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Litigation or Legislation: Protecting the Rights of Internally Displaced Persons in Colombia

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Litigation or Legislation:

Protecting the Rights of Internally Displaced Persons in Colombia

By Jennifer Easterday

Abstract

One of the most pressing and often overlooked consequences of over 40 years of fighting in Colombia is internal displacement. Approximately 3.8 million people have been displaced in Colombia since 1985, nearly 10% of its population. This is the second worst IDP crisis in the world, second only to Sudan. IDPs in Colombia suffer egregious violations of their basic human rights everyday. In this Article, I analyze Colombian policy and legislation concerning IDPs, and how the continuing deprivation of rights resulting from displacement has been litigated in the Colombian court system. By considering the parameters of each attempt to protect the rights of IDPs, I seek to find a path towards efficacious solutions to an urgent humanitarian crisis. Specifically, I discuss the government’s general policies concerning the IDPs and its ground breaking IDP legislation, Law 387, and how ultimately Colombia fails to implement its laws and protect the rights of displaced persons. I also present one of the few, if not only, in-depth English language discussions of the Colombian Constitutional Court’s recent and much lauded decision upholding the basic rights of the IDPs, in which the court declared the government’s treatment of IDPs unconstitutional and required specific governmental action to rectify the situation. I posit that the real breakthrough in this case is not the holding against the government’s policy, but one that allows greater access to the court system for IDPs and thereby grants them the opportunity to develop a political voice. I conclude by explaining how this political voice can develop and providing recommendations for local and international groups to make this possible.

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"There is no possibility that us victims will go on saying nothing."

“No hay posibilidad de que las víctimas sigamos callando”.¹

“My life before being displaced was very peaceful. [...] Then the conflict appeared in my hamlet and displaced me. Since then my life has changed a lot both economically and emotionally. The most worrisome thing is that there is no stability anymore. It’s been 10 years since my displacement in 1997, and, despite all the laws and decrees that have been handed down, the problem of displacement has not been given an integral treatment as called for by law. That has meant that we’ve had to live in cities, in municipalities and on the slopes of urban areas with the uncertainty that at any time we can be run roughshod over and massacred. [...] I’m not going to reveal where I am now because we are in the midst of a conflict that hasn’t been treated with much care and has made us lose confidence.” – Carlos, a 26 year old man displaced first from within the region of the Jiguamiandó and Curvaradó rivers and then to Medellín.²

1. Introduction

The conflict in Colombia is marked by paradoxes and increasing complexities as it involves myriad players with competing interests. Colombian citizens are caught in the middle of warring factions, and have suffered the consequences of over 40 years of fighting. One of the most pressing and widespread effects of the fighting is internal displacement, whereby citizens being forced to flee their homes and villages. With few resources and often bringing only what they can carry, these internally displaced persons (IDPs) usually flee to regional cities and the capital of Colombia, Bogotá, where they are subjected to deprivation of rights and a severe lack

of basic resources. In this Article, I analyze Colombian policy and legislation, and how the continuing deprivation of rights has been litigated in the Colombian court system. By considering the parameters of each attempt to protect the rights of IDPs, I seek to find a path towards efficacious solutions to an urgent humanitarian crisis.

In Section 2, I give a detailed description of the IDP situation in Colombia as it relates to the global IDP problem and the UN Guiding Principles on Internal Displacement. I will also offer background on the internal fighting in Colombia to contextualize its policy and legislative decisions. In Section 3, I analyze the government’s general policies concerning the IDPs and its ground breaking IDP legislation, Law 387. In Section 4, I will address Colombia’s failure to protect the rights of IDPs and implement its laws, questioning why the legislation and policies have failed and how the constitutional court’s decision can change things. In Section 5, I will then present one of the few, if not only, in-depth English language discussions of the Colombian Constitutional Court’s recent and much lauded decision upholding the basic rights of the IDPs, in which the court declared the government’s treatment of IDPs unconstitutional, and required specific governmental action to rectify the situation. In this Section, I posit that the real breakthrough in this case is not the holding against the government’s policy, but one that allows greater access to the court system for IDPs and thereby grants them the opportunity to develop a political voice. I conclude in Section 6 by explaining how this political voice can develop and providing recommendations for local and international groups to make this possible.

2. **Background**

   "Every day I saw the dead. That’s what most affected me: every day, every day, a dead body arrived in town. Every day, the stabbed, the clubbed to death, the shot, the recently dead, the rotten dead; every day the dead arrived. I wanted to see the dead because I said to myself: “What if one of them is from the area around my home; I
should tell my people.” – Ana Dilia, 35-year-old woman displaced from Catatumbo, Norte de Santander.  

“If you escape from one group, you don’t escape from the other. There’s no negotiating with any of them.” – Lilia, 42-year-old woman displaced from Guaviare to Bogotá.

Strip away high-powered politicking and talk of peace agreements and one is left with the stark reality of one of the worst humanitarian crises facing the world today. Colombian citizens have lived in fear and under repression for over 40 years; the one truth to be found in the Colombian situation is that its citizens are suffering. In this section, I outline the current international norms related to internal displacement before giving a detailed discussion of the IDP situation in Colombia. In addition to the general contours of the displacement crisis, I will describe the causes of displacement and a brief history of the Colombian conflict. The following sections will build upon this background to give an in depth analysis of the proposed solutions to the IDP problem and their ultimate failure in light of the Colombian conflict.

a. **Internally Displaced Persons: Overview**

Internal displacement, although acute in Colombia, is a global problem. In fact, there are 25.4 million persons displaced because of conflict worldwide, affecting 52 countries. The countries with the worst IDP problems are Sudan (5 million), Colombia (3.8 million), Iraq (1.7 million), Uganda (1.7 million), Democratic Republic of Congo (1.1 million). According to the U.N. Guiding Principles on IDPs, an internally displaced person is defined as:

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6 *Id.*
persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.7

Developed in 1998 by Francis Deng, then U.N. Representative of the Secretary General, the Guiding Principles were created as a response to the increasing problem of displacement and the lack of international norms regulating treatment of the IDP population. These Guiding Principles, while not binding, are based on international treaty and customary law, and “restate the relevant principles applicable to the internally displaced, clarify any grey areas that might exist, and address … gaps” in the existing legal norms.8 The Guiding Principles have been acclaimed as an important development and as influential in significant legislative and jurisprudential developments protecting the rights of IDPs. The Inter-American court has referred to the Guiding Principles as a source of international norms in significant decisions holding Colombia accountable for violating the rights of IDPs.9 The Guiding Principles have also been applied by numerous governments and intergovernmental agencies worldwide and formally recognized by many.10

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8 Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, February 11, 1998, para 9. Walter Kälin, “The future of the Guiding Principles on Internal Displacement,” Putting IDPs on the Map, Forced Migration Review/Brookings-Bern Special Issue (2006), 5. Kälin writes that “Despite states’ reluctance to endorse them, it was always clear that the Guiding Principles have an authoritative character as they are based upon, and reflect or restate, guarantees contained in international human rights and humanitarian law that respond to the specific needs of IDPs. Thus, they draw their authority not from the process of elaboration but from the fact that their content is solidly grounded in existing international law. In fact, it is possible to cite for almost every principle a multitude of legal provisions which provided the drafters with strong normative guidance. Even where language was used that was not to be found in existing treaty law, no new law in the strict sense of the word was created in most cases but existing norms were restated in more specific language.” Id.
9 Maria Beatriz Nogueira and Charalampos Efstathopoulos, Colombia test cases strengthen IDP protection, 28 Forced Migration Review 44 (July 2007).
10 Angola, Burundi, Liberia, Uganda, Peru and Turkey have made explicit reference to the IDPs in developing national legislation or policy; and regional organizations that have promoted the principles include the Economic Community of West African States, the Intergovernmental Authority on Development, the Organisation for Security and Cooperation in Europe, and The Parliamentary Assembly of the Council of Europe. Kälin, supra note 8.
b. **Internal Displacement in Colombia**

“The label of displaced person is still very oppressive for us, because as soon as you say displaced person, people begin to give you ugly looks. They try to find out “Why did he come, where did he come from, what was he doing?” But it’s something real that you can’t deny. Before the eyes of God, you can’t deny what you’ve suffered. And even less before the eyes of the state, because if we all agreed to say that we weren’t displaced, or to hide it, it would suit the state. We have no reason to hide our reality when the state is responsible for what we’ve suffered.” - Ana Dilia, 35-year-old woman displaced from Catatumbo, Norte de Santander.  

The forced displacement and terrorizing of the Colombian civilian population has led to one of the worst situations of internally displaced persons (IDPs) in the world. According to a leading IDP NGO in Colombia, the Consultoría para los Derechos Humanos y el Desplazamiento (CODHES, Consultancy for Human Rights and Displacement), as of this year, there were 3.8 million IDPs in Colombia since 1985, nearly 10% of its population. As of September 30, 2006, the state’s official number of registered IDPs was at 1.9 million persons, or 427,200 households. Official statistics also show that the rate of new displacements has declined in recent years. However, the U.N. Secretary General Representative stated that most of his interlocutors, including the Director of state-run Acción Social, estimate that there are 3 million IDPs. This discrepancy between NGO and government accounting is largely due to the fact that the government started a systematic registration of IDPs only in 2000. The gap between the two reporting sources is narrowing, however, as the government registration processes improve.  

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11 See IDP Voices, supra note 2.  
12 iDMC, supra note 5, at 6. Internal Displacement Monitoring Centre, Colombia: government “peace process” cements injustice for IDPs, 20 [hereinafter Peace Process and IDPs].  
15 Peace Process and IDPs, supra note 12 at 20.
Colombian IDPs are generally sustenance farmers or landless day laborers and do not represent a homogenous ethnic group, although Afro-Colombians and indigenous communities are often more targeted than other groups. With no established “frontlines,” it is difficult to escape the conflict, demonstrated by the fact that 96 percent of Colombia’s municipalities have experienced forced displacement. However, some regions experience more displacement than others do, with 60 percent of the displaced persons between 2000 – 2003 coming from regions of significant commercial interest such as Antioquia, Bolívar, Magdalena, César, Sucre, Putumayo and Chocó. Many IDPs are forced to flee repeatedly, from their village to a municipal center and from there to larger regional capitals or Bogotá, where they take up residence in shantytowns lacking health services, adequate food and housing. Bogotá absorbs an estimated 61% of the IDPs, with the regional capitals absorbing the rest, primarily the capitals of Medellín (Antioquia) and Florence (Caquetá).

Upon arrival, these citizens are subject to further intra-urban displacement at the hands of paramilitaries, deprivation of their rights, organized crime, and gang violence. The U.N. Secretary General Representative noted that the pattern of displacement has recently changed from massive displacement to displacement affecting individuals or relatively small groups. The Representative also noted that although generally persons are forced from rural areas to larger towns and urban areas, there is a growing tendency for inter- and intra-urban displacement, usually because of reformed paramilitary groups and/or criminal groups controlling the poor

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16 Id. at 22.  
17 Id.  
18 Id.  
19 Id.  
20 Id.  
21 Id. at 23.
urban areas where IDPs are usually located.\textsuperscript{22} These displacements are not recognized by government, as the authorities do not consider them to have fled beyond their “habitual place of residence, further compounding the discrepancies in IDP reporting.”\textsuperscript{23} Furthermore, since they are not categorized as IDPs, they are denied emergency humanitarian assistance.\textsuperscript{24}

The effects of this massive scale displacement are felt acutely by the displaced persons themselves as well as members of the receiving communities. Each displacement causes the individual trauma, often motivating them to abandon not just their homes, possession and communities, but also their life plans and sense of security.\textsuperscript{25} Most IDPs completely lose their status as citizens, experience profound trauma and live in conditions with severe shortages of food, housing and employment.\textsuperscript{26}

c. \textbf{Causes of Displacement:}

“People would tell me that the self-defence forces would come to town or that they wouldn’t come to town; that they would come at night or that they would come in the day. We didn’t eat, we didn’t drink, we didn’t sleep. People went down to the river to flee. I didn’t want to leave because I didn’t want to leave behind my things or my husband.” – Ana Dilia, 35-year-old woman displaced from Catatumbo, Norte de Santander.\textsuperscript{27}

\textit{In the Fiscalía (Attorney General’s Office), in the Red de Solidaridad (Social Action Network) and in the Defensoría del Pueblo (Office of the Human Rights Ombudsman) there were relatives of those who had killed my daughter. I knew who they were; I knew who had been there. In the Fiscalía in Riohacha, in the Personería (Office of the People’s Defender) of Riohacha and in the Red de Solidaridad of Riohacha, there were relatives of those involved. I had gone to deliver some papers – because I was already thinking of coming here -- and that’s when I saw some}

\textsuperscript{23} Peace Process and IDPs, \textit{supra} note 12 at 23.
\textsuperscript{24} \textit{Id}.
\textsuperscript{26} Springer, \textit{supra} note 25 at 11; Peace Process and IDPs, \textit{supra} note 12 at 24.
\textsuperscript{27} See IDP Voices, \textit{supra} note 2.
women there who were relatives of those who participated in the death of my daughter. And that frightened me and I said: “this is not for me.” I went to the Defensoría, and they were there too. So I didn’t get any help there, I didn’t ask for any, because I was very afraid, very afraid. And because of that, I told my friends I was going to Bogotá to deliver some papers, but I didn’t tell them anything else. – Blanca, a 64-year-old woman displaced to Bogotá.

The IDP problem was generated almost exclusively as a result of the forty years of the internal fighting in Colombia, either as a direct consequence of the fighting or as the consequence of policies designed to end the conflict, such as Plan Colombia. Characterized by strong regional differences, the country has experienced rural violence and conflict amongst its regions for most of its history. Colombia has also experienced protracted periods of political violence, the latest of which is the situation of widely dispersed fighting between the left-wing guerillas, the right-wing paramilitaries and the government army, an internal war which has raged for over forty years. Understanding the larger political context behind the fighting can help one better understand the world in which Colombian IDPs live, and how many different powerful factions in Colombia violate their rights.

The Colombian government minimizes the role of the conflict in causing displacement; a position U.S. officials tend to mirror. Kenneth Weigand of the U.S. Agency for International Development (USAID) told HRW “there’s constant migration out of some places into others. It’s impossible to know to what degree they are really displaced because of violence.” This position is reflected in the policies and rhetoric applied by the Colombian government to the IDP situation, which will be discussed in the following Section. However, as demonstrated here, the

28 See IDP Voices, supra note 2.
30 Human Rights Watch, Colombia: Displaced and Discarded 26 (2005) [hereinafter HRW Displaced and Discarded].
cause of displacement in Colombia is clearly the result of an internal conflict that has terrorized citizens for generations.

The civilian population is one of the primary targets in the fighting as the Fuerzas Armadas Revolucionarias de Colombia (FARC, Revolutionary Armed Forces of Colombia\(^\text{31}\)), Ejército de Liberación Nacional (ELN, National Liberation Army\(^\text{32}\)) and Autodefensas Unidas de Colombia’s (AUC, United Self-Defense Units of Colombia\(^\text{33}\)) battle for territory and loyalty.

\(^{31}\) Today, the FARC has 12,000 soldiers based throughout Colombia, but is primarily concentrated in the southwestern regions of the country. U.S. Department of State, *Country Report on Human Rights Practices 2005 – Colombia*, March 2006 [hereinafter Country Report]; International Crisis Group, *Colombia: Presidential Politics and Peace Prospects*, Latin American Report N. 14, 16 June 2005, 12 [hereinafter Presidential Politics]. Self-identified Marxists, the FARC grew out of the Colombian Communist Party. Initially advancing “agrarian reform, development of the peasant economy and political autonomy,” the FARC proposes a “New Colombia” based on “principles of social justice and economic self-determination.” It is primarily funded by providing protection for drug traffickers and demanding ransom from kidnapping civilians. Defending its atrocious and violent means of waging a war it claims is a righteous “campesino’s war,” the FARC argues that the crimes it commits are in response to a legitimate conflict that continues because the “reality of poverty and exclusion has not changed in Colombia.” Esquirol, *supra* note 29 at 30; Presidential Politics, *supra* note 31 at 13.

\(^{32}\) The second largest guerilla group, the ELN was formed in 1964 and today is a force of an estimated 2,000 fighters operating in the northeastern part of the country. See *Colombia Country Report*. The ELN was formed by Colombian students influenced by Ernesto Guevara’s ideology and the Cuban revolution. The members of the ELN were also strongly influenced by liberation theology, and some of their most important leaders were ex-Catholic priests. The ELN finances itself mainly through kidnapping and extortion targeting the oil industry, relying less on the drug trade than the other two combatant groups. Esquirol *supra* note 29 at 30. The ELN is responsible for hundreds of kidnappings each year, bombings and hijackings, but analysts do not consider it a very strong military power in the guerilla war. BBC News, “Colombia Backs ELN Ceasefire Plan,” Americas, April 18, 2004, available at [http://news.bbc.co.uk/2/hi/america/6570253.stm](http://news.bbc.co.uk/2/hi/america/6570253.stm) (last visited April 19, 2007); BBC News, “Colombia’s kidnappers-in-chief,” Americas, December 22, 2003, available at [http://news.bbc.co.uk/2/hi/americas/3340415.stm](http://news.bbc.co.uk/2/hi/americas/3340415.stm) (last visited April 19, 2007).

\(^{33}\) The largest of the warring factions, the AUC was formed in 1997 as an umbrella for Colombia’s various paramilitary groups. There are currently a reported 4,000 – 7,000 combatants, after recent demobilizations of approximately 31,000 fighters. Amnesty International Colombia Report 2006, Springer, *supra* note 25 at 1; Esquirol *supra* note 29 at 34. Originating as defense forces to protect landowners from guerilla warfare, private armies of drug traffickers, and vigilante groups carrying out “social cleansing” projects, paramilitary groups grew at an unprecedented rate during the 1990s. Scott Wilson, “Colombian Fighters Drug Trade is Detailed.” Wash. Post, June 26, 2003, at A01. [no longer available online]. The government of Colombia reports that the paramilitaries earn an estimated 80% of their income from the drug trade. Human Rights Watch estimates that the paramilitaries are responsible for 70% of human rights abuses in Colombia. See generally Human Rights Watch, *Smoke and Mirrors*, October 2005. In 2005 alone, the AUC was responsible for kidnappings, forced displacement, torture, recruiting child soldiers, and attacks against human rights workers. See *Colombia Country Report*.

In 2003, the AUC and the Colombian state signed the Ralito Accord, a peace agreement in which the AUC agreed to demobilize, establish a national peace and support the state’s anti-drug trafficking efforts. In return, the government agreed to take steps to reincorporate demobilized combatants into civilian life and ensure that those who gave up their arms would be secure. Arvelo, Jose “International Law and Conflict Resolution in Colombia: Balancing Peace and Justice in the Paramilitary Demobilization Process,” 37 Geo. J. Int’l L. 411, 426. The AUC officially demobilized in 2006, but it has continued to recruit fighters, purchase weapons, and regroup its forces. Arvelo, surra at 416; Presidential Politics, *supra* note 31 at 17. A vast majority of the demobilized soldiers were
Often armed groups will declare whole areas or villages as supporters of a rival faction, leading to large-scale massacres and expulsions in an effort to create homogenous “socially cleansed” areas of control.\(^{34}\) As a result, an atmosphere of distrust and insecurity prevails both within the armed groups themselves and among civilians.\(^{35}\)

Guerilla groups pressure \textit{campesinos} and indigenous groups to collaborate – if they refuse, they fear retaliation. If they agree, they face retaliation from the national army, which will harass citizens as the army takes control of villages suspected of supporting the illegal armed groups.\(^{36}\) The Colombian armed forces will pressure villagers to provide information and supplies, and their presence in villages draws the attention of guerilla groups who strike out granted complete amnesty under this agreement designed for the “rank and file” soldiers. Guerrero, Presentation on “Transitional Justice in Colombia,” Asser Institute Supranational Criminal Law Series, April 25, 2007.

\(^{34}\) “Social cleansing”, a tactic used by the AUC, involves the killing and intimidation of groups the paramilitary disapproves of, namely prostitutes, drug addicts, homeless, homosexuals and trade union leaders. \emph{See} Peace Process and IDPs, \textit{supra} note 12.

\(^{35}\) Springer, \textit{supra} note 25 at 6.

\(^{36}\) A/HRC/4/38/Add.3 January 24 2007, para. 16. Besides direct abuses, Human Rights Watch reports that there is open collaboration between the state military and right-winged paramilitary groups. \emph{See} Information about the Combatants; \emph{See also} Human Rights Watch, \emph{War Without Quarter}: Colombian and International Humanitarian Law 100 (1998) [hereinafter \emph{War Without Quarter}]. In fact, according to Human Rights Watch, the paramilitaries act as the de facto security force for the Colombian state, performing the kind of jobs the military cannot because of national and international regulations. Esquirol \textit{supra} note 29 at 34; Presidential Politics, \textit{supra} note 31 at 17; \emph{See generally} \emph{War Without Quarter}. Well-documented links between the military and paramilitary groups date back to the 1980s. Paramilitary soldiers report that they have worked side by side with army soldiers on projects coordinated at high levels of the military. Human Rights Watch, “Smoke and Mirrors” 21 (2005), available at \url{http://hrw.org/reports/2005/colombia0805/colombia0805.pdf} (last visited November 28, 2006). [hereinafter Smoke and Mirrors]. Furthermore, the state has encouraged demobilized paramilitaries to serve as security forces and police, tightening the relationship between the combatants and official state security forces. International Crisis Group, \emph{Towards Peace and Justice?} Latin America Report N. 16, March 14, 2006, 16; [hereinafter Towards Peace and Justice]. Recently, high-ranking members of the military have been subject to criminal investigation for links with the paramilitaries, with allegations reaching from financing operations to directly ordering massacres. Guerrero, “Transitional Justice in Colombia.” In 2005, former AUC leader Salvatore Mancuso stated that they controlled 30 percent of the Colombian Congress. Colombian newspaper \textit{Semana} reported that the AUC has received cash from senate candidates for guaranteeing a lack of opposition and maintains other links with legislators, mayors and councilors in exchange for these leaders ignoring paramilitary activities. Presidential Politics, \textit{supra} note 31 at 18. The Constitutional Court recently called for the arrest and indictment of several Congressmen for their connection with the paramilitaries and involvement in serious human rights abuses. “Colombia probe names Uribe allies”, BBC News, November 28, 2006, available at \url{http://news.bbc.co.uk/2/hi/americas/6194024.stm}. The Inter-American Court of Human Rights. held Colombia responsible for participation in a massive village massacre that occurred in July 1997 in the case of the “\textit{Mapiripán Massacre}” \emph{v. Colombia}. Merits, Reparations and Costs. Judgment of September 15, 2005. Series C No. 134, the. The Inter-American Court of Human Rights also held Colombian directly responsible for displacement in the case of the \textit{Ituango Massacres} \emph{v. Colombia}. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 1, 2006 Series C No. 148.
against villagers in retribution.\textsuperscript{37} It struck the U.N. Secretary General’s Representative as ironic that it seems more dangerous to stay neutral than to participate in the conflict – even when Colombian citizens don’t view it as their conflict and do not want to participate. As one person interviewed by the Representative stated, “[i]f we look to the left, we see the insurgents. If we look to the right, we see the paramilitaries. If we lift our eyes to the heavens to pray to God, we see the Government’s helicopters.”\textsuperscript{38}

Lifting their eyes to heaven, they will also likely see government planes spraying aerial chemicals designed to kill illicit crops as part of the US backed “Plan Colombia.”\textsuperscript{39} Plan Colombia, established in 1999, was originally designed to provide assistance to ending the internal conflict, but, under US influence, it evolved into a program designed to strengthen the Colombian military and fight drug trafficking. Under the plan, the Colombian government engaged in massive and indiscriminate spraying of crops in regions typically controlled by the guerillas. The spraying affects food crops, wells and farm animals, threatening the livelihoods of regional farmers and causing thousands to flee their homes.\textsuperscript{40} These farmers are left with few choices – generally they move to more remote regions to plant coca crops, join one of the fighting factions or flee to violent urban slums where they are stigmatized as guerilla supporters.\textsuperscript{41} Because the spraying takes place in regions with little or no government presence,

\begin{footnotes}
\item[A/HRC/4/38/Add.3 January 24 2007, para. 18.]
\item[A/HRC/4/38/Add.3 January 24 2007, para. 17.]
\item[Features of Plan Colombia has recently been changed by the United Status Congress, which now aims to provide “softer” strategies to fight drug proliferation such as alternative development and justice reform, as opposed to crop spraying and military funding, which has done little to stem the drug trade. The seven year plan has cost the United States $5.4 billion. “A new anti-drug strategy in Colombia,” by Chris Kraul, Los Angeles Times Staff Writer; LA Times, World News, October 14, 2007. http://www.latimes.com/news/nationworld/world/la-fg-tattoo4oct04,1,6127457.story?coll=la-headlines-world&track=crosspromo (last visited October 18, 2007).]
\item[Peace Process and IDPs, supra note 12 at 19.]
\item[Id.]
\end{footnotes}
there is little official monitoring or assessment of the problem and official response to farmers who petition for compensation is inadequate.\textsuperscript{42}

Another factor exacerbating the problem is the persecution of community leaders and human rights defenders, who are “directly threatened” and fear “summary executions, arbitrary detentions, forced disappearances, limitations to freedom of movement, or unfounded criminal charges brought against them.”\textsuperscript{43} Consequently, these community leaders and activists flee or are forced to flee.\textsuperscript{44}

Combined, these elements have caused a massive internal displacement in Colombia. The government has responded with ambitious but poorly implemented policies and laws trying to protect displaced persons and send them back to their home communities. These government actions will be discussed below, followed by a critique of why ultimately they have failed to protect the rights of IDPs in Colombia.

3. Colombia’s Response:

\textit{You arrive from there extremely afraid, with fear: you can’t say anything. I’m a person who didn’t know how to speak, and I can’t say: “I went to the Personería (Office of the People’s Defender) to give my statement and that I made it as I should have,” because I didn’t get (good) advice from anybody. Instead, they told me “don’t say anything, don’t say anything.” And so I said that I didn’t know, that I didn’t know who had killed [and raped my daughter]. But it was out of fear. Still, because of that, the Personería says that I don’t appear in their system because I didn’t make a declaration as required. Up to now, I’ve never received help from Acción [Social] (Social Action Network) or from any other institution. I haven’t even gotten the monthly assistance in provisions and rent. I’ve gotten absolutely nothing from the government here in Bogotá. – Blanca, 64-year-old woman displaced to Bogotá.}

\textsuperscript{42} \textit{Id.}
\textsuperscript{43} A/HRC/4/38/Add.3 January 24 2007, para 14.
\textsuperscript{44} A/HRC/4/38/Add.3 January 24 2007, para 14.
Whatever its shortcomings may be, Colombia has one of the most developed legislative records for IDPs in the world. The government passed its robust IDP assistance law, Law 387, in 1997. However, the existence of the legislation, even when coupled with numerous Constitutional Court decisions calling for its implementation, has done nothing to stem the tide of displacement or improve conditions for the IDPs in Colombia.\(^\text{45}\) This is the root of the issue at hand – Colombia faces a horrible IDP crisis, and has taken all of the obvious steps to provide for and protect these citizens. Yet, the IDP situation shows little sign of abating, and as discussed below, the Constitutional Court has determined that conditions are not improving. Must IDPs wait for the conflict to end before they can enjoy their constitutional and human rights; or is there something else at work that is keeping the government from adequately providing for the IDPs? This section will outline the current legislation and governmental policies in Colombia designed to protect the rights of IDPs. The following section will attempt to answer the questions posed above, looking at concepts such as judicial power, enforcement, problems with the legislation itself, and most importantly, the lack of political voice the IDPs have in Colombia. With no political capital, IDPs will continue to face institutional inattention and lack of rights protection.

The International Crisis Group notes that Colombia’s IDP policy traditionally “has focused on preventing internal displacement, providing emergency assistance and creating conditions for voluntary return.”\(^\text{46}\) The policies for IDPs in Colombia reflect a disjointed


approach that conflates the issue of the conflict with the unique problems faced by the IDPs.\textsuperscript{47} Some policies are contradictory and run the risk of inciting more violence and more displacement. Others are severely inadequate in terms of acknowledging the full extent of the problem at hand, by restricting classification of IDPs, creating narrow definitions and not allocating the necessary resources to provide assistance where it is most needed. This comes in part by the focus of the Uribe administration on “reestablishing security and the democratic state of authority throughout Colombia.”\textsuperscript{48} President Uribe’s approach prioritizes the prevention of new displacement and returning IDPs to their home communities.\textsuperscript{49} As such, his administration focuses its efforts on increasing the presence and strength of the Colombian Armed Forces in the country and bringing an end to the conflict, and as a result, causing the provision of rights for IDPs to fall by the wayside. Below I will discuss two of Colombia’s attempts to address the IDP problem, Law 387 and Uribe’s “return home” policy.

\begin{itemize}
\item \textbf{a. Legislation: Law 387 of 1997}

\begin{quote}
“In Colombia, the laws are very advanced. It has one of the most modern laws with regard to internal displacement. In reality, it’s not implemented.”\textsuperscript{50}
\end{quote}

Law 387 establishes the processes by which IDPs register with the government and receive emergency humanitarian assistance. This law is revolutionary in terms of the global approach to IDPs and was ahead of its time, passed before the Guiding Principles were adopted

\begin{footnotes}
\item[47] I do not with to imply that the conflict and the IDP situation are not related and should not be treated as two parts of a single problem. In fact they are intrinsically linked and the conflict is the cause of forced displacement. However, in designing policies to address the IDP situation, it is important to parcel out the causes and effects of a situation and stick to one side of the equation. The Colombian approach appears to try and do everything at once, without concentrating attention on one area. For example, there are measures designed to help victims of the conflict, but it is not clear that IDPs are given “victim” status for these laws.\textsuperscript{48} ICG, \textit{supra} note 46 at 16.
\item[49] \textit{Id.}
\item[50] HRW Displaced and Discarded, \textit{supra} note 30 at 5, quoting Marta Skretteberg, then the head of the Colombian office of the Norwegian Refugee Council.
\end{footnotes}
by the UN and before the Colombian Constitutional Court passed its first decision concerning the rights of IDPs. However, from the beginning, implementation of the law was wrought with difficulties that continue today. Given the focus on ending the conflict, there is hesitation to allocate funds to facilitate implementation and pay for the multitude of agencies it created. This is just one of many problems that plague the legislation, as will be discussed below.

The Law 387 defines a displaced person as one who:

has seen himself forced to migrate within the national territory, abandoning his residence, normal economic activities because his life, physical integrity, security or personal liberty have been made vulnerable or directly threatened, in relation to one of the following situations: internal armed conflict, tensions and disturbances in the interior, general violence, massive violations of human rights, infractions of international humanitarian laws, and other circumstances emanating from the above which could alter or drastically alter the public order.  

In order to be eligible for aid, IDPs must first give a declaration to a government official, either the attorney general’s office, the ombudsman’s office or local or municipal officials. The IDP must then give a copy of this declaration to the Social Solidarity Network (SSN) to become registered with displaced status. If the IDP makes her declaration within a year of the event(s) that forced her from her home, she is then qualified for emergency humanitarian assistance. Otherwise, she would only be allowed access to programs supporting return, reestablishment or

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51 Ley 387 de 1997. “Del desplazada Es desplazado toda persona que se ha visto forzada a migrar dentro del territorio nacional abandonando su localidad de residencia o actividades económicas habituales, porque su vida, su integridad física, su seguridad o libertad personales han sido vulneradas o se encuentran directamente amenazadas, con ocasión de cualquiera de las siguientes situaciones: Conflicto armado interno, disturbios y tensiones interiores, violencia generalizada, violaciones masivas de los Derechos Humanos, infracciones al Derecho Internacional Humanitario u otras circunstancias emanadas de las situaciones anteriores que puedan alterar o altereen drásticamente el orden público.” Available at http://www.derechoshumanos.gov.co/modules.php?name=informacion&file=article&sid=120 (last visited December 16, 2007).
52 Ley 387 de 1997, art. 32, as modified by Decreto 26 of 2000, art. 74.
53 Decreto 2569 of 2000, art. 16.
relocation – depending on the availability of funds. The SSN must complete a verification of the declaration within fifteen days of receipt. That individual cannot receive assistance if the SSN finds that facts alleged in the declaration are untrue, if the person does not meet the definition of IDP as set out in Lay 387, or if they miss the one-year deadline. If the SSN verifies the declaration, the individual is considered registered as an IDP and is informed of this fact. At this point, he or she should receive three months of humanitarian assistance, which the SSN can extend for another three months under certain circumstances, which must be set out in the original declaration. These circumstances are 1) if a member of the household is mentally or physically disabled and this fact is certified by a doctor; 2) if the head of the house is a woman or over sixty-five years old; 3) if there is a case of terminal illness (this does not have to be stated in the original declaration); or 4) at the discretion of the SSN for situations similar to the three noted above. The SSN also has the discretion to withhold assistance where it determines the individual is uncooperative or repeatedly refuses to participate in assistance programs and events.

This legislation has garnered considerable international support. U.N. Secretary General Special Representative Walter Kälin reported that it “shows the commitment of the Government to address the challenge of this huge displacement crisis.” The United States and European Union have both pledged financial support to aid Colombia in its endeavors to address the IDP crisis. While the U.S. aid comes mostly in the form of military support, the European aid is

54 Decreto 2569 of 2000, art. 18.
55 Decreto 2569 of 2000, art. 9.
56 Decreto 2569 of 2000, art. 11.
57 Decreto 2569 of 2000, art. 10. See also Código Contencioso Administrativo, art. 44.
directed at civil society and the United Nations office in Colombia. A number of European countries provide “significant” bilateral assistance.  

However, as noted above, the progressive laws of Colombia do little off the page and in reality, which I discuss specifically in Section 4. Here I will discuss Colombia’s primary policy regarding IDPs: the “return home” initiative. The failure of this and other IDP initiatives at work in Colombia suggests that there is something beneath the surface that must be addressed before IDPs can see true enjoyment of their rights, something that will not be fixed by applying another layer of policy or legislation, but by empowering IDPs to develop and use their political voice.

b. Policy: Return to Home Communities

“They’re sending people to their deaths. Return means death. . . . What the government says? It’s deceit, a lie, totally false.” - L.D., Ciudad Bolívar, Santafé de Bogotá

President Álvaro Uribe Vélez has initiated a policy of sending the IDPs home. In 2003, Vice-President Francisco Santos Calderón issued a report on human rights and international humanitarian law, which stated:

On the understanding that returning home is the best alternative, the Government has been working towards helping at least 30,000

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61 HRW Displaced and Discarded, supra note 30 at 7. The U.S. pledged U.S. $22 million in FY 2005, and the European Union over U.S. $410 million. Bilateral assistance comes from the Netherlands, Spain, and the United Kingdom, Canada and Japan. These figures have not been updated or verified to reflect the current situation or the particular stipulations or aims of the funding. Furthermore, it is unclear what HRW means when it qualifies the bilateral aid as “significant.”

62 HRW Displaced and Discarded, supra note 30 at 25, citing Human Rights Watch interview with L.D., Ciudad Bolívar, Santafé de Bogotá, August 4, 2004. L.D. and his displaced family were relocated by the government to Nariño, from where they were displaced a second time.

63 Uribe and his government have alleged ties to the right-winged paramilitary groups. These allegations call into serious question the motivation and objective of Uribista policies towards the IDPs and warring factions, a discussion that will be set aside for the purposes of the present discussion. See Semana.com, “Guía práctica para entender el escándolo de la ’para-política’”, [Practical Guide for Understanding the Para-Political Scandal] by Élber Gutiérrez Roa, April 11, 2007; The Economist, “The Plot Thickens, again”, April 21 2007, p. 54; New York Times “Colombia Rejects Paramilitary Report” by Simon Romero, March 26 2007, A4.
families, that is some 150,000 Colombians, to return to their own land.

The government reported that because of this policy, approximately 70,000 IDPs were returned to their homes in 2003 – 04.64 Officially, this policy requires the consent of returning families, and promises that the Public Armed Forces will restore “conditions of security to the zones and then channel resources by means of microcredit, food security programs, and community escort programs.”65 The United States supports the return policy. Shrugging off the possibility that lack of security and other threats to safety prevent IDPs from returning home, USAID’s Kenneth Wiegand commented, “once they taste the city, they see more opportunities.”66 Later in 2005, USAID officials conditioned their statements of support on the provision of security, voluntariness and security.67 Although the fact that the Colombian government has turned its attention to IDPs and ostensibly strives to provide IDPs with a secure home in their original communities, can be considered beneficial to their plight and progress in the overall problem, the policy and its implementation are flawed and these benefits are nullified.

In June 2004, the government offered housing subsidies only to families willing to return to their communities, a move that has been criticized by the UNHCR as “discriminating against those people who are unwilling to return and [which] runs counter to the principle of voluntariness that should be present in returns […].”68 Furthermore, although promised, security is either lacking or non-existent. Moreover, because the majority of IDPs come from the most

66 HRW Displaced and Discarded, supra note 30 at 26.
67 Id.
68 Id. at 24. Citing ACNUR, Balance de la política pública, 37.
remote regions of the country controlled by guerillas or paramilitaries, the presence of armed forces “protecting” the returned communities will just bring retaliation and more terror as the returned IDPs would be viewed as governmental supporters. Given the nature of the conflict, it is unrealistic to assume that the armed forces would be able to adequately provide permanent protection.69 As noted by the U.N. Secretary General Special Representative Walter Kälin,

the legitimate desire of the Colombian armed forces to protect civilians with their presence should not create situations where their mere presence in the midst of the villagers draws hostile fire to them and, thus, has the opposite effect from the one intended.70

In addition to promoting discrimination, engendering disparate treatment and fostering the threat of more violence, this return policy simply does not work. IDPs who return home are often forced to leave again, due to continuing violence or a lack of property titles.71 These second (or third, or fourth) displacements can occur as soon as six months after an IDP is

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69 One of the main issues of the conflict is a fight for territory. The fact that the Colombian armed forces have outright lost control of many regions of the country, have been directly linked to paramilitary massacres and human rights abuses, and are struggling to end the conflict suggests that their priorities are not going to lay in protecting villages of returned IDPs in the very regions of the country where the fighting is heaviest. On the contrary, one could argue that such “protective measures” are a loosely veiled attempt to create a military presence in more regions of Colombia and control groups of would-be guerilla supporters.

70 A/HRC/4/38/Add.3 January 24 2007, para 18. One questions whether the desires of the government are legitimate. See supra, note 69 and surrounding text.

71 HRW Displaced and Discarded supra note 30 at 25; See also Peace Process and IDPs, supra note 12. See also Luz Nagle, “Placing Blame where Blame is Due: The Culpability of Illegal Armed Groups and Narcotraffickers in Colombia’s Environmental and Human Rights Catastrophes, 29 Wm. & Mary Envtl. L. & Pol'y Rev. 1, 106 (2004). Nagle states “[t]he problem of poor landholders being unable to prove title leads to insurmountable economic challenges. Farmers who cannot prove ownership of land cannot receive credit to invest in the property and make it more productive. Unable to draw capital from the land, farmers who cannot prove title tend to degrade the property rather than practice stewardship. In addition, the inability to prove land title renders it difficult for displaced rural landowners to reclaim property upon return to their lands. ‘Although Law 387 of 1997 provides a system to freeze property transactions of displaced persons whether they hold formal title or not, the problem of enforcement remains.’” citing D. M. Grusczynski & C. Felipe Jaramillo, Integrating Land Issues into the Broader Development Agenda: Colombia, in Land Reform: Land Settlement and Cooperatives, 73 (2003), available at http://www.fao.org/documents/show_cdr.asp?url_file=/docrep/006/y5026e/y5026e07.htm (last visited Nov. 3, 2004).
returned home.\textsuperscript{72} Human Rights Watch reports that the policy has been severely criticized by displaced persons, NGOs, and several international agency officials.\textsuperscript{73}

By examining the application of these seemingly groundbreaking laws and policies, one can see that in reality, the IDPs are not receiving the amount or type of assistance they need. In fact, the return home policy can be detrimental to the IDPs who agree to be sent back to their original homes. Law 387 is similarly ineffective in providing real assistance for IDPs, as its implementation is marred with incompetence and inefficiencies. In the next Section, I address three specific criticisms of the Colombian response in its practical, definitional and rhetorical application. These problems are not ignored in Colombia and have been the subject of much litigation in the Colombian Constitutional Court. The most significant ruling in favor of IDPs in this venue was given by the Court in 2004, Sentencia T-25/04, which I will discuss in detail in Section 5. However, in spite of this active protection of IDP rights by the Court, the real impact of the holding comes not from its direct enforcement of Law 387, but in lowering barriers to justice for IDPs by allowing \textit{tutela} actions to be brought by third parties on behalf of IDPs.

\section{Why are IDPs still suffering?}

The policies of the Colombian government have been thoroughly criticized on nearly every point by national and international agencies, NGOs, scholars and the Colombian Constitutional Court. This section will highlight the most salient arguments against the return home policy and law 387. What is missing from this lengthy list of failures, however, is consideration of the relationship between the judicial provision of rights and the implementation of legislation. I argue that there is a distinct need for enforcement of the Constitutional Court’s rulings on provision of rights to the IDPs, and that the court has finally opened a key door to

\textsuperscript{72} HRW Displaced and Discarded, \textit{supra} note 30 at 25.

\textsuperscript{73} \textit{Id.}
achieving that end in the Sentencia-T-25/04. The holding against the government and the
declaration of a state of unconstitutionality is nothing new, and I do not see any real immediate
changes in the provision of rights stemming from the complicated and bureaucratic reporting
conditions foisted on the government. Rather, the court’s decision to allow individuals to sign
over their right to a tutela action to a third party leaves room for significant change in the IDP
rights regime in Colombia.

Colombian public policy measures are generally subject to quality issues including
improvisation, failure to address changing needs of the population, and a lack of follow-up and
evaluation of the results.\(^74\) The International Crisis Group summarizes the criticisms of
Colombia’s IDP policy aptly by stating “[t]he government’s humanitarian policy has
encountered many difficulties, largely because of the magnitude of the crisis, the lack of state
capacity, the reluctance to divert fiscal resources from military to social programs, and the wide
gap between policy planning and reality.”\(^75\) Here I will provide specific complaints from a
variety of sources. This is by no means a comprehensive discussion of these problems, but is
meant to illustrate the kinds of pervasive problems the court considered in Sentencia T-25/04.

a. **Practice: Diverging Numbers and Registration Problems with Law 387**

A large source of the problem with lack of aid going to IDPs involves how individuals
are registered and counted. As Kälin notes, registration should not “serve as a precondition for
conferring IDP status,” but should “remain a tool to identify those who will be eligible for
receiving assistance.”\(^76\) He gives an example of a displaced family with means to remain self-

\(^{74}\) Jose Cepeda Espinosa, Judicialization of Politics in Colombia, 68, 94, in *The Judicialization of Politics in Latin America*, (Rachel Sieder, Line Schjolden and Alan Angell, eds., Palgrave, 2005).
\(^{75}\) ICG, *supra* note 46 at 1.
sufficient even after displacement – they may not solicit assistance from the State and therefore would not register with Social Solidarity Network. However, this does not change their status as IDPs, their right to be recognized as a victim of displacement, and their entitlement to compensation under Article 10 of Law 387. In a more plausible application of this logic, an IDP who fears persecution and therefore chooses not to register would also be subjected to the same deprivation of rights. iDMC reports “[t]his type of under-reporting out of fear of being perceived as sympathisers with some of the armed groups is acknowledged as a major problem by both government and non-government institutions.” These registration inconsistencies, together with a rise in “less visible” individual displacement, the increase in rejected declarations by the SSN in cases that include intra-urban displacement, and displacement by crop-spraying lead to lower government statistics concerning the IDP crisis. iDMC reports that in Bogotá and the regions Chocó and Norte de Santander, the government confirmed that over half of the IDP applications were refused status. If the government cannot accurately project the number of IDP cases it provide assistance for, it cannot make prudent policy and funding decisions to adequately protect their rights.

b. **Definition: IDP numbers too narrowly defined**

Another problem with Colombian IDP policy that is often overlooked is the problem with definitions and interpretation. Although the Colombian government professes to support and adhere to the Guiding Principles, Law 387 was created before the Guiding Principles were established. The definition of an IDP under Law 387 is limited to those forcefully displaced as a

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78 Peace Process and IDPs, *supra* note 12 at 21
79 As opposed to easily observable mass displacement. Peace Process and IDPs, *supra* note 12 at 20.
80 Crop spraying is considered an environmental cause of displacement and therefore those displaced because of Plan Colombia are not eligible for aid under law 387. *Id.*
81 *Id.* at 20.
82 *Id.* at 21.
result of the internal conflict. Although violence from the conflict is the primary cause of displacement, Law 387 does not include those displaced because of development projects or natural disasters, which are common in Colombia. Finally, as Kälin goes on to note, although they are not categorically referred to as such in the Law 387, a number of measures designed to prevent ongoing displacement and recognizing IDP status refer only to “illegal armed groups”, failing to include mention of the armed forces or general absence of rule of law in large areas of the country where re-mobilized paramilitary groups are the *de facto* rulers. Also of concern is the possibility of narrowly interpreting “as a result” of the violence to exclude any displaced persons who were not directly and physically threatened or forced from their homes. Many individuals flee for fear of eventual violence, lack of resources to maintain a living in areas where resources are controlled by armed factions, or are forced to flee multiple times and register after a second or third displacement that comes as the result of the urban violence common in the IDP slums.

The determination of when displacement ends is also problematic. Under Law 387, displacement ends upon restoration of socio-economic conditions. This runs contrary to the government’s supposed prioritization of returning IDPs home and the importance it places on original community. Based on this provision, the government argues that registered IDPs should be placed into needs-based categories during the first three years of displacement and gradually excluded from the IDP list as they “would not longer be in particular need of emergency

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83 Article 1, Law 387.
85 A/HRC/4/38/Add.3 January 24 2007, para. 31. This is a very real problem and is indicative of the Uribe administration’s general policy of casting the conflict in narrow terms best suited to avoiding any acknowledgement of governmental involvement. See the two CIDH cases for a direct recognition of the Government’s responsibility for mass displacements and massacres; see also Smoke and Mirrors, *supra* note 39, on the government’s demonstrated ties with paramilitary operations.
86 CODHES.
assistance or protection." According to CODHES, the decision of when displacement ends is purely political, and not methodological. This demonstrates that the Colombian government categorically does not see the need to provide for any displaced person not registered with the SSN and that their focus is on strictly humanitarian assistance, not rights protection. These definitional restrictions will only serve to increase the inefficiency with which the government provides services, without solving the root cause of the displacement or the violation of the IDPs’ rights once displaced.

**c. Rhetoric: A Diversion Tactic**

The Uribe administration has engaged in a number of other rhetorical devices that serve ultimately to divert attention and resources from their positive obligation to protect the rights of IDPs. For example, IDPs are often discussed in terms that equate their situation to that of other poor Colombians, suggesting that IDP-specific programs discriminate against the non-displaced poor and are therefore inappropriate. Leaving aside the issue that this consciously ignores the unique suffering of IDPs, when it comes to “quality of housing, access to sanitation, level of education, and access to employment—displaced families are almost always worse off than other poor families that have not been displaced.” Furthermore, the refusal of the Colombian government to characterize the conflict as an “internal armed conflict”, and using the rhetoric of “terrorism” instead, deflects responsibility for IDPs under a number of international treaties and

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87 Peace Process and IDPs, supra note 12 at 21.
88 This could also be problematic as the Justice and Peace Law, or Law 975, is enacted. Law 975 provides reparations for victims of the conflict. However, if an IDP is not longer registered as such, it is unclear if they will be eligible to receive reparations under this new law.
89 HRW Displaced and Discarded, supra note 30 at 21.
norms, and protects the government from obligations to recognize the rights of the various factions. The Fourth Geneva Convention and Protocols I and II protect civilians from forcible displacement in armed conflict. Specifically Article 17 of Protocol II, which addresses non-international armed conflicts, provides that:

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures should be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

Thus, under this characterization, Colombia would be held to higher, and binding, standards of assistance for IDPs.

The list of problems inherent in the Colombian IDP policy and legislation is seemingly endless. This is not to demean the benefits to many IDPs who are able to register, receive humanitarian assistance, and return home in a safe and protected manner. It is a positive sign that the government has engaged in the dialog about displacement, and the fact remains that the Law 387 is unique and progressive comparatively speaking. Furthermore, many foreign states, local and international NGOs, the UN and other organizations have turned their attention to Colombia, the armed conflict and the IDP crisis with promises of financial, administrative and other forms of support. These signs are encouraging and are likely to assist the government in providing direct services and protection to many IDPs. However, these programs are designed to

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solve systematic, institutional problems, and provide for immediate measures of humanitarian assistance. They do nothing to require the government to live up to the high standards it set for itself in 1997 with Law 387 and its Constitutional mandate to protect the rights of Colombians. The Colombian Constitutional Court has issued numerous decrees holding the state in contempt of its Sentencia T-25/04. It has little power to do much more, and enforcement of its sentence essentially relies on the good faith cooperation of the state.

For this reason, I argue that rather than the focus on enumerating the administrative and bureaucratic ways in which the government fails to protect the rights of IDPs, the holding in the Constitutional Court’s decision that will have the most impact on improving the IDPs is allowing for collective *tutela* actions, and the recognition by the court that IDPs require special status as do other groups specifically protected by the Colombian Constitution, including women, children and elderly.92 By allowing IDPs greater access to the court system, the Constitutional Court has opened the door for more localized enforcement and recognition of the IDP crisis. Many agencies tasked with providing IDP assistance do not act until they receive direct orders from a court regarding an individual claim. By increasing the number of claims brought before the courts, such orders will become more frequent and agencies more responsive. Furthermore, pooling resources and allowing for more strategic impact litigation will ultimately mean the ability to argue for more significant rights and changes to the IDP system. Essentially, this holding has given the IDPs the political empowerment they have been lacking.

Below I will discuss the most salient benefit of this holding, the opportunity for political voice and the importance this holds in the development of an active civil society for IDPs. By promoting grass roots, upwardly focused rights protections, rather than the top-down layered

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92 In fact, most IDPs belong to these groups.
bureaucratic approach that has failed Colombian IDPs, the holding in Sentencia T-25/04 is a promising method for real change in the IDP crisis.

5. **Colombian Constitutional Court Ruling: Effective Judicial Activism?**

The Colombian Constitutional Court recently held that the government’s inability to guarantee the enjoyment of rights by IDPs was unconstitutional. In this Section, I highlight the contours of the decision and subsequent enforcement decrees including the categorization of an “unconstitutional state of affairs,” the use of the UN Guiding Principles as a norm setting document, the classification of IDPs as warranting special protection under the Constitution such as explicitly guaranteed to women, elderly and children, and the enumeration of specific tasks the government must complete to demonstrate compliance with the holding. However, I maintain that the most significant holding in the case, and that which is most likely to have a lasting effect on the enjoyment of rights for IDPs, is the holding allowing third parties to bring *tutela* actions on behalf of IDPs. This holding will allow IDPs who were previously unable to take advantage of the very open and accessible Colombian justice system to have their rights explicitly protected by orders from the courts to local agencies. In this way, IDPs will gain the political voice they have long been lacking.

a. **The Colombian Constitutional Court**

The Colombian Constitutional Court was created in 1991 with Colombia’s adoption of a new constitution. Both the establishment of the 1991 constitution and its judicial provisions were thoroughly and publicly debated, with active civil participation, including that of guerilla groups.93 The new constitution was considered a “symbol of peaceful rebellion, held within

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institutional channels and against arbitrariness, exclusion, and abuses of power [and was] a new, inspiring horizon in Colombia’s uphill battle for peace and equality in society.”\textsuperscript{94} The new constitution included a bill of rights with 31 enumerated fundamental rights (Articles 11 – 41), 36 social, cultural and political rights (Articles 42 – 77), and five enumerated collective and environmental rights (Articles 78 – 82).\textsuperscript{95} Relevant to the discussion of IDPs and protection of their rights are the provisions that allow for review and enforcement of its generous bill of rights.

The 1991 constitution created a variety of governmental bodies designed to provide and protect the newly enumerated rights of Colombian citizens, allowing the new bill of rights to “transcend mere words and became a social reality.”\textsuperscript{96} These provisions included the creation of a Constitutional Court, charged with upholding the integrity and supremacy of the constitution, and the position of a Defensoria del Pueblo, a public ombudsman charged with promoting and protecting the rights of citizens.\textsuperscript{97} Furthermore, the constitution created new procedures, such as the accion de tutela, designed to protect fundamental rights and available to individual complainants before the Constitutional Court, and an accion de cumplimiento, designed to compel authorities to uphold their mandated duties.\textsuperscript{98} The constitution states that international human rights treaties and conventions ratified by the Colombian Congress must prevail in their national system, and that all enumerated Constitutional rights must be interpreted to conform to these treaties.\textsuperscript{99}

\textsuperscript{94} Justice Manuel Jose Cepeda-Espinosa, \textit{supra} note 93 at 546.
\textsuperscript{95} Colombian Constitution, Arts. 11 – 82.
\textsuperscript{96} Justice Manuel Jose Cepeda-Espinosa, \textit{supra} note 93 at 546.
\textsuperscript{97} \textit{Id}.
\textsuperscript{98} \textit{Id}.
\textsuperscript{99} Colombian Constitution, Article 93. Colombia has ratified the following international treaties relating to human rights: Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment; International Covenant on Civil and Political Rights; Optional Protocol to the International Covenant on Civil and Political Rights; Convention on the Elimination of All Forms of Discrimination against Women; International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Economic, Social and Cultural Rights; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;
Under its Constitutional mandate, the Constitutional Court has developed guidelines for interpreting and applying the new constitution. These criteria include “reasonability, proportionality, protection of the ‘essential nucleus’ of constitutional rights, and direct application of fundamental constitutional rights even in the absence of legal regulation.” It is important to note that the “prevailing spirit of national transformation” that accompanied the new constitution nurtured the sweeping changes to the judicial system and expanded judicial power, scope, and functions. Significantly, a decree passed in 1991 also gave the Court explicit authority to determine the lasting consequences of its judgments and maintain competency over a case until the violated rights have been completely reestablished or the cause of violation eliminated. This gives the Court the power to release continuous decisions and orders in a given case to ensure compliance and rights protection.

The Constitutional Court is considered nationally and internationally an effective and transparent judicial body. The U.N. Representative to the Secretary General noted that he “was impressed with the degree of pride and the knowledge that ordinary people had, even in remote parts of the country, concerning the Constitutional Court and the protection of their rights” and

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100 Justice Manuel Jose Cepeda-Espinosa, supra note 93 at 547.
101 Id. A thorough discussion of the events and debate surrounding the establishment of a new Constitutional Court are relevant to the immediate discussion of the likely effectiveness of judicial protection of IDPs, but warrant more careful analysis than is practical in this context. Cepeda-Espinosa notes that the creation of the Constitutional Court was “an especially thorny issue that caused considerable debate among Constituent Assembly delegates.” Id.
102 Id.
103 Artículo 27 del Decreto 2591 de 1991.
stresses the high regard international constitutional experts have for the court. As such, we can assume that the Sentencia T-25/04 is legitimate, and not overtly influenced by either of the other two branches of government.

b. **Sentencia T-025/04:**

In 2004, the Constitutional Court made a landmark decision on behalf of the IDPs. Known as Sentencia T-025/04, international scholars have lauded the case as “groundbreaking,” a glimmer of hope for the IDPs and victims of the internal conflict, and as evidence that The Guiding Principles on Internal Displacement are becoming customary law. In the following discussion, I will highlight the salient points and establish a basis for discussion about the potential for this decision to effectively activate change in the protection of rights for IDPs.

In the 2004 case, the Constitutional Court held that the prolonged and recurring omission of the state to protect the rights of IDPs was unconstitutional. As such, the Court ordered the state to take a variety of steps to remedy the unconstitutional state of affairs, including providing the court with regular updates on the government’s progress. In each year since Sentencia T-25/04, the court has rendered numerous follow-up decisions on the implementation of the its orders, holding the government’s reports inadequate and ordering more comprehensive analytical reporting, in particular detailing results indicators to demonstrate progress in the effective enjoyment of rights for IDPs following the court’s decision.

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106 See Nogueira and Efstatopoulos, supra note 9.
Although Sentencia T-025//04 seems revolutionary in terms of IDP jurisprudence, the Constitutional Court has proffered 17 decisions in this area since it first encountered the situation in 1997. In these various decisions, the Constitutional Court has produced judgments protecting rights, which I have grouped into two main categories, the protection of specific rights and guarantee of access to services:

**Protection of Rights:**
1. Freedom from acts of discrimination (3 cases)
2. Life and personal integrity (5 cases)
3. Right to housing (2 cases)
4. Freedom of movement (1 case)
5. Rights of the child (3 cases)
6. Right to choose your place of residence (2 cases)
7. Right to free development of personality (2 cases)
8. Right to work (3 cases)
9. Right to petition related to access to programs for the IDP population (3 cases)

**Guarantee of access to services:**
10. Education (9 cases)
11. Emergency humanitarian assistance (3 cases)
12. Effective access to health services (6 cases)
13. Economic reestablishment to protect the right to minimum vitality (5 cases)
14. IDP assistance programs, with no access restrictions based on registration requirements. (7 cases)

These cases deal with specific provisions in individual cases, and beyond establishing non-binding precedent, do little to ensure a broad protection of rights. However, the importance of the court’s jurisprudence should not to be diminished as it regularly relies heavily on its previous decisions even though *stare decisis* is not a requirement in the Colombian judicial system. Sentencia T-25/04 describes each of these previously protected rights in detail and

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109 This could also be categorized as a guarantee of the “right to education”, translated from “para garantizar el acceso al derecho a la educación” (to guarantee access to the right to education). Sentencia T-025/04, pg. 33.
110 Sentencia T-025/04, pg. 33.
111 Colombia follows a civil system of law, where precedent is non-binding. However, lower courts generally follow the decisions of the Constitutional Court, and the Constitutional Court itself often relies on previous decisions in its judgments.
directly supports the previous decisions with articles from the Guiding Principles on Internal Displacement.\(^{112}\) In opinions given in 2000 and 2001, the court held:

that although ‘the Principles have not been formalized by means of an international treaty,’ they ‘should be taken as parameters for the creation of new rules and interpretation of existing rules in the area of regulation of forced displacement by the state,’ and ‘all relevant government personnel . . . must conform their conduct not only to constitutional requirements but also to those of the [Guiding] Principles.\(^{113}\)

The Constitutional Court also notes that it has used the Guiding Principles in cases in the past, including T-1346 of 2001, in which it adopted the definition of “displaced” confirmed by the Guiding Principles.\(^{114}\) The court concluded that the limits of the methods the authorities are obligated to adopt are determined according to three principles that it established in the sentence T-268 of 2003:

1. The principle of favorability in interpreting the norms that protect the IDPs;
2. The Guiding Principles of Internal Displacement;
3. The principle of the prevalence of substantive rights in the context of the Social State of Law (\textit{Estado Social de Derecho}).

The court synthesized these three parameters by quoting from a previous decision, saying the special methods favoring the displaced must provide that IDPs become less vulnerable, provide for the reparations of injustices derived from involuntary displacement and orient themselves towards the effective realization of certain basic rights of wellbeing that constitute

\(^{112}\) The court gives a thorough discussion of the Guiding Principles, why and how they were created and notes that they are supported by various international organizations, including the Inter-American Commission of Human Rights, the UN Commission of Human Rights for Economic and Social Advice, UN Secretary General, Organization of the African Union, and various governments, which have recommended their use in states faced with forced displacement. Sentencia T-025/04, pg. 33.


\(^{114}\) Sentencia T-025/04, pg. 34.
the base for autonomy and self-survival of the IDPs.115 Based on this precedent and international norms, Sentencia T-25/04 greatly broadens both the protection of rights and the access to enforcement mechanisms for all IDPs in Colombia. Thus, the case moves beyond specific fact patterns of individual cases to address a pervasive societal problem. This will have more impact on the actual living situation of IDPs than any of the previous decisions, legislation or policies.

ii. Procedural Background

Sentencia T-025/04 arose out of 108 tutela actions encompassing approximately 1150 nuclear families that had been victims of forced displacement.116 A tutela action allows any individual whose rights are being violated or threatened to bring a case without any attorney and through informal claims before any judge in the country.117 Judges must give the tutela actions priority over any other business and render a decision within 10 days, including any mandatory and immediate orders.118 Although initially designed to protect those rights enumerated in the new constitution, the Constitutional Court has expanded the various rights protected under tutela actions. This expansion includes protecting fundamental rights, economic, social and cultural rights and collective rights, and allowing tutela actions to be brought by incorporated entities and against state authorities and officials and private persons in positions of power.119 The Constitutional Court has the authority to review and issue judgment on any tutela action it chooses, usually selecting those cases that help develop or correct its own case law.120 This

115 Sentencia T-025/04, pg. 41.
117 Justice Manuel Jose Cepeda-Espinosa, supra note 93 at 553.
118 Id.
119 Id. at 554.
120 Id. at 553.
system of hearings is notably open and accessible, and has been generally successful in protecting the rights of traditionally marginalized groups.\textsuperscript{121}

In the instant case, the court combined \textit{tutela} actions from a large body of lower court decisions unfavorable to IDPs. The case was brought against the \textit{Red de Solidaridad Social} (Social Solidarity Network, SSN) and other governmental organizations alleging 1) that these authorities were not upholding their mandate to protect the population of IDPs and 2) they were failing to effectively answer requests for assistance.

On average, each of the families represented in the actions had four members, usually single mothers, elderly and children. Virtually all of the complainants were registered with the state as displaced persons, and all were victims of forced displacement occurring over a year before the court made its ruling. Most of the complainants had received some type of emergency humanitarian assistance in the first three months after displacement, but many had to wait as long as six months before receiving any assistance (with some waiting 2 years) and the assistance eventually given was not always adequate.\textsuperscript{122} Upon requesting help from the agency tasked with providing assistance to IDPs, the SSN, the displaced persons would be given one of several responses including 1) that the program requested was suspended or closed; 2) that there were errors in the application for assistance; 3) that petitions had to be answered strictly in the order received; or 4) that the agency receiving the petition was not the correct one for a specific type of aid. In essence, the displaced faced massive bureaucratic difficulties that ultimately resulted in no aid being given by the government.\textsuperscript{123}

\textsuperscript{121} See Cepeda-Espinosa, Judicialization of Politics in Colombia.
\textsuperscript{122} Sentencia T-025/04, pg. 1, 17-18.
\textsuperscript{123} Sentencia T-025/04, pg. 1, 17-18.
Collectively, the demands made by the *tutela* petitioners fall into three categories, 1) timely access to current assistance programs; 2) assistance beyond what is currently provided; and 3) systematic changes to Colombia’s IDP program. Specifically the plaintiffs’ demands were:

**Timely Access to current assistance programs:**
1. Recognition as displaced persons and entitlement to the benefits that arise from this condition;
2. Resolution of petitions for assistance in a clear and predetermined time;
3. Assistance with economic stabilization, living, relocation, job assistance, and access to education for their children;
4. Receipt of emergency humanitarian assistance;

**Assistance beyond what is currently provided:**
5. Protection of the land that belonged to the displaced;
6. A nutritional guarantee program;
7. Prescription medications;
8. Continued humanitarian assistance to the family in the event the head of household is separated from the nuclear family;
9. Permission to receive training to develop “productive projects”;
10. Reestablishment of health services denied by the government at the time of the hearing;

**Systematic changes to the Colombia’s IDP program:**
11. Appropriations made by the government agencies to solve the IDP situation and for the provision of necessary programs;
12. Funds made available by the Minister of Housing to move forward with housing and “productive projects”;
13. Governmental warnings to the legal representative of the Social Solidarity Network, that should it fail to meet its responsibilities to the displaced, it would be engaging in misconduct;
14. Creation of a municipal oversight committee for the overall IDP situation;
15. Contribution by the territorial entities, without exceeding their funds availability, to the housing provision plans for IDPs.\(^{124}\)

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\(^{124}\) *Sentencia T-025/04*, pg. 1, 17-18.
These demands are largely related to bureaucratic shortcomings and demonstrate what tends to be the biggest challenge faced by the Colombian government – a large and unwieldy program of assistance working under limited resources and with low priority for officials.\textsuperscript{125} Below I will discuss how these demands were addressed by the court, and how ultimately allowing greater access to the \textit{tutela} system will in turn foster more adherence to the court’s mandate by regional authorities charged with proving IDP assistance.

iii. \textbf{Conclusions and Holding}

The court begins by holding that the current IDP situation is unconstitutional and extended the results of the judgment to all IDPs, not just parties to the \textit{tutela} actions under review. This holding is based on the extreme vulnerability of the displaced population as well as the repeated failure of the various responsible authorities to offer IDPs opportune and effective protection. The court holds that governmental authorities had violated the rights of the entire displaced population to their rights to a dignified life, personal integrity, petition, work, health, social security, education, minimum needs and the special constitutional protections owed to the elderly, women as the head of the family, and children. The court concludes that the violations had been massive, prolonged and repeated. Furthermore, these rights violations could not be imputed to a single government authority, but to a structural problem that affects the entire political IDP system assistance, stemming from insufficient funds and institutional incapacity for implementing assistance programs.\textsuperscript{126}

Just as this is not the first case explicitly protecting the rights of IDPs, this is not the first time the Constitutional Court has made broad judgments addressing widespread social problems. Focusing again on precedence, the court bases its declaration of an “unconstitutional state of

\textsuperscript{125} A thorough discussion of the Colombian legislation regarding IDPs is included below in Section 5.

\textsuperscript{126} Sentencia pg. 24.
affairs” on seven previous cases, the first arising in 1997. In keeping with that decision and therefore establishing its authority as precedent, the court declared a state of unconstitutionality six times more. In those cases where the court finds massive violations of constitutional rights and declares an unconstitutional state of affairs, it has extended the effects of the *tutela*, in accordance with the magnitude of violations and in the interests of equality, to protect the rights of those that are in a similar situation but are not included in the *tutela* action.

The court bases these decisions in Articles 2 and 113 of the Colombian Constitution. Article 2 provides that state authorities have the “duty to protect all of the persons residing in Colombia in their life, honor, wellness, beliefs and other rights and liberties, and to secure the fulfillment of those social duties of the state and private individuals.” Article 113 states that the arms of public power must “collaborate in a harmonious manner with the remaining organs of the state to realize their objectives.” When the court concludes that authorities are not meeting the duties mandated by these articles, it orders the authorities to adopt corrective measures to overcome the situation. In past cases, the court has ordered the state to adopt various legislation, plans and programs, appropriate the necessary resources and modify practices in order to guarantee the rights being violated.

The court notes that although it has rendered many decisions and orders regarding the protection of rights of the IDPs, starting with the first case in 1997, grave violations of rights have continued. The court bases this observation on the continuing pattern of abuses experienced by IDPs in Colombia and the general passivity of the authorities charged with providing assistance for IDPs. It contends that these violations continue because the authorities

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127 CP Art. 2.
128 CP Art. 113.
129 Sentencia 62, CITE TO XN.
have not applied sufficient measures to overcome the violation of rights, and notes that even the precise solutions against specific violations ordered by the court in previous sentences have not prevented these authorities from being the subject of *tutela* actions.\(^{130}\) What’s more, the situation has been aggravated by the fact that some functionaries have now imposed a *tutela* action as a prerequisite before meeting their obligations to assist IDPs.\(^{131}\) The court also considers the fact that it had not made a formal declaration of an “unconstitutional state of affairs” and therefore had not given orders to overcome the situation as it pertains to the IDP population in general, which could possibly contribute to the continuing pervasive rights violations.\(^{132}\) Given this case history, the court sought to move beyond individual *tutela* fact patterns and address the larger societal problem of internal displacement and the rights violations experienced by a majority of those displaced. Thus, the court was able to articulate broad orders to ensure rights protection for each displaced person.

The court concludes that the situation of IDPs is not caused by the state per se, but rather by the internal conflict and in particular the actions of irregular armed groups.\(^{133}\) However, the court holds that under Article 2 of the constitution, the state has the duty to protect the population affected by this “phenomenon” and is therefore obligated to adopt a response to the IDP situation. The court further concludes that the state IDP solution suffers from serious deficiencies in its institutional capacity that affects every level and component of the body of law

\(^{130}\) It is unclear from the text of the decision whether these orders have been applied by the authorities and failed, if the orders themselves are insufficient, or if their application by the authorities was lacking.

\(^{131}\) Sentencia 43.

\(^{132}\) Sentencia 62.

\(^{133}\) Although arguably the state did not singularly “cause” the IDP situation, unless omission of protection and inadequate means to end the conflict can be seen as causal, it is critical to note that this decision was rendered before the ties of the government to paramilitaries had been made public in Colombia. Given the direct usage of the paramilitaries by state officials and the armed forces, there is now certainly a case to argue that the government is directly or partially responsible for the causation of the IDP situation. This dicta by the court can also be considered careful posturing by the judiciary in a case where the holding is strongly against the government. More discussion of this giving and taking of power between the various arms of government will be included below in Section 6.
that pertains to the IDPs. The court is careful to note that the *tutela* judge cannot solve each of the problems outlined in its decision, such as those that correspond to the national government and the territorial entities, in their respective areas of competency. However, this does not impede the ability of the court, when confirming the situation of rights violations in concrete cases, to adopt corrective mechanisms to secure the effective enjoyment of rights of the IDPs and to identify remedies to overcome the structural deficiencies that compromise various state entities.\(^{134}\)

The court softens its holding by explaining that it is not trying to order an unexpected cost, modify the program already designed by the legislature, nor define new governmental priorities. Rather, the court, referencing the legal instruments that address the IDP problem, appeals to the constitutional principle of harmonious collaboration between the branches of government to guarantee fulfillment of their constitutional duties and to effectively protect the rights of all residents in the national territory.\(^{135}\)

Thus, the court has analyzed the IDP situation according to the following logic:

1. There have been many previous *tutela* cases claiming rights violations;
2. Based on the Guiding Principles and the Colombian Constitution, the court consequently gave strict and specific orders to government agencies to stop these violations;
3. This has not worked, and grave violations of IDPs’ rights are still rampant;
4. The problem lays not with one specific agency but with overarching structural and bureaucratic inadequacies;
5. Therefore, as it has done in the past when confronted with broad social problems, the court is applying an expansive declaration of an “unconstitutional state of affairs” along with specific orders\(^{136}\) to the authorities to come into compliance with legislative and constitutional mandates.

\(^{134}\) Sentencia, 54.

\(^{135}\) Sentencia, 58.

\(^{136}\) A thorough discussion of these orders and their likelihood of success and implementation is beyond the scope of this paper. In short, the court ordered the Colombian state to: remedy budgetary and administrative deficits and meet the Court’s mandatory minimum levels of protection in a timely and effective manner. The court has subsequently released orders calling for the government to correct its response and fulfill the Sentencia T-25/04 orders. The court has identified problems in the following areas: “coordination between state agencies, registration and collection of demographic data on IDPs, sufficient budgetary allocations, lack of indicators to measure,
However, and almost in passing, the court also holds in Sentencia T-25/04 that organizations can bring *tutela* on behalf of individuals. Several of the *tutela* claims reviewed by the Constitutional Court had been dismissed before evaluating the merits because they were brought by local NGOs on behalf of a group of complainants. According to the court, this violates Article 10 of Decree 2591 of 1991, which provides that a complainant can delegate her rights to third persons when the complainant is unable to exercise her own defense of rights.\textsuperscript{137} Although normally this is type of delegation is allowed when the complainant is mentally or physically disabled, a child, homeless, or someone with a serious illness, there is nothing that impedes the court from extending this right to other situations.\textsuperscript{138} Significantly, the court concludes that given the condition of “extreme vulnerability” of the IDPs, and the fact that many of them are persons specially and explicitly protected by the constitution, namely women as the head of family, children, ethnic minorities and the elderly, requiring them to personally file *tutela* actions is unduly burdensome. As such, organizations that have been created with the aim of helping IDPs defend their rights are allowed to act as official agents of the IDPs.\textsuperscript{139}

This holding is significant for two reasons. First, it explicitly recognizes that IDPs must be granted special status under the Colombian law and Constitution. Raising the level of protection under the Constitution can lead to increased protection and enforcement of judicial orders to authorities. It can also grant IDPs special status in other cases of rights violations and application for special benefits provided to IDPs. Secondly, this holding grants the IDPs a

\textsuperscript{137} Sentencia T-025/04, pg. 26.
\textsuperscript{138} Sentencia T-025/04, pg. 26.
\textsuperscript{139} Sentencia T-025/04, pg. 27. The court goes on to enumerate requirements for said agencies acting on behalf of the IDPs in order that their rights are not violated. *Id.*
political voice and power they desperately need. With wider access to the judicial system, IDPs can have organizations advocate on their behalf via *tutela* actions, creating opportunities for important impact litigation, advocacy of rights to congressional leaders and eventual recognition of IDPs as an important interest group in Colombia. This, I argue below, is the crux of Sentencia T-25/04, and has the greatest chance of helping the most individual IDPs than other aspects of the holding.

c. **Political Voice and the Development of Civil Society**

“As a displaced person, people look at you as if you were a problem and you are discriminated against by society, it’s difficult to survive. It’s hard to recover that tranquility you once had. […] I decided to work as a leader of displaced people, of people who are poorer in spirit. I wanted to fight for things. Because it’s unfair that you are never able to recover what you’ve lost, and there is the lingering psychological trauma. I’ve suffered need, trauma. I don’t want anyone else to have to suffer as I suffered. I don’t want any other child to have to go through the same things my daughters had to go through.” – Ana Dilia, 35-year-old woman displaced from Catatumbo, Norte de Santander.

Culturally, Colombia is a country of laws, laws which may not be applied, but which are there nevertheless. Colombia legislates under the presumption that simply passing new laws will solve the country’s most pressing problems. As such, it is easy to frame social and political problems as a matter of regulations of these laws. However, new legislation, or even application of current legislation, will not solve the IDP crisis in Colombia. Rather, IDPs need to become the subjects of their development, not merely objects of assistance. To that end, the International Development Research Center (IDRC) stresses the importance of effective participation in the local political process. It claims that first, the level and type of participation must be valued

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140 See IDP Voices, *supra* note Error! Bookmark not defined..
141 Cepeda-Espinosa, *supra* note 93 at 665.
depending on the context, historical conditions and the motivations that compel action.

Furthermore, there is a direct dependence on the existence of tools that relate to the particular needs of each IDP population.\textsuperscript{142} As noted by Justice Jose Cepeda-Espinosa,

\begin{quote}
After more than 200 years, it has become clear that the separation of powers is not a sufficient guarantee against abuses. The detailed enumeration of the functions of those who exercise authority is not enough either. What is needed is to give citizens power, and to create mechanisms for them to exercise it in a specific and orderly fashion, through institutional channels, in any place and time.\textsuperscript{143}
\end{quote}

The Constitutional Court decision has created such a tool – it is context specific in terms of recognizing specific needs of IDPs concerning access to the courts, it gives a voice to a politically disadvantaged group, and it in effect could reduce the caseload of the courts and bureaucratic steps necessary for a displaced person to receive aid. When politicians perceive that the IDPs have a political voice, they will have more incentive to ensure their rights are protected and the situation of the IDPs will stand a chance of improving.

The Colombian Constitutional Court has addressed the positive obligation of the government to protect the rights of IDPs on numerous occasions. Sentencia-T-25/04, praised internationally as a breakthrough decision, is in fact one of several cases with similar holdings. It is true that this case is broader in scope, and seeks action from the government to actively protect all IDPs. The court’s decisions are generally followed by lower courts as though they are binding precedent.\textsuperscript{144} The specific orders given by the Constitutional Court to administrative authorities or private individuals following a \textit{tutela} ruling are also usually obeyed, and

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\textsuperscript{142} International Development Research Center (IDRC), Casasfranco Roldán, María Virginia. Las migraciones y los desplazamientos forzados, 1a. ed. -- San José, C. R.: Impresora Obando, 2002, 142.
\textsuperscript{143} Cepeda-Espinosa, \textit{supra} note 93 at 576 – 77.
\textsuperscript{144} Cepeda Espinosa, \textit{supra} note 74 at 89. This is due in large part because the court selects for review those \textit{tutela} decisions from lower courts that depart from its doctrine. All \textit{tutela} decisions are submitted for verification of consistency with the Constitutional Court’s doctrine. The court only has to review around 600 of 180,000 \textit{tutela} decisions to ensure its precedent is followed. \textit{Id.}
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noncompliance can be punished with successive penalties ranging from fines to arrest.\textsuperscript{145} In fact, although not common, arrest has happened – even at the highest levels of government, with directors of national public entities, mayors and even governors being arrested for failing to comply with \textit{tutela} orders.\textsuperscript{146} The court’s mandates are subsequently carried out.\textsuperscript{147}

Given the criticisms about the overly centralized administration of Law 387 and the general adherence to court decisions by local authorities, by providing opportunity for collective hearings to local judges and magistrates, Sentencia T-25/04 has the potential to enforce rights protection for IDPs. Furthermore, Colombian constitutional case law has in the past raised awareness of marginal issues in the national political agenda and has led to a reordering of priorities within the political system.\textsuperscript{148} Significantly, according to Judge Cepeda Espinosa, constitutional court rulings have become “weighty factors” in the development and definition of “collective actors and identities, which, in turn, have become visible and active in the political field.”\textsuperscript{149} This type of empowerment for weak and marginalized members of Colombian society is critical for the IDPs to finally realize the protection of their rights. With the court’s opening of the \textit{tutela} to collective actions for IDPs, those who are so marginalized and destitute that even \textit{tutela} actions were previously unattainable can have access to justice. Coupled with the general force and authority of constitutional court decisions in Colombia, the IDPs finally have a chance to be heard and receive the benefits of Colombia’s impressive IDP legislation.

However, the fact that there have been so many decisions along this line and other constitutional court decisions that have not effected change in policy\textsuperscript{150} leads one to doubt the

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\textsuperscript{145} Cepeda Espinosa, supra note 74 at 90.

\textsuperscript{146} Cepeda Espinosa, supra note 74 at 90.

\textsuperscript{147} Id.

\textsuperscript{148} Id.

\textsuperscript{149} Id.

\textsuperscript{150} Specifically the decision by the Colombian Constitutional Court that the Law 975, Justice and Peace Law, includes several unconstitutional provisions, met with nothing more than lip service from the government. In fact,
real power of the Constitutional Court in Colombia and whether in this case the court’s mandates will be carried out. There are also many arguments against judicial activism, however. In particular, other branches of government can coerce activist courts that overstep their bounds to comply with reigning political ideologies. In the Colombian case, criticisms of the activist court include countermajoritarian arguments of increasing uncertainty and creating disincentives to investment by ruling against the majority viewpoint to protect minority rights. Encouraging the use of lawsuits by traditionally politically silenced groups to drive policy change in their favor involves decisions that do not reflect majority opinion and can therefore engender long-standing conflicts. While these are valid points in terms of the general debate over judicial power, they neglect situations of severe social consequence in which arguably judicial activism is a means of last resort. Scholars in the United States made these same arguments during the civil rights era and today it is hard to see objectively “negative” consequences of these decisions.

It is also important to note that historically, those groups that are now being displaced as a result of the conflict are those that have been disadvantaged and politically silenced in Colombia. The current fighting mirrors regional conflicts that have plagued Colombia far longer than the current forty-year conflict. The poor rural farmers and indigenous groups have been the target and unwilling intermediaries of war for nearly all of Colombia’s history. It is no surprise then that they have an inherent distrust of government and no political voice. They might come from regions where cocaine-base is a form of currency, where the FARC establish

the government uses the process of review of this law, and the Colombian Constitutional Court’s unconstitutional holding, as an argument as to its legitimacy. It neglects to mention that it failed to make the significant changes recommended by the court.

151 Maurice Kugler and Howard Rosenthal, Checks and Balances: Institutional Separation of Political Powers, 90.
152 Id.
153 Cepeda-Espinosa argues that they are US context specific and therefore not only NA in Colombia but were also well known in 1991 when established court. Cepeda-Espinosa, supra note 93 at 669.
154 See Esquirol, supra note 29.
155 Id.
social rules such as no drinking during the week, mandatory periodic exams for prostitutes, and a system of punishment for violators of these rules that includes community service building roads and infrastructure for the region. They might have a paramilitary at their door requesting food for lunch one day, a guerilla demanding rice and supplies the next, and when one of these factions recruits their child for armed duty, the government refusing aid under suspicion that they support the illicit armed groups. Or, they may have been coerced into voting for a particular candidate in one of Colombia’s frequently fixed elections. In this type of environment, political voice seems like a luxury.

However, as noted above, the Colombian Constitutional Court has opened the door to justice for those members of society who have been cut out of the political process. Since the 1991 constitution was created, social groups and activists citizens have used the *tutela* system and the constitutional court to further political agendas that were previously ignored by policy makers. Judge Cepeda-Espinosa points out that although this has not been a massive mobilization due to the constitutional protection of individual rights and the ability for each individual to bring a *tutela* claim, “it is enough for one active citizen to take the time to write a short lawsuit before the court, or a brief request of review for a *tutela*, in order for the court to have to adopt a decision on the matter, even if it does not always delve into the merits of every claim.” However, in the case of the IDPs, it is not enough.

Law 387 is so complicated, poorly implemented and bureaucratic that orders from the constitutional court in light of general IDP protection is not enough. The orders and mandates from the courts go to specific authorities charged with specific duties – beyond the individual case, it is unlikely that these orders will be applied to subsequent IDP claims on a significant level. Put simply, the issues that plague the IDP program in Colombia will not be solved by

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generalities. For effective management of the program, the courts would have to give individual orders to the regional authorities in violation. This necessitates individualized hearings and rulings, and the Sentencia T-25/04 has increased the likelihood of these hearings. Furthermore, by allowing IDPs to bring collective *tutela* actions, the court has simultaneously widened accessibility and reduced the burden on the court system. It is not plausible to expect the courts to hear each individual IDP’s *tutela* claim; by allowing third parties to bring claims on behalf of the individuals, more cases can be grouped together and thus individuals can be protected adequately and the courts can hear fewer cases.

6. **Conclusion**

Facing an urgent and massive IDP crisis, and an internal conflict that has raged almost non-stop for 40 years, Colombia has no easy policy choices to make. The country presents a paradox of seemingly transparent democracy, a strong, activist Constitutional Court, and revolutionary and widely respected rights legislation. Why is it then that human rights abuses, specifically those against the internally displaced, are so pervasive? First, because the legislation in place is largely symbolic and does not reflect the true governmental policy towards the IDPs, which is to use the IDP crisis as another means to fight in the internal conflict and install governmental military forces or armed civilians in areas where the state lacks control. Secondly, it is because notwithstanding progressive decisions by the Constitutional Court declaring the state’s treatment of IDPs unconstitutional, there is little the court can do itself to effectively enforce its decisions. Finally, and most significantly, these rights violations are the result of a long standing and self-perpetuating political silence of those being most adversely affected by the conflict. By establishing a mechanism for more displaced persons to have access to the court
system via *tutela* actions, the Constitutional Court has made real ground in effecting real change for the IDPs.

**Recommendations:**

- To the Colombian Government: continue good-faith adherence to Sentencia T-25/04 and its subsequent orders.
- To Local NGOs: Develop projects designed to foster effective impact litigation based on the Sentencia T-25/04 and classification of IDPs as a “special needs” group.
- To International Actors: Continue to provide funding and assistance to provide immediate humanitarian assistance to the IDPs. Condition assistance and economic ties with the Colombian government on protection of rights, rule of law and adherence to Constitutional Court decisions. Promote and develop initiatives to foster political voice and participation of the IDPs.