

How far may Colombia's Constitutional Court go to protect IDP rights?

by Manuel José Cepeda-Espinosa

In 2004 Colombia's highest court declared that the inhumane living conditions of the country's IDPs were 'unconstitutional' and ordered the authorities to take action. Colombia has, arguably, the world's most progressive IDP legislation but can the state guarantee IDPs their constitutional rights?

Colombia's internal armed conflict is the longest running in Latin America, a complex conflict which has been fought primarily between left-wing guerrillas and Colombian armed forces and right-wing paramilitaries but also involving drug traffickers,

landowners and other legal and illegal interests. Displacement has been an endemic feature of the 40-year-long conflict. The vast majority of those forced to flee do not cross borders but become IDPs. Colombia has one of the highest IDP populations in the world.

The Colombian government estimates that there are 1.8 million IDPs but the Consultoría para los Derechos Humanos y el Desplazamiento (CODHES) – the country's leading NGO advocate for IDPs¹ – argues that well over three million people – of a total population of some 44 million – are internally displaced.

Since the adoption of the 1991 Constitution, Colombia has developed a large body of jurisprudence with regard to human rights. Among the

constitutional mechanisms to ensure the effective exercise of human rights is *acción de tutela*, a petition procedure which allows individuals to seek protection of fundamental human rights in the courts. A *tutela* is a 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 they claim violates their constitutional fundamental rights. Courts must hand down a ruling within ten days of receiving a petition. More and more citizens are using the *tutela* in defence of civil liberties, social rights and indigenous peoples collective rights. In 1992 a total of 8,060 *tutela* judicial decisions reached the Court for discretionary review but by 2005 there were 221,348. Since 1992, the Constitutional Court, to whom all *tutela* judicial decisions must be sent for *certiorari* selection, has received about 1,400,000 *tutela* decisions. Laws can also be brought before the Constitutional Court and declared unconstitutional in the abstract with *erga omnes* effects, through another kind of petition (*actio popularis*). In this event, the Court must rule within six months.

Since 1997 the Court has addressed individual *tutela* cases submitted by IDPs who invoke specific fundamental rights – including rights to non-discrimination, life, access to health and education services, minimum income, housing and freedom of movement. From its first decisions the Court acknowledged the existence of a humanitarian crisis. As more and more IDPs took up cases, by 2003 the Court had dossiers submitted by over a thousand IDP families.

Landmark decision

The Court delivered judgment T-025/04 in January 2004 after reviewing 108 cases. It formally declared that IDPs' inhumane living conditions needed to be addressed by all of the competent authorities. It noted that "due to action or omission by the authorities in providing displaced population with optimum and effective protection, thousands of people suffer multiple and continuous violations of their human rights." It came to this conclusion after noting the extreme vulnerability faced by IDPs, protracted and daily

violations of their constitutional rights and the repeated failure of the authorities to protect their rights. The Court took into account that the displaced population included a high number of persons to whom the constitution affords special protection – elderly persons, female heads of household, pregnant women, children, members of indigenous and Afro-Colombian communities and persons with disabilities. The Court noted that the violations of their rights were not attributable to the actions or omissions of a single authority but were due to deep-seated structural failures.

The Court's declaration of an unconstitutional state of affairs is only done when problems are so entrenched that they require the intervention of several organs of the Colombian state for their resolution. The Court may order the adoption of remedies that benefit not only the plaintiffs in an individual *tutela* action but also other persons who share the same situation – in this case, the entire displaced population in the country. The Court issued orders for remedying the budgetary and administrative capacity shortfalls and established minimum mandatory levels of protection of IDPs' rights that were to be secured in an effective and timely fashion. In August 2005 it further declared that actions taken since the ruling were insufficient and issued additional orders for correcting the response.

Although the Court's unprecedented action was justified primarily by the need to enforce fundamental constitutional rights the members of the Court also sought justification from international law. The Colombian Constitution provides that fundamental rights must be interpreted in the light of international human rights. The Court relied heavily on the Guiding Principles on Internal Displacement and used them as interpretative guidelines to determine the exact scope of the rights of IDPs and the extent of the state's obligations to promote them.

The government initially conveyed certain misgivings but has now explicitly committed itself to abiding by the Court's decision and to ensuring the entire apparatus of the

Colombian state complies with its orders. Funding for IDP programmes has been significantly increased. Permanent evaluation mechanisms are being put in place, including a set of targeted result indicators to measure progress in realising IDPs rights. The IDP issue is now firmly on the government's agenda and more frequently discussed in the Congress and the media. The Court's decision has also served to legitimise and protect agencies working to protect IDP rights. In June 2005 civil society advocacy groups met – on a basis of equality – with Cabinet ministers charged with submitting reports on progress in complying with demands set out in T-025/04.

Challenges ahead

Much has been achieved but there is still a long way to go before internal displacement in Colombia is adequately addressed. The Court has recently drawn attention to delays in the adoption of the measures required to overcome the unconstitutional state of affairs. It has highlighted the need for action in ten critical areas:

- coordination between state agencies
- registration and collection of demographic data on IDPs
- sufficient budgetary allocations
- lack of indicators to measure 'effective enjoyment of rights'
- policy vagueness
- failure to protect the indigenous and Afro-Colombian groups who have borne the brunt of displacement and whose communities are at risk of dispersal
- inadequate levels of security during the process of IDP returns
- failure to equally address the needs of those displaced before and after T-025/04
- poor coordination between different tiers of government
- lack of a policy to prevent displacement, especially during military operations.

The Colombian government has recently filed a new report, as required by the Court, indicating how it plans to address these ten critical areas. The Court has had to opt between imposing sanctions – fines or imprisonment of negligent officials – or continuing to order gradual advances towards fulfillment of IDPs' rights. The Court has chosen the latter

course and has made substantial progress. Organisations of displaced persons themselves have requested the Court to continue this approach. However, there are those who draw attention to the fact that almost three years have passed since T-025 was handed down. Some have asked the Court to declare public officials in contempt of court. Not only is its

credibility at stake but so too are the prospects of Colombia's IDPs finally achieving their constitutional rights.

Manuel José Cepeda-Espinosa is one of the nine judges serving on the Corte Constitucional de Colombia. Email: manueljcepeda@gmail.com

1. www.codhes.org



IDPs in
Colombia