

CHAPTER 4

The Human Rights of the Victims of Forced Internal Displacement in Light of the Progressivity of Economic, Social, and Cultural Rights

*Rodolfo Arango**

The internal displacement of people as a consequence of the armed conflict in Colombia tests the State's capacity to fulfill its international obligations concerning human rights. One major test emanates from the sheer number of internally displaced people (IDPs), as well as from the composition of the internally displaced population. This population varies between two and three and a half million individuals. The average person in this population is twenty-three years old. Approximately fifty percent of the population comprises of women and about fifty percent comprises of boys and girls under fifteen years of age.¹ A second major test emanates from the historical lack of Government assistance to this population. As of September 2006, according to the Colombian Constitutional Court,² the authorities have not guaranteed that a minimum level of human rights—as set forth in the Guiding Principles on Internal Displacement—be afforded to Colombia's internally displaced population. In fact, the actions and omissions of public authorities have shown tendencies that present challenges to the protection of displaced people's human rights.

The Constitutional Court has declared this an unconstitutional state of affairs, and is adopting measures to ensure that the State's obligations towards internally displaced people are met in accordance with the Guiding Principles on Internal Displacement. Judicial review has come to be the principal institutional means of monitoring public policy on displacement, and of protecting the human rights of those affected by the

* Ph.D. in Constitutional Law and Jurisprudence. Philosophy Professor, Departamento de Filosofía, Facultad de Ciencias Sociales, Universidad de los Andes, Bogotá.

¹ CODHES & Secretariado Nacional de Pastoral Social. *Desafíos para construir nación. El país ante el desplazamiento, el conflicto armado y la crisis humanitaria 1995-2005.* Colombia, 2006. p. 67.

² Award 266 of September 2006.

armed conflict. The Court's judicial review shows that in practice, the authorities in Colombia unjustifiably fail to fulfill international commitments and fail to recognize the human rights of displaced persons. In spite of the legislative and administrative actions undertaken to respond to the phenomenon of displacement, the omissions and errors in the design and implementation of public policy enable human rights violations to persist during the state of people's internal displacement. The effectiveness of judicial review on this subject depends on realizing the minimum fundamental rights of people who are victims of displacement. To fail to realize these fundamental rights would be one more reason to find the Colombian State responsible in violation of international treaties on human rights.

The complexity surrounding the forced internal displacement of millions of people demands a permanent and coordinated intervention from relevant public authorities. The principle of the progressivity of economic, social, and cultural rights (ESCR) is of central importance to this intervention, which centers on the review of the implementation of public policy expressed in Law 387 of 1997 and its statutory decrees. That is, this principle constitutes an objective criterion to measure the fulfillment of state obligations. It also includes the prohibition of backsliding on guarantees already achieved. In light of Decision T-025 of 2004 and its subsequent awards,³ the principle of progressivity of the ESCR has not, however, been satisfied. Consequently, according to the jurisprudence of the Court, the fundamental rights of the victims of displacement continue to be violated.

My hypothesis is that these rights are violated due to three factors: (1) inadequate design of the public policy associated with the comprehensive assistance to the displaced population; (2) incapacity of the proper authorities to protect the displaced population and combat the causes of displacement; and (3) the contradiction between the protection of the displaced population's rights and the policy of democratic security promoted by the current Colombian Government. The fulfillment of these principles by the public authorities would remedy this current humanitarian catastrophe of IDPs in Colombia. Without such assistance from the authorities, it would seem that the only recourse would be to seek intervention from the international community.

³ Awards 176, 177 and 178 of 2005, and 218 and 266 of 2006.

I. Characteristics of the conflict and the displaced population

Forty years of armed conflict in Colombia have left great desolation and destruction, and much death behind. The drug trafficking business—with its enormous economic gains—finances the participants in the conflict, as well as political, business, and social sectors. The social and economic inequality reflected in the structure of land ownership in Colombia, the clientelism and political corruption, and the precarious state of Colombia's democratic structure and function are factors that favor the power of irregular armed groups. This constellation of factors contributes to the massive violation of the human rights of the population, and in particular of people displaced by the violence.

The arrests of more than twenty Colombian parliamentarians⁴ and the investigations of more than seventy others for massacres of peasants have been widely documented in the press,⁵ and reflect the complicity of politicians in drug trafficking and in paramilitary operations. According to the statements of well-known paramilitary leaders, thirty-five percent of the Congress of the Republic is under paramilitary control. The Public Prosecutor's Office (*Procurador General de la Nación*) is pursuing various investigations concerning the intervention of paramilitaries in the elections for Congress and President of the Republic in the years 2002 and 2006. The intervention of paramilitaries in the legislative and presidential elections involved providing financial support to the candidates. For its part, the Government is advancing a policy of democratic security that intends to reveal and dismantle guerrilla bases and paramilitary forces, both of which are supported by some local administrations and part of the population.

In this context, one can appreciate that there is a large number of displaced people. However, the Government, the Catholic Church, and NGOs do not agree over the total number. The Government estimates the population of IDPs at two million, while the latter two groups estimate the

⁴ <http://www.elpais.com.co/paionline/notas/Marzo262008/nac02.html> (consulted February 8, 2009).

⁵ The Washington Post, February 17, 2007, page A28: "Scandal in Colombia Raises Skepticism on Capitol Hill, by Juan Forero." Cfr. also, *El Tiempo*, November 2006; *El Espectador*, November 2006.

population at three and a half million.⁶ There is also no consensus on which armed groups are responsible for the forced displacement. According to governmental sources of 2001, the paramilitaries are responsible for 48.2% of the displacement, the guerillas are responsible for 12%, and the combined actions of both armed groups are responsible for 37% of the displacement.⁷ Academics and intellectuals argue that “guerrillas, military, paramilitaries, livestock farmers, drug traffickers, emerald dealers, merchants, national companies and corporations and transnational companies” cause displacement. Some affirm that “there are not displaced persons because of war but rather that there is war so that displaced persons will exist.”⁸

II. Legislative response and regulation

Although forced displacement has been quantified in Colombia in the period between 1946 and 1958 (called “The Violence”), when it is estimated that two million people were expelled from their lands, forced displacement has only been considered a pervasive phenomenon since 1995. For some, displacement fundamentally results from the action of illegal armed groups. For others (e.g. academics during the 1990s), displacement’s roots are in “the consolidation of a model of exclusive development, characterized by... corrupt relationships... patronage and force.”⁹ In this latter perspective, people are removed from their agricultural lands. Forced displacement also results in lands being used for illicit activities such as coca production, which fuels guerilla and paramilitary operations.¹⁰

The response of the Colombian legislature to the situation of internal displacement was to expedite Law 387 of 1997. These measures were “adopted for the prevention of forced displacement; assistance protection,

⁶ CODHES & Secretariado Nacional de Pastoral Social. *Desafíos para construir nación. El país ante el desplazamiento, el conflicto armado y la crisis humanitaria 1995-2005*. Colombia, 2006. p. 19.

⁷ These proportions change in 2003 to 32.7% for paramilitaries, 22% for the guerrillas and 42% for combined (UNHCR. 2004. *Balance de la política pública de prevención, protección y atención al desplazamiento interno forzado en Colombia, agosto 2002-agosto 2004*. Bogotá: UNHCR, p.137).

⁸ Bello, Martha. 2004. “El desplazamiento forzado en Colombia: acumulación de capital y exclusión social”, en: Martha Bello (ed.). *Desplazamiento forzado. Dinámicas de guerra, exclusión y desarraigo*. Bogotá: UNHCR & Universidad Nacional de Colombia, p. 25.

⁹ *Id.*, p. 20.

¹⁰ *Id.*, p. 21.

consolidation and socio-economic stabilization of persons internally displaced by violence in the Republic of Colombia.”¹¹ This law defines who may be considered a forcibly displaced person, and also defines the rights such people enjoy. It also recognizes the responsibility of the State on the subject; creates the SNAIPD, with a National Council (an advisory body), municipal committees, district committees, and department committees, as well as the institutions of which they are comprised; orders the design of a National Plan for Comprehensive Assistance to the Population Displaced by Violence and determines its objectives; creates a National Information Network for Assistance to the Population Displaced by Violence to assure that measures of immediate assistance are taken; establishes measures to prevent forced displacement and tend to emergencies in a humanitarian manner, and to support the return of affected persons, promoting their socioeconomic consolidation and stability; creates a National Fund for Comprehensive Assistance for the Population Displaced by Violence, administered by the Ministry of the Interior; defines the origin of the resources of said fund; and adopts other measures for the protection of the displaced population.

The Law above has been developed through various statutory decrees¹² and from documents of CONPES.¹³ Regulating by means of various statutory decrees responds to the need to give specialized assistance to the displaced population on the subjects of registration, health, education, land, and housing. The general State policy is reflected by two additional instruments: the National Plan for Development and Decree 2002 of 2002.

The National Plan for Development 2003-2006 (Law 812 of 2003) and the Decree on Interior Disturbances of 2002 frame the public policy of assistance to the population displaced by violence within the policies of the communitarian State and democratic security. This has meant that the policy on returning the displaced population to their places of origin, on their involvement in the armed conflict, and on their assistance, is constructed in the framework of the anti-guerrilla fight. The Government of Álvaro Uribe Vélez views assistance to people who have suffered from forced displacement as a function of the State’s policies of public order.

¹¹ http://www.secretariasenado.gov.co/senado/basedoc/ley/1997/ley_0387_1997.html (consulted February 8, 2009).

¹² Cfr. among them Decree 266 of 2000, Decree 2569 of 2000, Decree 2007 of 2001, Decree 2131 of 2003.

¹³ CONPES (in Spanish).

These policies are based on the “fortification of public force and citizen cooperation within philosophies of military intelligence and direct participation in the conflict (network of cooperatives and peasant soldiers).”¹⁴

The Government enacted Decree 2569 of 2000, through which it partially regulated Law 387 of 1997 with the goal of specifying the responsibilities of some of the entities charged with assisting the displaced population. This decree also established norms that regulated the inclusion and expulsion of people in the official registry, as well as the stabilization and economic consolidation of the affected persons.

By means of Decree 250 of February 7, 2005, the National Plan was adopted for the Comprehensive Assistance for the Population Displaced by Violence. This replaced the former plan contained in Decree 173 of 1998. In the new plan, a “matrix approach” was developed for each of the phases of comprehensive assistance: prevention and protection, humanitarian emergency assistance and socioeconomic stabilization. This type of approach was also developed for the policy’s four strategic lines: humanitarian actions, local economic development, social management, and habitat. Despite these policy advances, the results of the comprehensive assistance plan continued to be, in the view of the Constitutional Court, insufficient to guarantee the minimum obligations towards displaced persons.

Moreover, several measures clearly go against guiding principles on assistance to the displaced population. For example, the governmental project for the legalization of land allows for land possession to transpire after a person has resided for five years on a particular piece of land, and the statutory decree of the Law of Justice and Peace (Law 975 of 2005) favors the demobilized paramilitaries who negotiated IDPs’ delivery to justice.

III. The intervention of the Constitutional Court

The Constitutional Court, exercising its particular review of the *tutela* of fundamental rights, had already pronounced the protection of IDPs’ specific rights in successive decisions.¹⁵ But it was by means of Decision

¹⁴ Bouley, 2004, p. 370.

¹⁵ The Court summarizes some previous decisions in Decision T-025 of 2004:

“Since 1997, when the Court dealt with the extremely serious situation of displaced persons in Colombia for the first time, 17 judgments have

T-025 of 2004 (with Justice Manuel José Cepeda Espinosa presiding) that the Constitutional Court analyzed the situation of thousands of people who were victims of forced internal displacement. In this decision, the Court conducted a general evaluation of the public policy of assistance to the displaced population in relation to the fulfillment of minimum obligations correlating to the rights of petition, meeting measures that secure an individual's level of subsistence, and various rights regarding work, health, housing, and education. The Court adopted the analysis of the public policy of displacement, starting by focusing on the realization of the minimum demandable contents of the rights. This is in contrast to the aggregative focus on the fight against poverty adopted by Government's policy.

The Court concluded, after a meticulous constitutional analysis of the strategies advanced by the State beginning with Law 387, that a massive and ongoing violation of the affected persons' fundamental rights existed.¹⁶ It was deemed that such violations did not result from the action

been adopted by the Court to protect one or more of the following rights: (i) on 3 occasions, to protect the displaced population from acts of discrimination; (ii) on 5 occasions, to protect life and personal integrity; (iii) on 6 occasions, to guarantee effective access to health care services; (iv) on 5 occasions, to protect the right to a minimum subsistence income... securing access to programs for economic re-establishment; (v) on 2 occasions, to protect the right to housing; (vi) in one case, to protect freedom of movement; (vii) on 9 occasions to guarantee access to the right to education; (viii) in 3 cases to protect the rights of children; (ix) in 2 cases to protect the right to choose their place of residence; (x) in 2 opportunities to protect the right to free development of their personality; (xi) on 3 occasions to protect the right to work; (xii) in 3 cases to secure access to emergency humanitarian aid; (xiii) in 3 cases to protect the right of petition, related to requests for access to any of the programs for the attention of the displaced population; and (xiv) on 7 occasions to prevent the use of the requirement of being registered as a displaced person as an obstacle for access to aid programs.”

¹⁶ The Court concludes that,

“...given the conditions of extreme vulnerability of the displaced population, as well as the repeated omission by the different authorities in charge of their attention to grant timely and effective protection, the rights of the plaintiffs in the present proceedings -and of the displaced population in general- to a dignified life, personal integrity, equality, petition, work, health, social security, education, minimum subsistence income and special protection for elderly persons, women providers and children, have all been violated (sections 5 and 6). These violations have been taking place in a massive, protracted and reiterative manner,

of a specific authority, but rather from the structural defect of the policy on comprehensive assistance to the displaced population. As far as the Court was concerned, the response towards the displaced population did not satisfy the constitutional and legal parameters that the State had taken on, and to which it had committed itself before the international community.

After its analysis of public policy with a focus on rights, Decision T-025 of 2004 considers that the situation of IDPs in Colombia constitutes “an unconstitutional state of affairs,” which demands the adoption of urgent and special measures for assuring rights—measures that must be carried out by the relevant authorities.¹⁷ According to the doctrine of the unconstitutional states of affairs, such urgent measures for protecting the essential nucleus of fundamental rights are justified when there exist factors such as:

“(i) a massive and generalized violation of several constitutional rights, which affects a significant number of people... (ii) a protracted omission by the authorities in complying with their obligations to secure rights... (iii) the adoption of unconstitutional practices, such as the incorporation of the *tutela* action as part of the procedure to secure the violated rights... (iv) failure to adopt the legislative, administrative or budgetary measures required to prevent the violation of rights... (v) the existence of a social problem whose resolution requires the intervention of several entities, demands the adoption of a complex and coordinated set of actions, and exacts a level of resources that implies an important additional budgetary effort... (vi) if all the persons affected by the same problem were to resort to the *tutela* action in order to obtain the protection of their rights, a higher judicial congestion would be produced.”

and they are not attributable to a single authority, but are rather derived from a structural problem that affects the entire attention policy designed by the State, as well as its different components, on account of the insufficiency of the resources allocated to finance such policy, and the precarious institutional capacity to implement it (section 6.3.). This situation gives rise to an unconstitutional state of affairs, which shall be formally declared in this judgment” (section 7 and paragraph 1 of the final decision).

¹⁷ The doctrine of the unconstitutional state of affairs has been applied by the Constitutional Court in several cases relating to persons in prison, the situation of pensioners, the protection of human rights activists and the omission of calling for competition to become public notary.

Since Decision T-025 of 2004, the Court has passed diverse awards (Awards 176, 177 and 178 of 2005, and 218 and 266 of 2006¹⁸) for reviewing the completion of what was ordered in the original decision.

IV. Application of the Guiding Principles

In Decision T-025 of 2004, the Constitutional Court embraced the Guiding Principles on Internal Displacement (compiled by the Representative of the UN Secretary-General on Internally Displaced Persons, Francis Deng, in 1998) in an interpretation of the scope of the rights of IDPs. In the analysis at hand, we are interested in the minimum rights of the displaced population that the Constitutional Court specifies on the grounds “of the international obligations acquired by Colombia in the field of human rights and international humanitarian law, as well as the compilation of criteria for the interpretation and application of measures to assist the displaced population which is contained in the Guiding Principles.” Such rights comprise the minimum assistance that must always be satisfied by the State.¹⁹

V. Doctrine of the minimum and the principle of progressivity

Starting from the constitutional precedent and the Guiding Principles referred to above (regarding Decision T-025 of 2004), the Court specified the minimum content of IDPs’ rights, which must be guaranteed at all times. The content of these rights is part of the content of the minimum obligations owed by States that have ratified international human rights instruments. Moreover, the Court imposes a higher standard on the authorities than in ordinary civil law cases, in order to combat a backsliding in the level of protection of social, economic, and cultural rights. This high standard of obligations imposed on the authorities is

¹⁸ After this analysis was prepared, the Constitutional Court issued other additional rulings (awards)¹⁸ in which it calls for compliance with the requirements of Decision T-025 of 2004. Some of these rulings are: ruling 109 of 2007, ruling 233 of 2007, and ruling 116 of 2008 (in which the Constitutional Court adopted a set of 174 obligatory indicators for measuring progress, stagnation, or backward movement in overcoming the state of unconstitutionality, and in the guarantee of effective enjoyment of the twenty rights of the displaced population); ruling 005 of 2009 (regarding protection of the fundamental rights of those of African descent who are victims of forced displacement); ruling 008 of 2009 (regarding the persistence of the state of unconstitutionality); ruling 009 of 2009 (adopted as a result of the assassination of a displaced leader); ruling 011 of 2009 (regarding the shortcomings in the registration systems for the displaced).

¹⁹ Decision T-025 of 2004, paragraph 9. Concerning the Constitutional Court’s application of the Guiding Principles, see Chapter 6 in this book.

based on the principle of progressivity of ESCR (Article 2, paragraph 1 of the International Covenant on Economic, Social, and Cultural Rights,²⁰ ratified by Law 74 of 1968) and on the special protected condition that internally displaced people enjoy.

In its task of specifying the review of restrictive measures of claimants' rights, the Court defines the scope of the displaced population's minimum rights. To this end, it distinguishes between the essential nucleus of their fundamental constitutional rights and the satisfaction of duties of assistance for immediate compliance in accordance with the State's international commitments.²¹ In doing so, the Constitutional Court formulates a constitutional rule, from which it interprets the minimum rights of the displaced population. Such a constitutional rule presupposes the existence of an unconstitutional state of affairs—that is, the massive and recurrent violation of fundamental rights.²² The constitutional rule formulated by the Court establishes:

“When a group of persons, which has been defined—and is definable—by the State for a long time, is unable to enjoy its fundamental rights because of an unconstitutional state of affairs, the competent authorities may not admit the fact that those persons die, nor that they continue living under conditions which are evidently harmful to their human dignity, to such a degree that

²⁰ International Covenant on Economic, Social, and Cultural Rights, Article 2, para. 1:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

Article 11, para. 1:

“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”

²¹ For the difference between the essential nucleus of the constitutional fundamental rights and the minimum level of protection to be satisfied by the State in accordance with international duties, see paragraph 9 of the Colombian Constitutional Court, Decision T-025 of 2004.

²² There exist a broad number of decisions about unconstitutional states of affairs—see the website of the Constitutional Court (www.constitucional.gov.co) under “estado de cosas inconstitucional.”

their stable physical subsistence is at serious risk, and that they lack of the minimum opportunities to act as distinct and autonomous human beings.”

Based on this rule, the Court specifies, the minimum content of assistance. This minimum content must always be satisfied by the State. According to the Court:

“[The] minimum level of protection that must be guaranteed in an effective and timely manner... implies (i) that the essential nucleus of the constitutional fundamental rights of displaced persons may not be threatened in any case, and (ii) that the State must satisfy its minimum positive duties in relation to the rights to life, dignity, integrity—physical, psychological and moral—family unity, the provision of urgent and basic health care, the protection from discriminatory practices based on the condition of displacement, and the right to education of displaced children under fifteen years of age.

In regards to the provision of support for the socio-economic stabilization of persons in conditions of displacement, the State’s minimum duty is that of identifying, in a precise manner and with the full participation of the interested person, the specific circumstances of his or her individual and family situation, his or her immediate place of origin, and the alternatives of dignified subsistence available to him or her, with the aim of defining that person’s concrete possibilities of undertaking a reasonable project for individual economic stabilization, or of participating in a productive manner in a collective project, for the purpose of generating income which may allow him or her, and any dependent displaced relatives, an autonomous livelihood.

Finally, in regards to the right to return and re-establishment, authorities’ minimum duty is that of (i) not imposing coercive measures to force persons to return to their places of origin or to re-establish themselves elsewhere, (ii) not preventing displaced persons from returning to their habitual place of residence or re-establishing themselves elsewhere; (iii) providing the necessary information about the security conditions that exist at the place where they will return, and about the responsibilities that the State shall assume in the fields of security and socio-economic assistance in order to guarantee a safe and dignified return; (iv) refraining from promoting return or re-establishment whenever such decisions imply exposing displaced persons to a risk for their lives or personal integrity, and (v) providing the support required to secure that return is carried out in safe conditions, and that those

who return are able to generate income which can provide them autonomous livelihoods.”

In Decision T-025 of 2004, the Constitutional Court refers to the principle of the progressivity of ESCR, and the implicit prohibition of retrogression in the protection of the displaced population’s rights. Concerning the application of international law as a criterion of judicial review against measures that can constitute a retrogression in the level of protection of ESCR already achieved, the Court specified the conditions that must be met so as not to violate the prohibition of retrogression as they have been understood by the UN Committee on Economic, Social, and Cultural Rights. These measures or conditions are set out as follows:

“These four conditions may be applied to all rights with a markedly positive-duty imposing dimension, because of the specific conditions of their bearers, and may be summarized in the following parameters. First, the prohibition of discrimination (for example, an insufficiency of resources may not be invoked to exclude ethnic minorities or the supporters of political rivals from State protection); second, the necessity of the measure, which requires a careful study of alternative measures, which must be unattainable or insufficient (for example, if other sources of finance have been explored and exhausted); third, a condition of future advance towards the full realization of the rights, in such a way that the reduction of the scope of protection is an unavoidable step to return, after overcoming the difficulties which led to the transitory measure, to the route of progressiveness in order to achieve the highest degree of satisfaction of the right... and fourth, a prohibition of disregarding certain minimum levels of satisfaction of the right, because measures cannot have the effect of violating the basic nucleus of protection which can ensure the dignified subsistence of human beings, nor can they begin by the priority areas which bear the highest impact upon the population. The Court shall now define those minimum levels.”

In two previous cases the Constitutional Court had already declared legislative measures as unconstitutional because the measures had ignored the prohibition of retrogression deduced from the principle of ESCR progressivity. In Decision C-991 of 2004,²³ the Court declared the

²³ The Constitutional Court indicated here that the limitation introduced by Law 812 of 2003 in the protection of single parents and people with some incapacity represented an important retrogression in comparison with what was established by Law 790 of 2002.

statements of Law 812 of 2003 as unconstitutional, and thereby established which temporal limits were to be set for the special protection of persons in a situation of disadvantage in relation to a policy of the restructuring and downsizing of State entities.. The Court maintains that “if in general terms the retrogressions in matters concerning the protection of ESCR are prohibited, such *prima facie* prohibition appears with special force when the enforcement of ESCR of special protected persons is at stake.”²⁴ The cases of victims of internal displacement are perhaps the most important application of the stated duty of the special protection of disadvantaged persons.

In Decision T-595 of 2002, the Constitutional Court had ordered the public administration to guarantee, without delay, access to mass transportation services for claimants with physical limitations and those deserving special protection based on their condition of vulnerability. The Court also referred to the enforcement of ESCR, making it clear that progressivity predicates the effective enjoyment of ESCR and requires, among other things, the obligation to adopt decisions “that are based on a rational decision process which structures a realistic public policy, so that the democratic compromises taken by the government do not turn into an empty promise.”²⁵ Accordingly, the presumption of the unconstitutionality of retrogressions, the burden of argument on the head of the State, and the strict review of adopted measures added to the demand for a public policy and for its support in a rational decision-making process.

In “*La prohibición de retroceso en Colombia*,”²⁶ it was suggested that a step-by-step test be used in the judicial review of regressive measures for ESCR. The above text also discusses a test based on the reconstruction of decisions of the Constitutional Court regarding the realization of ESCR. For example, if the legislator is going to design public policy for the development of ESCR and modify the measures previously adopted, this must be done within the constitutional framework that requires the progressivity of ESCR and prohibits—except for arguments of great weight—a return to previous, lower levels of achievement vis-à-vis rights protection (i.e. regressive measures). The test to be utilized by the judge in reviewing supposedly regressive measures has the following structure:

Therefore, the Court concluded that such limitation violated the minimum level of protection of social rights which had just been gained.

²⁴ Colombian Constitutional Court, Decision C-991 of 2004.

²⁵ Colombian Constitutional Court, Decision T-595 of 2002.

²⁶ Arango, 2006.

“Test of Constitutionality of Regressive Measures for Social Rights”

1. Existence of measure that negatively interferes in the area of a social right
(+)
2. Prohibition of regressive measures for social rights
(applied by means of presumption of unconstitutionality)
(+)
3. The prohibition is accepted if it meets the following conditions:
 - 3.1 The reasons that justify the measure are valid**
 - 3.1.1 The financial crisis invoked does not exist at the moment of recognizing the benefit (+)
 - 3.1.2 The administration is not exclusively responsible for the crisis (+)
 - 3.1.3 The errors are not predicable to the beneficiary of the benefit (+)
 - 3.1.4 The dismissal is not exclusively based on the suppression of an accusation (entity) (+)
 - 3.2 The reasons justifying the measure are sufficient**
 - 3.2.1 The measure meets the principle of reasonableness:
 - 3.2.1.1 It does not discriminate against any specific person or group (+)
 - 3.2.1.2 A public policy exists for the progressive development of the right (+)
 - 3.2.1.3 The public policy is implemented within a reasonable amount of time (+)
 - 3.2.1.4 The restrictive measure is upheld in a rational decision process (+)
 - 3.2.2 The measure meets the principle of proportionality:
 - 3.2.2.1 It pursues a vital end (+)
 - 3.2.2.2 It is necessary (inexistence of less harmful alternatives) (+)
 - 3.2.2.3 It is strictly proportional (benefit of protection > magnitude limitation) (+)
 - 3.3 The measure does not affect persons with special constitutional protection**
 - 3.3.1 The specific obligations to special protection are met (+)
 - 3.3.2 Affirmative actions required by the subjective condition are adopted (+)
 - 3.4 The measure permits the effective realization of the right**
 - 3.4.1 There is no absolute omission (+)
 - 3.4.2 The measure permits the extension of assistance coverage (+)

3.4.3 The measure permits the increase in quality of assistance (+)
3.5 The measure does not ignore the minimum or lower level
3.5.1 It does not ignore the essential content of the right (= no tragic case exists) (+)
3.5.2 The essential nucleus of the fundamental right is protected (= 3.8.1.1) (+)
3.5.3 Retrogression is an inevitable step towards future progress (+)
3.6 The measure respects the priority of social public spending above other allocations
3.6.1 It respects the priority of social public spending (+)
3.7 The impact of the measure has been evaluated systematically and integrally
3.7.1 Systematic evaluation of impact does not show violation of tax progressivity (+)
3.7.2 Integral evaluation of impact does not show violation of tax progressivity (+)
3.8 The measure meets the parameters of international law
3.8.1 It attends to the norms of the ESCR Convention (+)
3.8.1.1 The essential nucleus of the fundamental right is protected (+)
3.8.1.2 The minimum assistance obligation for immediate compliance is met (+)
3.8.1.3 The measures are adopted to the maximum of available resources (+)
3.8.1.4 The measures are justified before the totality of the rights of the Pact (+)
3.8.1.5 The measures are applied after an exhaustive examination of alternatives (+)
3.8.2 The parameters (Directives) of the ESCR Committee are attended to (+)
3.9. The measure meets the burden of argument on the head of the State
3.9.1 It was assumed by public authority (+)
3.9.2 It was satisfied to the level required in the concrete case (+)
4. Declaration of constitutionality or unconstitutionality of the measure under review

The general conditions numbered in 3.1 to 3.9 must be met in their totality to conclude that the regressive measure is justified. The numerals of more than two digits (e.g., 3.1.1 and 3.9.2) illustrate conditions stated by the Constitutional Court in concrete cases, by reason of which not all of

these conditions have general obligatory force.²⁷ Not meeting even one of the conditions above (from 3.1 to 3.9) is enough to conclude the contrary—that is, that the regressive measure violates constitutional rights.

VI. *Evaluation of the Colombian authorities' actions and omissions*

The aim of the present analysis is not to evaluate the entire design and implementation of the Colombian State's public policy on forced internal displacement, as such an analysis exists in diverse reports and related documents in the decisions of the Constitutional Court.²⁸ The present analysis addresses the question of whether the Colombian authorities' actions (and omissions) are tantamount to ignoring the State's international obligations to guarantee minimum rights to the displaced population. More specifically, it seeks to evaluate whether the existing policy and its execution violate the Guiding Principles' prescriptions (numerals 3.5 and 3.8 of the test of constitutionality) to protect a minimum content of fundamental rights to this population. In particular, this section examines whether the policy fails to protect these rights by failing to recognize the prohibition of retrogression as regards social, economic, and cultural rights.

In order to address the above question, the test of the constitutionality of regressive measures presented above was applied. Our conclusion is that the proper authorities, in spite of their efforts, continue to fail to fulfill their international obligations and to provide sufficient support for protecting a minimum standard of fundamental rights to IDPs. This conclusion is based on the analysis of two recent documents: Award 266 of the Constitutional Court on September 25, 2006 and the follow-up report presented by the Ombudsman's Office to the Constitutional Court in October 2006. From these documents, it is possible to glean nine groups of regressive measures (by action and omission) that affect the minimum rights of forcibly displaced people. These regressive measures are then evaluated for their constitutionality in accordance with the reasons that the public authorities could use to justify them.

²⁷ *Id.*, pp. 168-9.

²⁸ Cfr. UNHCR. 2005. *Report to the Constitutional Court*, March, 2005; National Controller's office, *Fifth Surveillance Report*, May, 2006; Ombudsman's Office, *Evaluation report*, October 2006.

A. Recognition of persons victims of forced internal displacement

The first way in which the minimum rights of displaced persons are disregarded is that the law requires that a person must be registered as a displaced person in order to receive State assistance. The petition for such recognition must be made by the interested party within the year following displacement. Additionally, there is a statutory norm²⁹ denying the recognition of displaced status to a person who completes the application after having passed a year in displacement. Both of these related State measures, although they may have relevance for the purpose of curtailing fraud, are not justified from the perspective of protecting minimum IDPs' rights, as displacement is a fact that should not depend on administrative recognition. Moreover, the impossibility of being recognized as displaced after having passed a year in displacement is entirely unreasonable. The abandonment of the place of residence to save one's life puts displaced people in a situation that impedes them from meeting the legal requirements for recognition. To receive State protection, the interested party only has to manifest that she or he is a displaced person. To deny State assistance, the public authorities must prove that this is not true—otherwise, the State would violate its obligations as set out in the Guiding Principles, in particular as regards protection during displacement (Principles 10 to 23) and humanitarian assistance (Principles 24 to 27).

B. The problem of under-registration of the displaced population

While the State claims that there are less than two million displaced people in Colombia, the Church and other social organizations (e.g. CODHES), as independent observers, argue that the number is about three million.³⁰ Thus, with perhaps over a million more people displaced and unregistered than are actually accounted for by the State, a minimum level of rights clearly cannot be upheld for a large portion of displaced people. Moreover, under-registration distorts the public policy of comprehensive assistance for displacement, as well as the policy's design, execution, and effectiveness. Thanks to the intervention of the Constitutional Court, the public authorities (e.g. *Acción Social*) reported an increase in the number of individuals and families registered in the Central Registry for the

²⁹ Para. 3 of Article 11 of the Decree 2569 of 2000, which further develops Law 387 of 1997.

³⁰ Bello 2004, p. 30.

Displaced Population.³¹ However, as the Ombudsman³² maintains, the official response to the requirements and needs of displaced people is not sufficient. Authorities do not record the number of rejections or the reasons for rejections. Similarly, the State does not keep records of the number of appeals or of the responses to appeals. Without these data, it is not possible to establish exactly how many displaced people there are or if the public authorities have taken the necessary measures to protect people. The above omissions in data translate to a failure to recognize the Guiding Principles and the minimum fundamental rights of all the people not included in the system, which by principle and policy entitles them to receive State assistance.

C. Institutional coordination for guaranteeing comprehensive implementation of public policy

Award 266 of 2006 of the Constitutional Court and the report of the Ombudsman's Office (2006) make it possible to confirm that the problems of institutional coordination for displacement assistance have not been resolved. This omission violates the Guiding Principles and the minimum rights of victims of displacement. The most evident proof of the lack of institutional coordination is that the reports from State entities do not include uniform information on the subject of content and periods of assistance. Similarly, they do not contain unified criteria, they repeat information, and they provide inconsistent data. The lack of institutional coordination complicates the State's ability to adhere to what was ordered by Decision T-025 of 2004. The failure on the part of the State to meet international obligations was made evident in the commentary of the Constitutional Court in Award 218 of 2006:

“[T]he reports presented to the Constitutional Court by the recipients of the orders issued in Decision T-025 of 2004 and Awards 176, 177 and 178 of 2005, so as to determine (i) whether such entities have properly proven that they have overcome the unconstitutional state of affairs in the field of internal displacement, or that they have advanced significantly in the protection of the rights of the displaced population, and (ii) whether the Court has been provided with serious, precise and depurated information to establish the level of compliance given to the orders issued in the aforementioned judicial decisions.”

³¹ Sistema Único de Registro, SUR, in Spanish.

³² Ombudsman's Office, *Evaluation report*, October 2006, p. 6-7.

D. The allocation of responsibilities among central and territorial entities

According to the 2006 report of the Ombudsman's Office to the Constitutional Court, the State's actions for resolving the problems of allocating responsibilities between the national government and territorial entities (e.g. departments and municipalities) have not worked. The creation of a group for coordinating territorial action and assuring the financial effort of territorial bodies by means of the General Budget Law, among other things, is not a novel measure. It follows the line of action that the Government has set in recent years, and has demonstrated the State's inefficiency in resolving the subject in question.³³ Likewise, the Court notes in Award 266 of 2006 that the MIJ has determined the creation of a special leadership committee within the institution to guarantee this process of coordination and follow-up with the municipalities and departments. However in response to Court authorities, "no specific term has been established for the creation of this directive committee."

The aforementioned omissions do not allow for the minimum rights of displaced people to be recognized. After Decision T-025 of 2004, which declares the unconstitutional state of affairs, and despite of the efforts of the national and local governments, the omission to fulfill the State's obligations to protect a minimum standard of fundamental rights to IDPs prevails.

E. Budgetary responsibility at the central and territorial levels

The Ombudsman's Office reports that the budgetary measures taken by the national government present three problems: (1) a problem of focus—i.e. the individualization of economic assistance to specific groups and people without seeking a solution to the structural problem of displacement; (2) a problem of allocating responsibilities; and (3) a problem of inconsistency between budgetary efforts and the Government policy of restricting the transfer of economic resources to the regions where displacement takes place.³⁴

³³ Controller's Office, *Fifth Surveillance Report*, May 2006, pp. 20 f.

³⁴ Ombudsman's Office, *Evaluation report*, October 2006, pp. 10-13.

Regarding the first problem, according to the Ombudsman's Office the State's focus on attempting to treat forced displacement as if it were simply another commonplace component of the national budget is wrong. The aid-based focus of the assistance to displaced people prevents special allocations from being included in the budget for correcting the structural problems that lead to displacement, such as the dismantling of armed groups. This ignores the kind of urgent and complex approach that the situation requires, and it illustrates the pressing need to overcome the situation of displacement.

Concerning the second problem, the Ombudsman's Office identified the following contradiction: while the national Government affirms that it is the territorial governments (departments and municipalities) who are responsible for the least budgetary effort, and that these territorial governments failed to fulfill their obligations of displacement assistance, the 2005 report shows that, to the contrary, the territorial entities implemented resources that were twelve percent above the goal initially programmed by CONPES.

With respect to the third problem, the current Government promotes constitutional reform of the system of budgetary transfers from the central Government to the territorial authorities. These transfers would result in the reduction of resources for territorial bodies. This goes against the increase in the growing responsibilities that they are assigning to the territorial bodies.

State investment shows an increase in resources set aside for displaced people. In 1995, 1.108 million pesos were invested in the displaced population; in 2004, 318.949 million pesos, and for the 2005-2006 period, 1.3 billion pesos were set aside.³⁵ Despite the increase in resources assigned to the displaced population, the Government has not included any strategies in its public policy on displacement assistance that would increase municipal and departmental governments' responsibility and management capabilities. To the contrary, the Government seeks to cut economic resources from the budget in order to achieve fiscal savings. Moreover, the public policy of displacement assistance is centered on an aid-based focus to the displaced groups. This causes these groups to depend increasingly on State assistance, without including strategies and programs to achieve a true socioeconomic stabilization of the displaced

³⁵ Ibáñez Londoño, Ana María. La estabilización económica de la población desplazada, Working Papers FIP, Fundación Ideas para la Paz, Bogotá, November 2006, p. 9.

population, such as through the creation of employment and stable income.³⁶

In accordance with the above, it is possible to establish that the reasons given by the Government to justify the failure to fulfill international obligations (in particular the prohibition of retrogression in satisfying economic, social and cultural rights of people who are victims of forced displacement) are not acceptable.

F. Differential treatment of individuals who have special constitutional protection

The Constitution and international law recognize the need to protect individuals and groups according to their particular situation (e.g. boys and girls, the elderly, women, and ethnic minorities). In particular, the State has recognized a series of fundamental obligations to protect individuals or groups with special status. These obligations derive from international human rights treaties, which are an integral part of Colombia's legal system. In the case of people who are victims of forced displacement, an even greater level of higher protection is required than for the rest of the Colombian population, as they do not have their specific needs assured. Moreover, the harmful effects of displacement leave them in a situation of imminent risk. In this respect, the fourth Guiding Principle on Internal Displacement establishes that, "[c]ertain IDPs, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs."

According to the Ombudsman's Office,³⁷ in the reports that were presented in compliance with the Court's orders, the authorities "do not take into account the essential differences within the displaced population, which causes difficulties at the moment of realizing the protection of specific rights like the rights to truth, to justice, to reparation, and to non-repetition, rights which the displaced persons are entitled to." As with other subjects, the authorities' responses consist of simple plans and projects of future action, without demonstrating differentiation in treatment. This violates the Guiding Principles, as well as the principle of progressivity in the protection of ESCR. These principles include (a) the

³⁶ *Id.*, p. 10.

³⁷ Ombudsman's Office, *Evaluation report*, October 2006, p. 13.

order to meet the duties of special protection and (b) the adoption of affirmative measures in favor of IDPs.

G. Differential treatment of ethnic communities who are victims of displacement

The Constitution, the International Covenant on Civil and Political Rights (ICCPR), and the 1969 International Labor Organisation (ILO) Treaty concerning indigenous peoples recognize that indigenous peoples are holders of specific rights, which must be kept in mind by the State. According to the Ombudsman's Office's report, as regards the treatment of indigenous peoples, the greatest advances have been made in public policy. In three principal documents, the authorities have presented reports of events and activities that are planned with and for these populations:

(i) Long-term Plan for Afro-Colombian Communities (Plan a Largo Plazo para Comunidades Afrocolombianas) that will form part of the 2006-2010 National Development Plan (Plan Nacional de Desarrollo 2006-2010). This plan seeks to encourage the participation of Afro-Colombian communities in formulating public policy concerning the improvement of their living conditions. The plan also includes an information system to identify, characterize and quantify the population in this group and thus allows for their inclusion in social, economic, and cultural Government assistance programs. The plan establishes goals to be met every four years, with the first period ending in 2010.

(ii) Plan for Comprehensive Assistance to Vulnerable Populations and Populations at Risk of Forced Disappearance (Plan de Atención Integral a Población Vulnerable y en Riesgo de Desaparición), approved by CNAIPD on June 13, 2005 (Agreement 05). This is a Government program that “establishes the programming, financial, and work objectives of those institutions that make up SNAIPD, so that they may aim, with opportunity and efficiency, towards meeting the commitments that the Colombian State has with its fellow citizens who suffer from vulnerability due to the internal violence and forced displacement.”³⁸ The plan of assistance to the vulnerable population defines the principles that guide it, its objectives, the phases of intervention and action strategies, the development of stages of assistance, the national network of information

³⁸ National Comprehensive Assistance System for the Displaced Population (SNAIPD), President of the Republic, January 2005 (<http://www.acnur.org/biblioteca/pdf/4849.pdf>).

on the displaced population, and the SNAIPD technical national committee.

(iii) Directive of Comprehensive Assistance to Indigenous Communities Displaced or at Risk of Forced Disappearance (Directriz de Atención Integral a Comunidades Indígenas Desplazadas o en Riesgo de Desplazamiento). This directive establishes:

“[i]ndigenous peoples, to a lesser or greater extent, maintain particular characteristics that differentiate them from the rest of Colombians: their own languages, cosmology, customs and traditional ways that govern their daily life. Displacement not only affects the families and leaders that must abandon their territories, but also the communities themselves, given that these peoples are united by strong ethnic, territorial, and cultural ties, taking into account that the hardships occurring as a result of generalized violence generate a weakening in the ethnic integrity of these groups as collective subjects of rights.

The assistance distinguishes, starting from the elements expressed above, those elements which must be specified in such aspects as: an adequate support of their traditional methods of providing nourishing diets, the way they organize themselves in housing, the role of the traditional doctor in psychosocial care, their educational processes and their processes of participation in making decisions, aspects that must be specified in the Unique Integrated/Comprehensive Plans—PIU—that the Departmental Committee formulates and in the contingency plans that the respective Displaced Population Assistance Committee formulates for each case.”³⁹

Nevertheless, for the Ombudsman’s Office⁴⁰ the actions and plans “do not contain precise information about how they will be implemented and evaluated.” In the same vein, the Controller’s Office recognizes that the Government has established strategies towards the indigenous population through its compliance reports in Decision T-025 of 2004. However, the Controller’s Office considers that the measures adopted by the

³⁹ Guidelines for Prevention and Comprehensive Assistance to the Indigenous Population in Situations of Displacement and Risk, with a Differential Focus, Ministry of the Interior and Justice, October 2006.

⁴⁰ Ombudsman’s Office, *Evaluation report*, October 2006, p. 14.

Government have only been designed on paper, but not yet put into practice.”⁴¹

In spite of the Ombudsman’s Office’s positive stance on the adopted measures in relation to the special protection of ethnic communities, these measures are merely plans and future projects. They are not results. Moreover, there is not a clear measure for addressing differential rights amongst the Afro-Colombian population.⁴²

Policy on assisting the return of IDPs to their original residence

According to the Guiding Principles, the process of returning displaced people to the places from which they were expelled or forced to flee must be realized under conditions foreseen in the framework of forced displacement—that is, under voluntary, secure, and dignified conditions. In the opinion of the Ombudsman’s Office in its report before the Constitutional Court (2006), the measures of returning the population to their original municipalities (as promoted by the entities of the SNAIPD) have been brought forward “without giving attention to the security conditions of transport to and permanence in the places of origin, and they [the above measures] don’t fulfill the necessary conditions of a returning process.”⁴³

The opinion of the Ombudsman’s Office is worrisome because the governmental omission puts at risk the minimum rights of the displaced population. The Government’s report does not specify concrete, specific actions for protecting the rights of IDPs. Clearly, the framework and the plans for returning IDPs are not sufficient for assuring the effective protection of the displaced population’s rights at the moment of return, and, especially, for assuring the possibility of achieving future socioeconomic stability. For example, according to information from the Controller’s Office that was turned over to the Constitutional Court at the end of 2006, “In 2004, 17,458 out of a total of 326,541 families registered in the RUPD were accompanied, while in 2006 this number increased to 31,899 out of a total of 413,533 enrolled families. For 2005 there is no information, which complicates analysis on this subject and reduces reliability in the reported numbers.”⁴⁴ In the opinion of the Ombudsman,

⁴¹ Controller’s Office, *Sixth Surveillance Report*, October 2006.

⁴² Controller’s Office, *Fifth Surveillance Report*, May 2006, p. 15.

⁴³ Ombudsman’s Office, *Evaluation report*, October 2006, pp. 15-16.

⁴⁴ Colombian Constitutional Court, Award 333 of 2006.

“the absence of this mechanism is made evident in the processes of return that have already occurred. In studying the information required in Writ 218, regarding massive displacements—whose analysis will be presented below—the Public Prosecutor’s Office found that in none of these cases was it reported that a return plan had been applied that provided for conditions of security and dignity.”⁴⁵

On the other hand, the return of the displaced population depends, in large part, on the success of the measures that seek labor stabilization for displaced families, especially the turning over of lands permitting the independent satisfaction of basic needs. In this regard, Government policy has been a total failure, and has resulted in retrogression regarding the guarantee of minimum social, economic, and cultural rights. The newspaper *El Tiempo* reports that in 2006 only 0.3% of persons displaced by violence obtained access to a plot or portion of land.⁴⁶ Of the goal for fifteen thousand families to benefit from the turning over of lands between 2002 and 2006, land was only handed over to 5,500 families (36.6%). Of the 150 thousand hectares of land that the national Government was thinking of handing over, only about seventy-nine thousand (52.8%) was conceded. On the other hand, the State organization in charge of executing this policy turned over large areas of land to paramilitary bosses when these lands were originally assigned to displaced persons.⁴⁷ For its part, the Controller’s Office informed the Constitutional Court of the following in its sixth surveillance report of Decision T-025 of 2004:

“This review body considers that the efforts reported by the various competent authorities of SNAIPD in the formulation of policy to surmount the unconstitutional state of affairs in the area of economic stabilization are obviously insufficient for those ends, which proves the failure to carry out the Constitutional Court’s orders on this subject... The common report establishes that Incofer has handed over 21,881 hectares to 1,694 families from 2002 to the present day, distributed thus since 2004:

	2004	2005	2006
HOMES	36%	31.9%	24.2%
HECTARES	43.54%	31.19%	20.86%

⁴⁵ *Id.*

⁴⁶ *El Tiempo*, Sunday 27 May 2007, p. 1-12.

⁴⁷ *Id.*

In consideration of the percentages above, this review body considers that it is not admissible that obvious retrocession in the awarding of lands to the displaced population be presented as advances. The Office of the *Procurador General de la Nación* must conclude that not only are there no advances on this topic, but also that the regressive nature is evident.”⁴⁸

Experts on the subject have brought to light the deficiencies in the policy of IDPs’ return and economic stabilization. According to Ana María Ibáñez:

“Colombia has strong legislation to tackle the problem of displacement and some components of the policy, like the provision of emergency humanitarian aid and access to social services... Even though these elements require adjustments in order to improve their effectiveness, it is now necessary to concentrate on programs that would boost the displaced population’s economic stabilization... As economic stabilization is achieved, the displaced population ends its condition of displacement, which alleviates the pressure on State resources. In spite of the foregoing, the current policy contains an aid-based focus and has neglected this important component. It must, therefore, adopt innovative programs and assume the necessary investments to settle the socioeconomic stabilization component. Although they can be substantial investments in the short-term, in the long-term it is essential in order to prevent that one group of the Colombian population faces chronic poverty and is so greatly dependent on State help.”⁴⁹

VII. Preventive measures for forced displacement

One of the most critical points of the Government’s policy is the prevention of forced displacement. This is due to the current Government’s focus on democratic security, which is based on a military approach and not on protection of the civil population, such as victims of the armed conflict. Faced with the above policy constraints, efforts from organizations that seek to protect and improve the lives of IDPs and those in threatened communities—such as the Early Warning System (SAT) and the Inter-institutional Early Warning Committee (CIAT)—have not been effective.

The SAT functions out of the Ombudsman’s Office. It is the instrument with which the Ombudsman gathers, verifies, and analyzes the

⁴⁸ Colombian Constitutional Court, Award 335 of 2006.

⁴⁹ Ibáñez 2006, p. 17.

information related to the civil population's states of vulnerability and risk as a consequence of the armed conflict. It also advises the relevant authorities of their duties of protection, so that they may coordinate and offer timely and integrated assistance to affected communities.”⁵⁰

The function of the SAT is “to warn about situations of risk and promote the integrated humanitarian prevention of the State before the effects of the armed conflict, with the goal of protecting and guaranteeing the civil population's fundamental rights in a timely manner.”⁵¹ Its strategic goals are to “promote policies and prevention strategies for massive human rights violations... and to promote the humanitarian intervention of the State, social solidarity, and the generation of spaces and attitudes that favor a political solution to the internal armed conflict.”

To accomplish its task, the SAT has an organizational structure of three working groups. The Structural Analysis and Early Action Group analyzes the conflict, and identifies and evaluates threats and vulnerabilities. It also receives, analyzes, interprets, and systematizes the information relevant to the risk of massive human rights violations. The Social and Inter-institutional Projection Group promotes policies and public efforts, social processes, solidarities, and alternative mechanisms of conflict resolution and communication processes in order to create inter-institutional and community synergies, which affect the structural causes of the conflict. In conjunction with the regional and sectional ombudspersons, the Regional Analysts Group supports and carries out SAT activities in a determined jurisdiction. These activities include monitoring the number of IDPs, creating risk reports, and tracking situations already reported. It also includes the promotion of local and regional actions in the area of social and inter-institutional projection.⁵²

As the Ombudsman's Office indicates, the UNHCR report⁵³ about Colombia in 2004 expresses that “this positive reaction in response to the High Commissioner's recommendations has showed, nevertheless, deficiencies in the risk's evaluation and the efficacy of the responses. In many occasions, such responses aren't capable to avoid rights violations or infractions due to different factors.” The same report affirms that “the recommended measures to CIAT have had mainly a military character,”

⁵⁰ http://www.defensoria.org.co/?_s=sat&_op=1 (Accessed June 1, 2007).

⁵¹ *Id.*

⁵² See, http://www.defensoria.org.co/?_s=sat (Accessed June 1, 2007).

⁵³ UNHCR/ACNUR 2004, p. 16.

while the measures of the civil authorities limit the measures to departmental order “without having designed effective control mechanisms which secure their implementation.”⁵⁴

A policy of displacement prevention that is based on the incorporation of the civil population in the conflict (peasant soldiers, informants, and rewards) and on a military approach (massive detentions, war zones, and population control) fails to recognize the principles of international humanitarian law. Such a policy not only violates the principle of distinction between combatants and non-combatants, but also places the civil population in a situation of grave risk. On this point, the Government not only fails to fulfill its international obligations, but also does so in a massive and conscious manner, thereby violating the rights of displaced persons.

VIII. The reality of human rights in societies that are not well-ordered

John Rawls made the idea of well-ordered societies popular in his *Theory of Justice*.⁵⁵ According to this idea, advanced societies with solid public institutions and stable social structures, allow everyone to develop a sense of justice. In this context, human rights can be a parameter of action that is fulfilled spontaneously in social relations, or that is fulfilled through the intervention of public authorities. The strict priority of basic liberties (represented in the first principle of justice) over and above the principle of difference (second principle of justice) assures civil and political rights a place of privilege in well-ordered societies. For its part, the development of ESCR is left to the action of public powers, in particular to the legislative branch.⁵⁶

Nevertheless, in societies that are not well-ordered, the validity of human rights is precarious or non-existent. Societies that are not well-ordered are defined as those in which the State does not have a monopoly of force in all the national territory; the public institutions are weak and do not accomplish their functions; corruption is extensive and economic inequality divides the social classes and excludes large sectors of the population from the benefits of progress. In this context, the declarations and interventions of judges can only be a part of the solution. Issues of poverty and social exclusion must be considered in the institutional

⁵⁴ *Id.*, p. 127 ff.

⁵⁵ Rawls 1971.

⁵⁶ Arango, 2005, pp. 142 ff.

responses of judges and international human rights entities. In this perspective, Partha Dasgupta proposes an alternative vision of justice for societies that are not well-ordered in his book, *An Inquiry into Well-Being and Destitution*. It is worth noting Dasgupta's following reflections: "The research about poverty shows that there exists a clear interdependence among rights. The absence of food, for example, directly affects the possibility to exercise the right to work and the right to health. In the absence of enough food, in quality and quantity, the level of involuntary unemployment grows."⁵⁷ The most affected are women.⁵⁸ He also adds a psychological factor not taken into account by traditional economic theory: an undernourished person lacks the motivation and capacity necessary to employ himself or retain employment.⁵⁹ Moreover, chronic hunger ruins self-esteem and the capacity to express one's emotions and needs in a coherent way. On the other hand, there also exists a tie between nourishment and propensity to illness. He writes, "Of all the infectious diseases that have been identified as leading causes of deaths during the eighteenth and nineteenth centuries, those whose relationship with nutritional status could be considered 'perverse,' accounted for about one-third of the number of deaths."⁶⁰

At an institutional level, the Constitutional Court reviews the public policy on displacement. One of the most important advances in the judicial protection of displaced people's fundamental rights is the establishment of indicators for measuring the effective enjoyment of rights. The Constitutional Court, by means of Award 109 of May 4, 2007, adopted a list of such indicators. This adoption resulted in part from a debate on these indicators, involving the Government, representatives of displaced people, review agencies, and the Constitutional Court. The indicators for measuring the satisfaction of the rights established by the Constitutional Court are as follows:

⁵⁷ Dasgupta 1993, p. 482.

⁵⁸ *Id.*, pp. 306, 310.

⁵⁹ *Id.*, p. 42. Dasgupta continues: "The range of purposes and plans a person can reflect upon and choose from is itself dependent on the state. If he is badly undernourished and ill, most activities are out of his reach. His agency role is impaired in all senses" (*Id.*, p. 61).

⁶⁰ *Id.*, p. 407.

HOUSING

Indicator of effective enjoyment:

Legal dwelling on land—Home legally occupies land in decent condition

HEALTH

Indicator of effective enjoyment:

Access to general social security system in health (SGSSS)—

All individuals have affiliation to SGSSS

Access to psychosocial care—All individuals who seek psychosocial support receive it

Access to vaccination schedule—All children in the home have the complete vaccination schedule

EDUCATION

Indicator of effective enjoyment:

Regular attendance in formal education—All children and youth in the home regularly attend a level of formal education (5-17 years)

FOOD

Indicator of effective enjoyment:

Availability of food in sufficient quantity—The home has adequate food for consumption and has access to a sufficient quantity of the same

Childcare—All children in the home who are not under the care of an adult attend childcare programs

GENERATION OF INCOME

Indicator of effective enjoyment:

Remunerated occupation or access to autonomous source of income—At least one member of the home who is of working age has a remunerated occupation or autonomous source of income

IDENTITY

Indicator of effective enjoyment:

Possession of identity documents—All members of the home have their complete identification documents

ECONOMIC STABILIZATION

Indicator of effective enjoyment:

Inscription of displaced households in the System of Social Protection—Percentage of families that gradually meet the nine criteria of stabilization

The Constitutional Court ordered the competent authorities to present indicators that show results that would allow the real and measurable enjoyment of rights by the displaced population in the stages of prevention of displacement, immediate assistance, return migration, and emergency humanitarian aid by June 22, 2007 at the latest. The Court also ordered these authorities to announce the indicators that would incorporate the differential focus of specific assistance that subjects of special constitutional protection must receive.⁶¹

As other experiences have shown, Colombia has attempted to adopt all measures necessary to overcome a critical situation. However the distance between the written right and the reality is great. Problems present themselves because the institutions, people with relevant knowledge, logistical capacity, established and effective procedures, and a commitment and coordination of responsible organizations do not exist.

The intervention of Decision T-025 of 2004 and its follow-up awards provide the following conclusion about the State's capacity to fulfill its international obligations concerning the human rights of IDPs: the lack of resources and the institutional insufficiency in Colombia require that the comprehensive assistance to displaced people be more than an intention and future project, and more than a current reality. The steps forward are few, and reflect the failure to recognize the international obligations for the protection, promotion, respect, and guarantee of human rights. This is especially true on the subject of ESCR. As the Ombudsman's Office notes in a recent report, "It is worrisome that thirty-two months after an unconstitutional state of affairs being declared, and after more than ten years of these number of problems' existence, the responsible entities of SNAIPD still find themselves in a phase of design and planning, perpetuating the situation and ignoring the rights of the victims of forced displacement, faced with the absence of effective answers."⁶²

In accordance with the above conclusion, the judicial strategy must be complemented with a political strategy.⁶³ It is important to ensure the redistribution of income and at the same time to guarantee economic growth. Such an objective can be promoted through effective public policies in favor of the following: land protection; environmental protection; the education for women and allocation of basic resources; the

⁶¹ Award 109 of May 2007.

⁶² Ombudsman's Office, *Evaluation Report*, October 2006, pp. 26-27.

⁶³ Abramovich 2006.

guarantee of balanced nutrition; and the promotion of employment opportunities. As far as the above policies are implemented, access to basic services (as far as health, education, housing, clothing, work, and social security are concerned) will be guaranteed to all citizens—thereby increasing the aggregate level of general well-being.⁶⁴

Being conscious of the importance of social movements for elaborating appropriate public policies and for guaranteeing the realization of minimum ESCR is of vital importance. In this way, one can fight against the institutional and bureaucratic fraud. Popular movements for health, education, or land in Colombia, Argentina, Brazil, Ecuador, or Paraguay, like the action of social organizations dedicated to the defense of human rights, have the capacity to convert plans, policies and programs into reality.

An especially grave limitation in achieving progressivity in the enjoyment of social, economic, and cultural rights by people displaced by the internal armed conflict is the absence of adequate coordination among the different authorities and administrative levels. This negative aspect in the implementation of public policies on displacement is highlighted by the Controller's Office:

“The Reporting Body recognizes the meetings of these coordinating authorities and the documents that result from them, but no relation is shown between these and effective assistance to the displaced population in each of the components of the policy; that is to say, the real effect of the institutional coordination in front of the needs of the target population.

In the case of territorial coordination, no leadership role on the part of Ministry of the Interior and of Justice is observed that would allow them to complement the actions of the territorial bodies at the central level, a situation that becomes worrisome, since it requires the joint participation of the same, for the purpose of achieving the fulfillment of the goals proposed for each component of the public policy...

Additionally, the report does not supply a breakdown of the data by department and municipality, which does not allow a more concrete evaluation to be realized about who the investment is

⁶⁴ Arango 2006, pp. 153-171.

affecting and how, nor a determination of the beneficiary population of the same.”⁶⁵

The lack of adequate coordination among the national and territorial organizations impedes the progressive development of internally displaced people’s fundamental rights.

V. Conclusion

In conclusion, the public policy of assistance, protection, and prevention of internal displacement in Colombia presents grave errors in its design and execution. These errors have to do with: (1) the lack of clarity in the allocation of obligations (Article 4 of Law 387 of 1997 assigns obligations on the subject of internal displacement to a “system” [i.e. to SNAIPD], and not to concrete authorities); (2) the lack of clarity in the budgetary responsibilities between the central Government and territorial entities (departments and municipalities that receive the displaced population); (3) the under-registration of people affected by displacement (fewer than two million, according to the Government, and more than 3.5 million according to the Church and other organizations); (4) the standstill of State actions in planning, so that precise dates for achieving results in the prevention and assistance of displacement are not established; (5) the absence of differential treatment in the implementation of policies according to characteristics of age, gender, and cultural and ethnic origin; (6) the inconsistency between the policy of democratic security that involves civilians in the armed conflict (e.g. informants) and the prevention of displacement; (7) the deficiencies when estimating the risk involved during the return of the displaced population to its place of origin; and (8) the contradictory results of a displacement prevention strategy that has a military approach.

The defects in design and implementation of the policy on forced internal displacement ignore the principle of progressivity of social, economic, and cultural rights, and violate the minimum ESCR of displaced persons. The actions and omissions of the Colombian State do not ensure the minimum rights of the affected population. The analysis of the principle of progressivity of ESCR shows that the reasons given by the authorities do not satisfy the international parameters for rights protection as outlined by the Guiding Principles. Even when there have been

⁶⁵ Controller’s Office, *Sixth Surveillance Report: Constitutional Court, Award 333 of 2006*.

budgetary efforts on the part of the Government, the destined monies have not been sufficient to provide basic necessities for all of the displaced population. One major factor of this failure stems from the underestimation of the number of displaced people in Colombia. The Government claims that there are more than a million fewer displaced people than other organizations claim. Accordingly, the Government begins from a position where it cannot abide by the Guiding Principles, even if it were able to satisfy said principles amongst the people it does recognize as displaced.

Decision T-025 of 2004 widely establishes the faults in design and implementation of the policy to address displacement and its follow-up awards. The democratic security policy of the Government exacerbates the state's omissions and errors in the design and implementation of that public policy. The creation of peasant soldiers, the establishment of networks of informants, the massive detentions of persons, the creation of war zones, and the offering of rewards for accusations are measures that can be effective within a military approach. At the same time, they cause forced displacement. On this point, the Government not only violates the minimum rights of the displaced population by omission, but also fails in actively recognizing and complying with international humanitarian law, including laws associated with human rights.

The policy opposing forced displacement in Colombia must be examined from the perspective that special conditions exist in societies that are not "well-ordered." This sort of scrutiny is essential because institutions that do not function well can cause many economic resources meant for victims of violence to end up in the wrong hands (e.g. with an inefficient bureaucrat who is incapable and ineffective at protecting the human rights of the affected people, or who is simply corrupt). The judicial review of public policy by the Constitutional Court in Colombia, with its great prestige and responsibility, is indispensable and has been important for realizing human rights. A new conceptualization of rights, however, is needed from the perspective of societies that are not "well-ordered." The national and international response to massive displacement requires a comprehensive, structural, and long-term strategy against poverty. This strategy, as Dasgupta's aforementioned analysis shows, must start from the principles of interdependence and integrality of human rights, and must also involve the active participation and social mobilization of displaced persons.