts the axiological order of Colombia's Constitution. For this reason, the Court classified the displacement crisis as an unconstitutional state of affairs.⁹

For the displaced population facing the lack of an effective response from the State, the law establishes the ultimate limit of the deprivation caused by armed conflict and by the changing priorities generated by it. This makes the possibility of judicial protection of the displaced population's rights all the more relevant.

II. Judicial action to correct IDP public policy failures

An armed conflict results in a general decrease in the welfare of the population and affects the normal functioning of the State. The increasing number of legal claims brought by IDPs is a symptom of the difficulties they face when seeking assistance, and is a sign of institutional weakness. The inadequate response of public entities causes them to lose legitimacy in the eyes of the displaced population and thus to lose the confidence that the displaced population had placed in them. In the context of an armed conflict, this has a negative impact on the ability to govern. Paradoxically, the legal demands brought by the displaced population are a demonstration of its faith in institutional procedures. These legal demands are an opportunity for institutions to regain the legitimacy lost by the State's failure to fulfill its duties.

Compliance with the orders of a constitutional judge therefore transcends mere compliance with a judgment. In the context of a conflict, it represents a way to strengthen the relationship between a citizen and authority. Unfortunately, this relationship has been damaged by the State's inadequate protection of the displaced population. This relationship is neither sufficient for eliminating the causes of displacement nor for mitigating the effects of displacement. Institutional practices affect the relationship between the authorities and IDPs. An examination of the cases reviewed by the Court reveals two common elements in this relationship: (i) limits in the capabilities of IDPs to access public services for IDPs, owing to insufficient legal and public policy parameters; and (ii) discretionary interpretation of the law and public policy by public officials.

Public officials tend to confuse the content of IDPs' rights with the content of IDP policy. For example, authorities confuse people's rights to

⁹ Colombian Constitutional Court, Decisions T-215 of 2002 and T-025 of 2004.

adequate food and to an adequate standard of living with the “right” to the standard temporary offer of three months assistance, regardless of the fact that the subsistence needs, for example, of the displaced population may extend beyond a three-month period.¹⁰

The officials in charge of assistance to IDPs interpret the law in such a way that it becomes an inefficient instrument for protection.¹¹ Authorities often interpret legal rulings as an obstacle to policy development and implementation—especially under circumstances where there is tension between IDPs seeking assistance and the authorities who are obliged to provide it. Officials feel that the need to respond to legal rulings affects their planned response to displacement and limits their ability to meet their other obligations. They accordingly perceive the constitutional action taken by IDPs as a betrayal of the relationship between official and beneficiary. A high departmental official, for example, stated, “IDPs have become *tutela* mercenaries and use Decision T-025 as their arsenal.” The above problems with the relationship between IDPs and the authorities who are responsible for protecting them partially explain why IDPs regularly turn to the courts for protection. In addition, these problems reveal the importance of an effective response to displacement—both to protect the rights that have been violated and to strengthen the relationship between IDPs and authorities.

It is difficult to establish which claims judges hear most frequently. Nevertheless, it is possible to get an idea of what the displaced population demands by looking at the *tutela* cases that the Court reviews.

The greatest number of claims relate to conditions allowing IDPs to reach a durable solution to their displacement—predominantly to solutions associated with housing, access to land, and to income generation.¹² The authorities themselves have recognized that the key shortfalls in their

¹⁰ In Colombian Constitutional Court, Decision T-025, the Court clarified that these time limits should be extended in the event that at the expiration of the three-month period, people remain unable to provide for themselves (chapter 9, paragraph 4).

¹¹ For example, in refusing assistance to those who are displaced within the same city and seek protection in a different neighborhood. See Colombian Constitutional Court, Decision T-268 of 2003.

¹² See Colombian Constitutional Court, Decisions SU-1150 of 2000, T-025 of 2004, T-078 of 2004, T-770 of 2004, among others, which ruled on hundreds of claims related to the rights to life and to an adequate standard of living.

actions result from policy flaws and also from the low coverage of the programs in the above-mentioned areas.¹³

The absence of effective policies on housing, land, and income generation creates a vicious circle, in which IDPs, who are not given the necessary resources to sustain themselves, continue to demand that the State cover their basic needs. With time, IDPs become even more vulnerable—which is to the further detriment of their other rights, such as the right to healthcare and education.

The high price of land in urban areas means that the coverage of State programs is insufficient to meet the displaced population's housing demand. As a consequence, the displaced population may illegally occupy private or municipal property, or settle in such high-risk areas as unstable slopes or riverbanks. Authorities act to protect this private or municipal property and also to protect the lives of the IDPs living in high-risk areas, which often results in the eviction of IDPs from these areas.¹⁴

The scarcity of available housing and employment opportunities (in addition to the number of displaced families and the high *per capita* cost of solutions to IDPs' myriad of difficulties) explains the critical situation of the displaced population, and thus the high number of claims for housing and income relief. As long as the conflict continues and security remains unstable in the areas of origin, judicial protection of IDPs' rights represents the only alternative to returning to their original residence—but without the guarantees of security, dignity, and voluntary return.

Numerous examples of the conflict between the rights of IDPs and the rights of others exist. Some of these conflicts demonstrate the lack of an axiological consensus on how to deal with the problems caused by displacement. This is the case with debts that IDPs are unable to pay because of their flight. IDPs have either abandoned their land, or an armed group or third party has occupied it. Thus IDPs no longer receive an income from those lands. In spite of the fact that a *force majeure* prevents them from meeting their financial obligations, financial institutions demand payment through the courts, which end up auctioning the assets of IDPs. The obvious question is why the State does not protect the rights of IDPs with the same determination that it protects the rights of banks to demand payment. The Court has had to intervene to ensure compliance

¹³ CONPES Document CONPES 3400 of 2005.

¹⁴ Colombian Constitutional Court, Decision T-078 of 2004.

with the duty of solidarity¹⁵ and to maintain an equitable contractual relationship between IDPs and the banks.¹⁶

As a prerequisite for accessing State programs, the State mandates inclusion in the SNAIPD. The purpose of this mechanism is to prevent non-IDPs from illegitimately accessing programs designed for the displaced population. Nevertheless, the State recognition of the situation in which IDPs find themselves, as well as certain administrative practices, exclude IDPs from accessing these programs. For example, persons who request to be recognized as IDPs are required to prove that they have suffered a direct threat, notwithstanding the fact that, in areas of conflict, threats and risks to inhabitants can be sufficient reason for fleeing. Often there is evidence of accidents from landmines as well as evidence of limitations upon freedoms imposed by armed combatants, all of which constitute objective causes for people to fear for their lives and safety.

In the past, legal arguments have been invoked by the authorities in order to refuse to attend to cases of intra-urban displacement. For example, in quoting the literal meaning of the term ‘place of residence’ (Article 1 of Law 387 of 1997), authorities argue that people must cross the frontier of their municipality’s urban area in order to be protected by the SNAIPD.

The operations to eradicate illicit crops represent the most complex example of the criteria for registration in the system. It is now common administrative practice to refuse IDP recognition to persons who flee the areas of these operations. The authority in charge of IDP recognition disregards the fact that such crops are the main source of funding for guerrilla and paramilitary groups, and that during the eradication operations combat is intensified, with a particular increase in the use of landmines.¹⁷

The obstacles to registering in the system that were previously mentioned explain why the bulk of individual claims by IDPs must be

¹⁵ Article 95 of the Colombian Constitution establishes that “Every person must... 2) comply with the principle of social solidarity, responding with humanitarian actions to situations that place at risk the life or health of persons.”

¹⁶ See Colombian Constitutional Court, Decisions T-419 of 2004 and T-640 of 2005.

¹⁷ The increase in landmines during the eradication of illicit crops became evident in the operations that were developed in the area of the Serranía de la Macarena (200 kilometers south of Bogotá), and in the municipalities of the North of the Nariño Department (along the border with Ecuador).

included in the register—so that IDPs attain necessary access to programs that can, in theory, assist them.¹⁸ The cases that the Court has reviewed show that the decision not to include IDPs in the registry is often a result of public officials' discretionary evaluation of IDPs' declarations.

The displacement of public officials from areas of conflict is another demonstration of the double vulnerability of IDPs and of the impact of displacement on their welfare. If public officials cannot remain in conflict areas, no one will be able to assume the role of preventing displacement and of providing IDPs with assistance and protection. The first case of displacement that the Court reviewed was the following example: a healthcare worker was threatened by an armed group for carrying out his job.¹⁹

Teachers, healthcare workers, and municipal *personeros*²⁰ have all sought judicial protection of their rights to live and to work, seeking transfers to areas in which these rights are guaranteed. The Court has analyzed the problem from the perspective of the nature of official public duty and has concluded that public duty does not include the obligation to risk one's life. Ironically, public officials who do not work in conflict areas and who do not recognize the great danger faced by those who do are those who end up denying this protection. Threatened officials are left with no other option than to continue risking their lives or to flee, thus losing their jobs in the process.²¹

These, and other similar cases, show the difficulties faced by authorities and the displaced population when dealing with the effects of displacement. In the Colombian context, the situation is paradoxically worsened by the strength of institutions and by the inertia of active and highly developed public policy sectors. This prevents institutions—such as those in the health and education sectors—from responding to the reality of the conflict. Authorities and policymakers design “business-as-usual” policies and consistently decide to tackle displacement as a problem of

¹⁸ See Colombian Constitutional Court, Decisions T-327 of 2001, T-268 of 2003, T-339 of 2003, T-417 of 2004, T-740 of 2004, T-1094 of 2004, T-175 of 2005, T-563 of 2005, T-882 of 2005, T-1076 of 2005, T-1144 of 2005, T-086 of 2006, T-482 of 2006.

¹⁹ Colombian Constitutional Court, Decision T-120 of 1997.

²⁰ *Personeros* are the municipal level representatives of the Public Ministry (which includes the functions of both National Controller's Office and Ombudsman's Office).

²¹ See Colombian Constitutional Court, Decisions T-120 of 1997, T-258 of 2001, T-419 of 2003, T-539 of 2004, T-813 of 2004, T-852 of 2004, T-976 of 2004, T-1132 of 2004, T-685 of 2005, T-998A of 2005.

poverty, without responding to the specific needs of the displaced population. For this reason, the Court has emphasized the need for affirmative action in favor of the displaced population.²²

Particularly in urban areas, the general level of awareness of the plight of IDPs is low because armed conflict does not affect all areas of the population or all regions to the same extent. The safer that the general public feels in urban areas, the less willing they often are to help the victims of the conflict. This means that the public's perception of security increases the vulnerability of the displaced population that is fleeing conflict areas. As a result, urban planners appear to be more concerned with preventing the arrival of more IDPs in major cities without paying due attention to how to prevent people from being displaced in the first place.

III. The effects of the Constitutional Court's judgments

The Court has been behind the most important advances and developments in policies regarding the displaced population in Colombia—especially since 2004 when it handed down Decision T-025. Structured judgments of the Court have had an impact on institutional activities, political and legislative developments, and the allocation of resources in favor of the displaced population.²³

Because the Court's most important judgments have tackled problems with public policy at a macro level, the resulting impact on the welfare of the displaced population has been determined by the willingness and capacity of institutions to implement these judgments. It is thus difficult for IDPs to perceive the direct impact that these judgments have had on their welfare. Furthermore, the lack of a baseline establishing the conditions in which the population lives makes measuring results even harder.

A. Clarity regarding the content of State obligations

The Court has defined State obligations and IDPs' rights by integrating international standards in the national legal framework, bearing in mind the strong legal standard by which the institutions of the Colombian

²² See Constitutional Court, Decisions T-602 of 2003 and T-025 of 2004.

²³ See Constitutional Court, Decisions SU-1150 of 2000 and T-025 of 2004.

State²⁴ operate. Many of the international standards are designed for circumstances different than those that apply to Colombia. Accordingly, it would appear reasonable to hold Colombia to higher standards.

One of the most important aspects of the Court's definition of IDPs' rights and the State's corresponding obligations is that the Court takes into account the level of constitutional and institutional development of the State. The Court does so by applying the principle: "to the maximum of its available resources." This approach could be adopted in the context of other displacement crises in the world.

The Guiding Principles on Internal Displacement are an example of the link between international parameters and domestic law. The Court held that the Guiding Principles form part of the "Constitutional Block"²⁵ because the majority of these principles originate from treaties duly ratified by the Colombian State. This means that the Guiding Principles constitute a fundamental parameter for interpretation of domestic legislation and for the design and execution of policies and programs in favor of the displaced population.²⁶

B. Displacement on the public agenda

The Court has encouraged the Government to change the priority of policies in order to meet the axiological order set out in the Constitution. According to the Court, attending to and overcoming a humanitarian crisis such as displacement must be a priority for the State. Nevertheless, diverse sectors of the population have different interests, and the interests of the displaced population end up taking a back seat to other interests related to armed conflict. For example, protecting the productive system and continuing with a "business-as-usual" development model often takes precedence over protecting IDPs. In order to give displacement the

²⁴ This is precisely the content of Principle 3 of the Guiding Principles on Internal Displacement (UN, 1998).

²⁵ Article 93 of the Colombian Constitution establishes that "treaties and international covenants ratified by Congress, which recognize Human Rights and which prohibit their limitation in states of emergency, will take legal primacy internally."

²⁶ See Colombian Constitutional Court, Decisions SU-1150 of 2000, T-327 of 2001, T-602 of 2003.

priority it deserves, the Court has ordered that the authorities take urgent and positive action in favor of IDPs.²⁷

The low priority that the State has historically given displacement is also reflected in the irregular functioning of the entities in charge of evaluating IDPs' needs, of defining public policies, and of coordinating processes of assistance.²⁸ One of the Court's concrete results has been the insistence that authorities guarantee that these entities operate on a permanent basis.²⁹

C. Allocation of resources in favor of the displaced population

In order to protect IDPs' rights and ensure preferential treatment, the Court, in accordance with domestic legislation, sought clarity from the authorities regarding what resources should be assigned to displacement. The Court ordered the Government to calculate the financial effort necessary to guarantee the effective protection of IDPs' rights and to act in such a way as to ensure coherence between the budgets required and allocated. The Court respected the competency of the legislature to set the budget and of the Executive to execute the budget, but it mandated that the process be coherent.

The Court ordered that the Government evaluate the resources necessary to attend to displacement in the medium and long-term, thus leading the Government to make a multi-year financial commitment. This has given the displaced population certainty on the minimum amounts that will be assigned to displacement in future fiscal years. This ruling also indirectly led to priority being given to displacement at the most practical

²⁷ See Colombian Constitutional Court, Decisions SU-1150 of 2000, T-1635 of 2000, T-1346 of 2001, T-098 of 2002, T-215 of 2002, T-602 of 2002, T-669 of 2003, T-790 of 2003, T-985 of 2003, T-025 of 2004.

²⁸ In all municipalities, a Committee for Comprehensive Assistance to the Displaced Population should operate regularly. This Committee is in charge of coordinating the response of different institutions to prevent displacement, assist IDPs and promote durable solutions for IDPs. At the national level, the CNAIPD is charged with defining public policy on displacement. High officials of the Government must participate in the National Council (Articles 6 and 7 of Law 387 of 1997).

²⁹ The National Council has met regularly during two periods. It met on three occasions following Decision SU— 1150 of 2000. It then did not meet for two and half years, and only following Decision T-025 has it begun to function on an ongoing basis (at least from March 2004 until the writing of this document in August 2006).

level of public policy, providing an answer to the question: “How much is the State willing to invest to protect the 8 percent of the population affected by the humanitarian crisis?”

The Government response to the Court’s decision represents a triumph for the displaced population, which, through constitutional mechanisms, achieved a commitment from the Government to spend an average of US \$420 million annually on displacement for a period of five years. This represents a substantial increase from the average \$69 million that the Government had assigned annually in the five years prior to Decision T-025.³⁰

D. Strengthening institutions

It is complicated to evaluate the impact of the increased financial commitment noted in the previous section, but it is not the purpose of this document to do so. This commitment has not yet translated into a substantial improvement in the welfare of the displaced population. Nevertheless, the fact that numerous State institutions assign resources to displaced populations (implying a commitment to spend these resources) is a significant advancement, particularly in the midst of a conflict in which other interests and needs could be given priority over attention to displacement.

A consequence of Decision T-025 of 2004 has been that some institutions have strengthened their ability to assist the displaced population, providing assistance that at least responds to this population’s specific needs. In the two years following T-025 of 2004, the norm is that institutions have trained technical personnel in charge of responding to forced displacement. As a result, public officials’ discourse on displacement is no longer focused solely on the lack of budget, but also on how to guarantee that the displaced population receives an effective enjoyment of its rights.

In October 2005, the Government established a working group through which public officials identified practices that could constitute discrimination against displaced populations. In several regions of the country, public officials met with displaced populations in order to seek new mechanisms to replace known discriminatory practices. A catalogue of conduct interpreted by the displaced population as discriminatory was

³⁰ Document CONPES 3400 of 2005.

assembled. In order to further clarify the impact of discriminatory conduct, workshops were carried out with different sectors of the population—indigenous peoples, Afro-Colombian communities, women, and youth—so as to gather sufficient information for allowing the construction of a catalogue of discriminatory behavior. Once the catalogue had been compiled, the CNAIPD adopted Agreement 03 of 2006, in which it issued precise instructions to public officials in order to eradicate these types of discriminatory practices.³¹

This change in institutional perspective can be seen only in the accompanying processes of policy formulation, but it is an important change, and one that would not have taken place without the intervention of the Court.

E. Public policy development

Following rulings such as SU-1150 of 2000 and Decision T-025 of 2004, the Government identified areas of action that required legal developments to attend to the specific needs of the displaced population and to respond to the impact of the armed conflict. One example is the case of land: Law 387 of 1997 required the Government to establish mechanisms for the protection of land abandoned by IDPs. This is important, as it constituted an acceptance by the State that in the context of armed conflict, the State was incapable of protecting the rights of all its citizens to possess property. Furthermore, the State recognized that the weakness of the land registration system in some parts of the country operates as an incentive to displace people from their land, which can then be appropriated by armed groups or unscrupulous third parties. Thus, a special, temporary framework for the protection of landholders' rights is required.

Law 387 of 1997 required the State to develop a mechanism for the protection of land. Faced with the continued lack of a regulatory framework to do so, the Court reminded the Government of its obligation to uphold the provisions of Law 387 of 1997 in Decision SU-1150 of 2000. The Government responded with Decree 2007 of 2001.³² Nevertheless, the implementation of this Decree was insufficient and the

³¹ In spite of the positive nature of the process and the importance of this measure, as of this date there are no follow-up reports that can account for the effect of Agreement 03 of 2006.

³² Colombian Constitutional Court, Decision SU-1150 of 2000, (paragraph 45).

Court reiterated the importance of protecting IDPs' abandoned assets in Decision T-025.³³

Decree 2007 of 2000 is one of the most important legal provisions regarding the protection of IDPs. It mandates that whenever there is risk of displacement, or that whenever displacement has taken place, an inventory of the lands and of the population's rights to that land must be carried out. This procedure would protect the displaced population from the dispossession of its land, insofar as it grants certainty to its rights. Once the assets have been identified, the protective measure ("declaration of displacement or of imminence of displacement") is registered in the Public Deeds Offices and the Central Registry of Abandoned Lands (RUP).³⁴ This declaration is then binding for third parties and can be held against them. The measures entail restrictions upon the sale of the identified assets, thereby preventing under-priced and forced sales.

These judgments, including Decision SU-1150 of 2000, have propelled the development of public policy not only on land issues, but also on health, housing, education, the production of identity documents, and the generation of income.³⁵ These judgments have also provided the impetus for the formulation of the SNAIPD.

F. The relationship between IDPs and authorities: the role of IDP participation

Displacement fractures organizational processes and therefore takes a high toll on social and community organization. Armed groups target their aggression toward community leaders and toward those with community influence, such as teachers and even religious leaders. In areas of arrival, those that were local leaders prior to their displacement are often afraid to resume their work at the head of their communities. For this reason, Decision T-025 promoted a new relationship between authority and citizen, which was an important development, particularly given that these citizens are victims of the conflict.

³³ Colombian Constitutional Court, Decision T-025 of 2004 (6.3.1.2).

³⁴ This protective measure was implemented in 2006 by INCODER.

³⁵ As well as Decree 2007 on land, the results of Colombian Constitutional Court, Decision SU-1150 included decrees on housing, health, education and Decree 2569 of 2000, modifying Law 387. Similarly, Colombian Constitutional Court, Decision T-025 of 2004 not only caused the Government to issue SNAIPD (Decree 250 of 2005), but also to issue decrees on health and housing, to advance public policies in relation to land, and to update Decree 2569 of 2000.

The Court set out some rules for the participation of the displaced population—rules that, if they were to be respected in all cases, would establish a relationship of mutual respect between public official and IDP. In order for this participation to be effective, the opinions of the displaced population need to be taken seriously by the authority in question. The person formulating public policy needs to explain why he is taking a particular measure, to listen to IDPs' views and, in the event that the official does not share the opinion of the displaced population, to explain the reasons for the decision he or she is taking. In a context such as Colombia, these basic rules constitute an unprecedented development in terms of the exercise of democracy.³⁶

In accordance with the above principle of participation, in June 2005 the Court invited displaced populations to take part in a public audience on compliance with Decision T-025 of 2004. This public audience represented the first time that cabinet-level government had met with IDP organizations. In this forum, the Government explained the advances it had made in complying with Decision T-025 of 2004, not only regarding obligations to the Court, but also to displaced populations. Following this account, IDP groups set forth their own views on the level of compliance. This process was unique. Indeed, in what other country affected by an internal armed conflict have the victims of forced displacement evaluated the expositions of cabinet ministers before responding with respectful and well-founded recommendations?

IDP organizations delved into the need to establish more flexible criteria for the adoption of measures to protect the rights to life, integrity and personal security of the leaders of the displaced population. The opinion of IDP organizations is that authorities assess risk levels without taking into account the special types of persecution to which leaders of the displaced population are exposed. In the field of healthcare, the IDP representatives pointed out, for example, that access to a service does not necessarily guarantee the provision of the corresponding treatment offered in theory by that service, given that there is neither access to a specialist, nor provision of prescribed medications. IDP organizations revealed that only 19.1 percent of displaced populations arriving in a city such as Bogotá have access to emergency humanitarian aid. They also pointed out that programs lack attention to specific psychosocial needs, and that

³⁶ Colombian Constitutional Court, Decision T-025 of 2004 (10.1.2).

housing programs are not designed to attend to the requirements and capacities of the displaced population.³⁷

Displaced populations also reported problems in the structure of the national system itself. They pointed out how the institutions' offer of a process of re-establishment is restricted to the departmental capital cities, and that institutional presence is limited in small municipalities—though it is these small municipalities that bear the strongest impact of displacement. IDP organizations recommended increasing the local presence of *Acción Social* in its role as the coordinating entity for the national system.

The above public audience was not only the first such audience in the history of the Constitutional Court, but was also an audience that demonstrated the importance of the organization of the displaced population. Due to a lack of representation in political parties, IDPs face the difficult task of rebuilding community organizations for the defense and protection of their rights following displacement.

The participation of victims of the armed conflict in the processes around Decision T-025 of 2004 constitutes recognition by the authorities of the citizenship of these victims. It also serves to reaffirm their status as the recipients of special rights and as agents of change. This participation has a favorable social and political impact with regard to advancing and reestablishing said rights. It also affects reparations and reconciliation³⁸ because recognition of the displaced population as victims of the conflict brings respect from the authorities. It is precisely this respect that was lost in the context of armed conflict, and which causes people not only to be victimized, but also to seek and fight for recognition and assistance from the State. Given the ongoing conflict and the impact of this conflict on the displaced population, the participation of IDPs in general and in the audience of the Court is even more important than the participation of society as a whole within the social State based on the rule of law.³⁹

³⁷ *Mesa de organizaciones de la población desplazada*. Document presented during the June 19, 2005 public hearing in Bogotá.

³⁸ To clarify, the participation of IDPs in general, and particularly their participation in the process of Colombian Constitutional Court, Decision T-025 of 2004, has a reparative effect and can have a positive impact in terms of reconciliation. This is not to say that the audience is, in itself, a form of reparation.

³⁹ According to André Du Toit (2000), in the context of transitional justice, it is important to reestablish the human and civic dignity of the victims of serious violations of human

Even though a set of rules was defined in the T-025 process regarding the participation of IDPs, these rules could and should be used for the population as a whole and toward a diverse set of State policies. Therefore, this should be one of the most important consequences of the T-025 process.

G. System of accountability

The system of accountability outlined in Awards 176, 177, and 178 (orders for compliance with Decision T-025 of 2004) involves State institutions and civil society in a joint evaluation of the State response to the IDP situation. As mentioned above, this system is particularly relevant, given that it relates to victims in the context of an armed conflict. Further, like other systems developed by the Court, it has the potential to be applied to other policy initiatives, such as:

- (1) The State should have a system for self-evaluation, based on clear indicators and precise goals;
- (2) Information on the results of measures adopted by the State should be shared with State control mechanisms, NGOs working in the area, and the beneficiaries of the relevant policies;
- (3) State control mechanisms should publish regular evaluations of institutions that administer policies including: (i) the *Contraloría General de la República* on the management of resources; (ii) the *Procuraduría General de la Nación* on the behavior of public officials; and (iii) the Ombudsman's Office on the respect for human rights; and
- (4) Civil society organizations and organizations representing the target population could publish reports evaluating the results of IDP policies.

This model of accountability, if adopted, should strengthen the State's control mechanisms and establish clear rules enabling populations to see

rights. He points to the necessity that justice (in the context of the article, *Truth Commissions*) strengthens the reestablishment of an "egalitarian moral respect for people as the publicly recognized basis for (new) rights-based cultures" (this author's translation).

how they can contribute to the construction of relevant and effective public policy.

H. Rights-based focus in public policy development

Decision T-025 of 2004 established practical criteria to apply a rights-based focus in the design and implementation of IDP public policy or any public policy. These criteria are extremely useful for policymakers because they are not familiar with principles or with human rights concepts such as progressive realization and the prohibition to adopt regressive measures.

Decision T-025 of 2004 and the associated orders for complying with measures to protect IDPs have influenced a policy approach that emphasizes a focus on rights. The Court's starting point is what it calls the principle of coherency: the principle that public policy should be formulated to meet the State's aims on a particular subject and should be set up in such a way so that the necessary conditions are guaranteed for enabling public policy to achieve its specific goals. This coherency among goals, means, and mechanisms is the basic rule that the State should apply when formulating its policies for assisting the displaced population.⁴⁰

The goals should be established based on the obligations of the State. The goals in turn should be derived from a revision of the legal framework applicable to a given situation, in this case to forced displacement. The State's obligations and the specific needs of the population determine the basic parameters to be used in the formulation of public policy. Thus, a State policy is only constitutionally acceptable when it offers guarantees that the State can achieve its goals. Policy, therefore, must always be an instrument for the realization of the rights of the target population.

The Court, however, cannot tell the Government what the content of its policies should be. But it can set out "some guidelines and criteria that should be applied in the assistance to the displaced population to guarantee the respect of its fundamental rights... [T]hese guidelines are constitutional imperatives, meaning that in the event that they are not complied with, they can be enforced legally."⁴¹ In other words, it should

⁴⁰ This concept on the reach of Colombian Constitutional Court, Decision T-025 of 2004 was set out by Manuel José Cepeda (the presiding judge of the Constitutional Court for this Decision), in a seminar at the University of Los Andes in Bogotá on November 17, 2005.

⁴¹ Colombian Constitutional Court, Decision SU-1150 of 2000.

be possible to evaluate *ex-ante* whether a given policy is an adequate means of achieving the State's declared objective. Of the various alternatives open to the State, the best policy (and therefore the one the State should implement) is the one that will most effectively guarantee the enjoyment of the relevant rights.

Moreover, it is not the Court's role to tell the Government exactly what it must do to comply with these policies. Consequently, the Court asks the Government to define what it needs and later tells the Government that it should take follow-up action. In addition to these rules, there are a series of guidelines that set out the State's obligation in terms of affirmative action, progression, progressive realization, and the prioritization of actions. Regarding the latter, the Court recognizes the restrictions on the ability of the State to immediately and comprehensively attend to the needs of each sector of the population, and to comply with obligations to uphold social and economic rights.

With respect to affirmative action, it follows from the aforementioned principle of coherence that it is not enough for the State to indicate that it will develop programs in favor of the displaced population. The history of public policy is full of examples where policies aimed at advancing the material equality of a given sector of the population did not progress further than the drafting table. Decision T-025 of 2004, and in particular Award 176, establishes a procedure to translate policy objectives into concrete results. According to this procedure, all policies have to be accompanied by mechanisms that are clear with regard to the following: (i) the content of the policy; (ii) how the policy meets the specific needs of the target population, particularly people enjoying special constitutional protection (a differential approach); (iii) defining which institutions are responsible; and (iv) the goals, benchmarks, and resources that are to be destined for the target population. Defining policies in this way allows for the follow-up and evaluation of concrete results in favor of the displaced population (or any sector of the population to which these constitutional guidelines may be applied).

It is not sufficient to ensure access to State resources for vulnerable groups of a population. The State must define more precisely the appropriation and allocation of resources for each of these groups. Otherwise, the displaced population's rights would be jeopardized even further and the situation aggravated by poor organization and lack of representation.

The challenge set by the Court is to formulate, apply, and evaluate public policies that translate into the progressive and effective protection of the displaced population's rights. To that effect, the Court has established practical guidelines that can be used by those designing and implementing public policy. There was a general consensus that it was necessary to establish a baseline for the displaced population's situation in order to assess improvements in the effective enjoyment of rights. The State carried out a demographic survey to characterize segments of the displaced population registered by the Government in the second half of 2004. At the conclusion of this exercise the State had, for the first time, an estimate of the situation of the displaced population and the results of public policies.

In technical terms, the most complicated exercise has been the elaboration of common indicators (used by all those working for the assistance and protection of the displaced population) that evaluate the level of the population's enjoyment of its rights. Traditionally, public policy was evaluated using purposes and benchmarks outlined in the public policy itself. Using the effective enjoyment of rights as the criteria for evaluation makes explicit the State's obligation to achieve results. Though governments should take the required measures, doing so does not necessarily guarantee the effective enjoyment of the rights that these policies seek to protect. As seen above, the Court's view on the evaluation of public policy represents a qualitative leap forward toward a human rights-based perspective.

The concept of "to the maximum of its available resources," contained in Article 2 of the International Covenant on Economic, Social, and Cultural Rights, is a concept that, in the absence of clear guidelines, remains vulnerable. Without clear guidelines, the interests of landowners, merchants, and miners with government influence can often be considered before the interests of IDPs or any other vulnerable population. By examining the mechanisms for the allocation, execution and revision of budgets, the Court has given the Government and the displaced population practical tools to ensure the adequate protection of the displaced population's rights.

The Court promotes a system of institutional action whereby the allocation of resources is a basic tool for the advancement of the population's rights. Resources should be allocated based on an axiological exercise, which determines the State's priorities using the values enshrined in the Constitution. The amount allocated should correspond to the

magnitude of the problem that the public policy aims to address and should be sensitive to changes in demand (in this case, to the size of the displaced population), the needs of the population, and restrictions or improvements in the State's capacity to assist the population. For this reason, the starting point for budget allocation was the evaluation of the needs of the population—an evaluation that provided an estimate of the cost of the State's response. Given the inability of the State to resolve all the problems in a single fiscal year, the Court established two rules: (i) progressive realization and (ii) a minimum level of protection, which consists of a nucleus of rights that should be guaranteed to all IDPs at all times.

In Award 176 of 2005, according to the annual budget cycle, the Court established mechanisms to assure resources that guarantee the financing of effective programs for displaced persons. These mechanisms include the following steps: (i) the planning should be adjusted on the basis of the needs of the population, identified in the survey mentioned above; (ii) annual budget allocation (i.e. the relation between the amount estimated as necessary and the allocation in the annual Budget Law); and (iii) evaluation of execution (i.e. at the end of each fiscal year the Government should report on how it spent the resources allocated). Such a scheme of planning, follow-up, and evaluation in relation to a determined sector of the population, and one that involves an important number of institutions, had not yet been applied in Colombia. It represents a demonstration of what the Court calls the “principle of seriousness,” or that the State should comply with what it has promised.

If both the State and society were to respect these guidelines for the social policy development set by the Court, they would be taking a significant step toward the realization of the social and economic rights of the population.

IV. Limitations of constitutional justice

It is clear that the continuing armed conflict not only causes the total number of IDPs in the country to increase constantly, but that it also creates a far from perfect operating environment for the institutions responsible for assisting the displaced population.

There are several interests that may overshadow those of the victims in an armed conflict. They include:

- i. The interests of the persecutors, who retain the force to silence those who seek to defend their rights;
- ii. The interests of third parties that take advantage of institutional weakness, public disorder and the fragility of communities to obtain illegal or undeserved profits; and
- iii. The interests of other sectors of the population who do not act in solidarity with the displaced population and who have greater influence than the displaced population in the definition of public policy.

It is the belief of many policymakers that action in favor of the displaced population would discriminate against other groups in the population. Thus policymakers with this orthodox view often use technical arguments against the priorities set by the Court. In practice, these arguments act as a barrier to the implementation of the Court's rulings, though they fall short of acting against the Court in any way that the Court can currently question.

National and local public officials do not have the legal background to understand many of the Court's decisions. A continuous training model does not exist for them. The public officials in charge of carrying out public policy lack the necessary legal tools to respond adequately to the demands of the Court. These public officials need to be trained to properly interpret legislation and judicial rulings.

Whilst the high levels of Government respect judicial actions and obey the Court's rulings, it is clear that these rulings create tension within the Executive branch. The position of the Executive is ambiguous. On the one hand, it recognizes that the Court's interventions create the conditions necessary for all of the State's entities to commit to aiding and protecting IDPs. On the other hand, it sees judicial action as an interference with its normal operation, and as a risk to its autonomy in managing institutional policies.

A limitation of an impact of a judicial action is related to authorities' lack of comprehension of the importance, urgency, and necessity of responding effectively to judicial order. This lack of comprehension creates the risk that the interaction between the Executive and the Court reduces the debate on displacement to a debate on compliance with the Court's judgments. That is, public officials concentrate on complying with Court orders rather than on resolving the underlying problems set out by

the Court. The danger here is that the exercise becomes an exchange of information between two public branches—an exercise that does not result in a material improvement in the welfare of the displaced population. An interaction of this kind that does not get to the bottom of the problem would lead to the following adverse situations: (i) a person, unprotected by the State, would be displaced; (ii) having been displaced, the person would seek assistance from the authorities who would not provide it; and (iii) even after seeking constitutional protection for her or his rights, said rights would still not be effectively protected.

The *tutela* action has a potential risk. It can establish discrimination between the population that demands their rights through this action and the population that does not. The authorities' response can be faster and more comprehensive for IDPs who use the above action. This risk was identified by the Court's Decision T-025 of 2004.

However, as the Court itself has made clear, the unconstitutional state of affairs has not been remedied and the displaced population continues to find that the *tutela* method is the most efficient form of protection that it has. This is exemplified by the number of *tutela* cases related to the protection of the displaced populations' rights that the Court is reviewing. In the last two years, the number has increased five-fold.

Judicial protection has proven to be the fastest and most efficient mechanism that the displaced population has found for the protection of their rights. For this reason, the State should guarantee that certain conditions be met in order to facilitate judicial assistance to the displaced population.

The Constitutional Court's intervention has been the principal encouragement behind the response of the Colombian State. Without judicial intervention to protect IDPs' rights, the State response could decrease and lose momentum, resulting in the increased vulnerability of the displaced population.

V. Conclusion

In many cases, judicial protection has become the most effective way to protect the displaced population's rights. This is apparent given the following: (i) the fragility of IDP organizations (a logical consequence of displacement); (ii) the need to attend simultaneously to the requirements of various sectors of the population; (iii) the difficulty that institutions

have in adapting to the reality of the conflict; and (iv) the existence of diverse interests (many of which are linked to the on-going armed conflict).

The Colombian experience underscores the importance of strengthening and consolidating national protection mechanisms, particularly as the armed conflict is taking place in a solid, well-developed State in which different branches of public power function relatively well. In a context like this, it is important to strengthen the work of all branches of the State in order to increase the efficiency of the State's response to IDPs' myriad of adverse circumstances.

The intervention of the judicial system not only protects relevant rights, but also reestablishes the relationship between citizen and State that had been affected by the lack of prompt protection and the weakness of the assistance offered. It is essential to reestablish this relationship in the context of an armed conflict in order to strengthen institutional legitimacy and to recover the ability to govern. An adequate institutional response has the additional benefit of helping to achieve durable solutions, and of thereby favoring reconciliation in a post-conflict future.

Though the importance of individual protection must not be neglected, due to the magnitude of the displacement crisis, judicial action has the greatest impact when directed at an analysis of structural problems that limit the State's response. The issues that judicial action seeks to correct are indicators of the most important gaps of the State's response. Therefore, it favors the adoption of necessary adjustments by the authorities.

The Court demonstrates that its effect is more significant when there is a follow-up mechanism to the compliance of a Court order. In general, displacement does not take first priority in the public policy agenda. Constitutional, judicial interventions therefore have a clear impact in that they ensure that the State recognizes displacement as one of its priorities. In order for a judicial decision to be effective and for the relevant rights to be protected, it is necessary to institutionalize participative mechanisms to follow-up on the Court's structured judgments.

In the case of displacement, judicial intervention responds to a structural flaw in the State response to a problem that affects broad sectors of society. In order to avoid the response to this decision becoming an endless exchange of demands and legal sanctions, or excuses and

explanations, it is necessary to reach a consensus among the displaced population, all branches of the State, and the social actors involved in the response to displacement.

The fact that the population whose rights have been violated turns to the judicial authorities is a demonstration of institutional capacity and of the population's faith in these institutions. Faith in institutions cannot be squandered, especially in the context of a conflict. The challenge faced by the authorities is to guarantee that judicial decisions are respected, thereby achieving effective protection of the population's rights and reinforcing the identity of the State as a "social State" based on the rule of law.