

The Judicial Protection of IDPs in Colombia: The importance of the Guiding Principles (Draft)

**Justice, Manuel José Cepeda-Espinosa
Constitutional Court of Colombia
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I am honored to participate in this event, and very grateful to all the experts and policy makers that helped draft and adopt the Guiding Principles. During the last decade, the Guiding Principles have played a key role in the judicial protection of IDPs' rights in my country.

As you all well know, Colombia has one of the world's highest numbers of forced internal displacement, as a consequence of the armed conflict it has endured for the last four decades. Disputes over territorial control and access to strategic resources by irregular armed groups, confrontations between the State's Armed Forces and illegal armed actors, fumigations of illicit drug crops, and the atrocities committed against the civilian population, are just some of the most salient factors that fuel this humanitarian crisis.

According to the Office of the United Nations High Commissioner for Refugees (UNHCR), Colombia's displaced population comprises about 8% of the country's total population, calculated in approximately 45 million inhabitants (78% urban and 22% rural). IDPs are dispersed all over the country. Practically every municipality in the country has been impacted by the phenomenon. Minors younger than 18 years old account for around 50 per cent of the displaced population, and their families also include significant proportions of elders and individuals with disabilities. They live in conditions of utter misery in marginal, overcrowded urban settlements. Women of all ages, which amount to about half of IDPs, bear the most heavy burden of care, income, survival as well as very high risks specifically related to gender in a violent context and macho culture.

Furthermore, the country's Indigenous and Afro-Colombian populations have been disproportionately affected by displacement. Some indigenous groups have been violently expelled from their ancestral territories, which have become, together with their natural resources, axes of the armed conflict. Over a dozen of the country's 82 indigenous peoples are at high risk of extinction in the short-term. Also, Afro-Colombian groups, which have undergone a significant process of ethnic and cultural revitalization over the past decade, are greatly threatened in the distant territories of the Pacific basin.

Nevertheless, Colombia is a land of sharp contrasts. Whereas it is afflicted by the globe's second largest humanitarian crisis regarding IDPs, it also has a strong and independent system for the judicial protection of IDPs' rights.

Despite the harsh conditions of violence that Colombia has had to endure on account of internal armed conflicts, the country also has a 100 year-old tradition of competitive free elections, Rule of Law, and judicial review of legislation. Moreover, the generous human rights provisions of the 1991 Constitution have marked a significant turning point in ordinary citizens' everyday lives. Fundamental rights are enforced by all of the country's judges through the special constitutional writ of protection of human rights (*tutela*). A *tutela* is a constitutional complaint that any citizen can bring before any judge in order to seek an immediate judicial injunction against actions or omissions of any public authority that violates his or her fundamental rights. Courts must hand down a ruling within ten days of receiving a *tutela* petition. Then, all *tutela* decisions are automatically sent to the Constitutional Court.

IDPs, as well as other Colombians, often resort to *tutela* in order to obtain a State response to their problems. Where should a Colombian judge find useful light concerning the content, the scope and the limits of the rights of IDPs? The Colombian Constitutional Court, which has the power of reviewing all *tutela* decisions, found it precisely in the Guiding Principles (GP).

Amongst more than 30 *tutela* decisions on the topic, I will mention the most important one, known as T-025. It was rendered in January

2004 and since then the GP are at the core of the judicial enforcement of IDPs rights.

In case T-025, after reviewing over one hundred *tutela* decisions, the Colombian Constitutional Court concluded that the fundamental rights of all IDPs were being disregarded in a massive, protracted and reiterated manner. These generalized violations were due to structural failures of the government, seen as a whole. Thus, it declared that an “*unconstitutional state of affairs*” had arisen in this field.

Such structural problem was caused, according to the Court, by the deep gap that existed between what the law promised to the IDPs, on the one hand, and the scant financial resources allocated to protect and assist IDPs, as well as the State’s precarious institutional capacity to implement public policies, on the other.

Having declared the existence of an *unconstitutional state of affairs*, the Court not only protected the individual petitioners, but went even further to protect all IDPs, past, present and future. It imparted a number of structural complex orders aimed at overcoming the *unconstitutional state of affairs*. Mainly,

- (i) the Court ordered the national and territorial entities to adjust their budgets and programs in order to close the gap between their commitments concerning IDPs, and the level of resources allocated and their institutional capacity to act to protect IDPs rights. They could do it autonomously and gradually, but within a predefined timetable.
- (ii) The Court, following the Guiding Principles, established minimum mandatory levels of protection of IDPs’ rights.
- (iii) The Court ordered that in the adoption of the decisions aimed at overcoming the *unconstitutional state of affairs*, authorities were to provide the organizations that represent IDPs effective participation in the correction of the structural failures highlighted by the Court.
- (iv) Since the orders amounted to a huge and costly reform, the Court said that, should the government identify the need for a re-definition of the legal framework in force since 1997 (Law 387 of 1997) or a modification of the State policy on account of budgetary restrictions, it would have a term of

one year to think about it. Then it could make a public statement announcing that it was impossible for the government to fulfill its legal commitments and thus it would amend them to diminish its obligations. Fortunately, the government opted to maintain its commitments and decided to increase significantly the budget for IDPs programs and embark in several reforms.

- (v) Finally, the Court retained its jurisdiction over the case in order to supervise the gradual advancement in the closure of the gap between promises and results and to be sure that the government effectively directed its policies to protect IDPs rights. In the last four years, the Court has issued 37 follow-up decisions after evaluating the periodic reports submitted by the government and assessing the opinion of IDPs organizations, UNHCR and oversight independent agencies, such as the Ombudsman and the National Public Attorney.

What was the importance of the Guiding Principles in decision T-025 and its aftermath? From the perspective of a judge, let me underline its key functions:

First, the GP provided criteria to define the content and the scope of IDPs' fundamental rights. Our Constitution and the basic human rights and international humanitarian law treaties ratified by Colombia do not regulate specifically the matter. The GP helped specify what the generally framed rights do mean to IDPs.

Second, since the decision adopted a gradual approach to overcome the unconstitutional state of affairs, the GP provided a basis for setting standards concerning the minimum levels of satisfaction of IDPs' rights. The Court set 9 standards. Thus the government could ask for more time to give optimal protection to IDPs or to overcome the unconstitutional state of affairs; but it may not postpone addressing the minimum standards set by the Court invoking the GP.

Third, the creation or reform of the basic institutional infrastructure to protect rights implies positive duties and responsibilities of the government. Thus, it was paramount for a judge to have a solid basis to order the adoption of positive actions and measures. The GP, in conjunction with national instruments, provided part of this basis.

After the T-025 decision was rendered, the Court had to tackle with a very complex follow-up process. In this second stage of judicial protection of IDPs rights the Guiding Principles also played a key role.

First, there arose the problem of how to measure the progress achieved by the government in overcoming the unconstitutional state of affairs and build durable solutions. It took two years for the government to admit to measure its performance by result indicators, not process indicators, and to design such indicators. The Court pushed hard, if I may say. It required for such indicators to measure the effective enjoyment of rights by IDPs. The government had to show how many IDPs were actually being protected in practice at moment zero, and how this protection of rights improved and expanded over time due to compliance with the orders imparted by the Court in T-025. A commission created by civil society, with the participation of IDPs, was invited to apply by itself these indicators in the field and submit an independent report to the Court. The commission did a national survey and thus obtained more accurate, valuable and balanced information than the government itself. Amongst all the controversies surrounding the design of the indicators, the GP provided criteria to define what precisely the indicators had to measure.

Second, as IDP leaders felt empowered by the Court and became more active and visible, the risk to their life increased. The Court ordered the adoption of a special plan to effectively assess their risk and give them the corresponding level of protection. Since the right to personal security is not enumerated in our Bill of Rights, the Court interpreted the right to life and personal integrity in the light of the Guiding Principles to ground this order imparted to the Minister of Interior.

Third, there was the issue of whether the general policies adopted by the government were adequate to protect especially vulnerable IDPs such as children, women, disabled, elders, indigenous peoples, and afrocolombians. The government argued that they were but the UNHCR and several NGOs thought otherwise. The Court convened several public hearings in which governmental authorities had to explain to the IDPs themselves, face to face, why these general policies were really sufficient. The hearings were not only revealing

of the shortcomings of the general policies but also deeply moving. The authorities ended up explaining why they had not been able to reach the most vulnerable and welcoming ideas about how to improve its performance. The Court judged with this approach insufficient and decided to issue several follow up decisions, one for each especially vulnerable group of IDPs. In April it ordered the government to take into account the distinct risks faced by women as well as their specific needs and to design new programs to address them. Last Friday the Court gave a similar order with respect to children, after underlining their specific risks and needs, and required, in addition, the immediate application of pilot projects in the cities where the children were more exposed. To test the improvement of the government's institutional capacity the Court also mentioned the name of 600 women and 18000 children IDPs that had to receive complete humanitarian aid within a few weeks. The Court ordered that the design of these programs be done with the effective participation of IDPs. In all these decisions, Guiding Principle 4 strengthened the grounds for a judge to order differential treatment to specific IDPs.

Someone may think that judges should not do that. It is too much intervention in the spheres of other branches of government. Nevertheless, the government has not argued that. The Court has not done what the government must do. It has ordered the government to do it. Moreover, the international dimensions of Colombia's humanitarian crisis, and the additional legitimacy given by the Guiding Principles to the orders issued by the Court, as well as other domestic factors, have been pivotal for the general acceptance of our decisions.

In sum, during the follow up process, the Guiding Principles were a source of legitimacy for increased judicial intervention regarding the protection of IDPs. This has been a crucial function of the Guiding Principles that gave sustainability to innovative judicial interventions. It also gave solid basis to the oversight independent governmental agencies when they criticized the government for not meeting international benchmarks as applied by the Court.

What have been the results of all this?

Although the influx of IDPs is permanent – in 2007 there were according to official statistics 289.969 new registered IDPs- and the unconstitutional state of affairs continues - mainly due to the inability of the government to surmount its precarious institutional capacity and to the lack of evidence showing that the minimum levels of satisfaction of all IDPs rights have been met - there are positive results. But, since this is not the main topic of this commemorative event, I will only list some results:

- Since 2004, the national budget for IDPs was multiplied by a factor of 8 in fixed dollars. By a factor of 3, in constant pesos.
- Public policies are being reshaped by the government towards the protection of rights.
- Significant progress has been achieved concerning health (79% is affiliated to health social security) and education (around 80% of IDP children go to school).
- Objective criteria (result indicators) to measure policy results have been adopted inspired in the effective enjoyment of IDPs' rights and accelerated universalization of protection.
- The terrible living conditions of IDPs have been kept on the public agenda.
- IDPs organizations have been empowered a lot, both politically and technically.
- The discourse of blame assigning has been replaced by constructive dialogue.
- The debate about really how many IDPs there are, has been complemented by who they are and what do they need.
- Governmental accountability has highly increased.
- All relevant actors are now aligned to move in the same direction: IDPs rights. This of course, taking very seriously the Guiding Principles.

But we still have a long way to go. Although it is the responsibility of Colombia to solve the armed conflict, prevent internal displacement and protect IDPs, I want to thank all of you for having an interest in my country.