

# **HUMAN RIGHTS, FORCED DISPLACEMENT AND ECONOMIC DEVELOPMENT IN COLOMBIA: CONSIDERATION ON THE IMPACT OF INTERNATIONAL LAW ON DOMESTIC POLICY**

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## **Introduction**

Colombia has the largest number of internally displaced population (IDP) in the world, well ahead of the following four: Iraq, Sudan, the Democratic Republic of Congo and Somalia (IDMC, 2012: 16). Official sources acknowledge more than 3.5 million people forcefully exiled (UNHCR: 2012), while civil society organizations put the figure beyond five million (CODHES, 2011: 8). The sheer magnitude of this phenomenon, coupled with the fact that national authorities have developed a sophisticated policy based on the guidelines developed by the United Nations, have triggered scholarly interest both domestically and internationally.

Several approaches have been developed in order to explain and formulate possible solutions to this issue. In all their diversity, they all agree on the extreme complexity of this phenomenon, which interlinks rural conflict, the struggle of various armed actors, gross and systematic violations of human rights, a state apparatus traditionally weak and therefore with limited control over vast areas of the country, a development model that favors large rural property and, last but not least, illicit drug trade. The latter has permeated all instances of national life through corruption, and has provided considerable resources to existing social conflicts, thus triggering unusual brutality.

Despite the complexity of the situation, public policy designed to address its outcomes builds on the premise that the humanitarian challenge is solely the product of the armed conflict existing in Colombia for more than six decades. Those who are violently expelled from their places of habitual residence as a consequence of any of the other factors described above cannot expect to get the protection and assistance of the authorities. This is in sharp contrast with IDPs who have fled the armed conflict and who are entitled to an (admittedly limited) set of benefits. Moreover, those who have been forced to leave their homes due to the implementation of development projects related to mining or the production of biofuels face not only the absence of programs to repair their rights and alleviate their basic needs, but face also the denial of their existence as IDPs. Indeed, authorities responsible for designing and implementing plans and projects on these industries have excluded even the faintest possibility of them triggering involuntary exodus.

The position of the Colombian authorities is shocking, especially if one considers that, today, the link between development projects and forced displacement is widely accepted. In fact, most international institutions that promote such projects (e.g, the World Bank) have been busy designing courses of action to address population transfers and manage their proper resettlement.

What prevents Colombian policy makers to expand the definition of IDP in order to include those displaced by development projects? To be sure, there is the sheer pressure of multinational corporations with interests in mining, or bio-fuels, and the interest of

government in the exploitation of natural resources. Moreover, there is funding and budgetary issue, as the government seems reticent to expand expensive IDP benefits to a whole new group of the population. However, such explanation seems unsatisfactory. For one, it has not only been the government, but also the courts, who have restricted excluded economic migrants from the definition of IDPs. Therefore, the bureaucratic/budgetary explanation seems less likely, as it was the courts who decided upon the entitlements in the first place. Moreover, other policies that hinder the unrestrained exploitation of such interest have in fact been adopted: for example, environmental concerns have frozen off-shore drilling in the Colombian Caribbean, social mobilization blocked gold mining by Canadian corporation Greystar, and Colombia was made a pilot in the application of voluntary standards of security and human rights in extractive industries. Why is it, then, that the very notion of development-induced displacement is such an anathema in this country?

While we believe that there is much arm twisting from powerful interests involved in this process, we suggest in this paper a different line of thinking about this problem. We argue that this approach is oblivious of the fact that most decisions connected with development induced-displacement are not taken on a merely domestic basis, but rather are the consequence of global interaction among agents in different states. In this sense, the Colombian negative to include economic displaced people as part of the IDPs category can be better understood in reference to global regimes regulating IDPs, on one hand, and foreign investment, on the other. There is, in this case, a conflict between two agendas of global governance: first, global IDP policy, that lacks legitimacy and requires

that the heavy lifting of policy is adopted at the national level. And, in conflict IDP policy, we find foreign investment law, which distrusts domestic systems, and requires that policy choices are taken on the international level. Expanding the definition of IDP's to include development-induced displacement would mean an intrusion of domestic IDP policy into foreign investment law. Such intrusion is therefore resisted, not only due to specific Colombian concerns, but on the basis that such a decision would imply a shift in the basic balance between two agendas of global governance.

To make that point, we introduce first the context of IDPs in Colombia, and then turn to the matter of the definition of such concept under domestic and international law. We then explore the global governance dimension of IDP policy, and explain why it lacks legitimacy and therefore depends on domestic decision-makers. The following section, in turn, explores foreign investment law, and explains why that legal regime relies on the main decisions being made at the international level – mainly, because it considers investment host state's legal systems as *failed* law. This is not a finished project. Further research questions are presented at the end of this draft.

# **1. Internal displacement in Colombia and its complexities.**

Forced displacement in Colombia can be considered as a constant throughout the history of the country. Ultimately, it has been instrumental in the process of nation building -- "an engine of the country's history, a kind of vicious axis of destruction-reconstruction-destruction of economic, political, technical, ecological and cultural Colombian society" (CODHES, 1999: 75). Its endurance is better explained, not by the phenomenon in itself,

but by its use as an instrument by different actors, for various purposes. Displacement has been a weapon of war used by all parties of the conflict: an instrument that landowners have resorted to in order to expand their domains, and mechanism for the development of infrastructure projects such as dams, roads and hydropower. At the same time it has become an indirect consequence of the actions of coca and poppy crops.

In essence, forced displacement has been an instrument used throughout the country's history, by the most diverse actors, in order to gain control over land, resources and human beings, either for strategic or purely economic purposes. That is, it has been a tool in various types of conflicts occurring since the beginning of the Republic, which remain unresolved to this day. (Molano, 2000: 35), (Lemaitre, 2011: 15). Among different instrumental uses given to forced displacement, two have a particularly long historical tradition in the country: its use as an instrument of economic accumulation and expansion of large estates, and their use as combat strategy. (CODHES, 1999: 76). These functions relate directly with two conflicts that have developed over the history of Colombia, which have evolved as the country transforms itself-including new elements and dynamics-and still remain unsolved: conflict over land, and conflict for territorial control (CODHES, 1999: 76).

The first refers to one of the oldest social problems in the country: land distribution. The concentration of land ownership is extremely inequitable in Colombia, where it is estimated that 1.4% of landowners own 65.4% of the area (Monitoring Committee, 2008: 22). The second conflict, similarly unresolved, refers to the strategic territorial control of

political and economic instances in the context of internal armed conflict. Armed actors attempt to capture governmental structures in certain territory in the country, in order to control strategic corridors or assets. This is no recent conflict, armed conflict has been a constant in the history of the country, but one should avoid conceiving it as a single conflict whose manifestations vary over time. Throughout the years, conflicts have been different: both actors and the idea of the struggle has changed in each phase. Experts refer to "violences" in the plural, to make an analysis of the conflict because each stage has brought different types of confrontations (Sanchez and Peñaranda, 1995).

The armed conflict currently unfolding is a low-intensity struggle involving guerrilla groups, state armed forces and, despite the demobilization process that took place between 2003 and 2006, paramilitary and self-defense armies. Additionally, it features an extra ingredient that makes it even more complex: drug trafficking. Emerging in the sixties with the US west coast market for marijuana, trafficking hailing from Colombia has adapted effectively to both changing markets, and policing strategies by the Colombian state. Groups engaged in this activity have allied themselves with different actors in the conflict, so that while in some regions drug traffickers fund right-wing armies that fight the guerrillas, others have agreed with insurgents and pay a "revolutionary tax" in exchange for protection for their crops. At the same time, though formally pursued by the state, which has received the cooperation of US for an ambitious and aggressive program to combat trafficking<sup>1</sup>, drug-related corruption is embedded in all levels of government and society (Vargas, 1999).

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<sup>1</sup> So far, two programs to combat drug trafficking have been implemented with the strong support of the United States, which has provided material and financial resources: the "Plan Colombia", designed during

Forced displacement into this new chapter of the Colombian armed conflict is sometimes the result of by panic among the civilian population, derived from fighting taking place near their villages and fields. However, this type of exodus, which might be called accidental, is secondary and lower in incidence than the planned displacement used as a combat strategy by all sides, either for military purposes (for example, for the control of strategic corridors and areas of arms trafficking and other illegal products), or for political goals (for example, the destruction of the social foundations of the adversary<sup>2</sup>) (Comisión de Seguimiento, 2010: 33-34).

These two conflicts (agrarian and armed) overlap and complement. In most areas, there is a dual component inducing displacement. For example, the Sierra Nevada de Santa Marta has become a battleground in which armed actors struggle for strategic control, and various drug cartels fight for control of trafficking routes. At the same time, the Sierra has also become the backdrop for a dispute between indigenous communities and government officials around implementation of several infrastructure projects (Lemaitre, 2010). Also it is not uncommon for the same armed actor to change roles from one conflict to the other, even within the same region.

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the Clinton administration, and "Patriot Plan" sponsored by the Bush administration and currently subject to controversy in view of its poor results.

<sup>2</sup> According to the Third Survey of National, conducted by the Universidad Nacional of Colombia in 2010, the main cause of displacement are direct threats. This was stated by 53.4% of all displaced households. The second reason, mentioned by 16.7%, was the murder of a close relative. These data support the conclusion that the exodus is an aim sought by the armed actors and not simply collateral damage. (Monitoring Commission, 2010: 33-34)

## 2. IDP policy as global governance

Despite its particularities, the Colombian IDP crisis is part of a wider global landscape. IDPs came to the global spotlight as successive humanitarian crisis forced massive populations to move within the borders of a single state, mainly since the early 1990s. To be sure, forced displacement had been in the agenda of international institutions for decades (Holborn, 1939: 124) (Barnett, 2002: 238- 242).

In most of the twentieth century the approach used by international institutions was that forceful displacement became a problem as populations or individuals crossed borders – thus becoming, for example, “refugees”, or asylum seekers. Displacement was an intergovernmental problem, which concerned the relation between states. This premise was confirmed by the effects of World War II, as the allies established the United Nations Relief and Reconstruction Agency (UNRRA) in 1944. UNRRA existed until 1947, when its mandate ended. In 1948, a temporary International Refugee Organization was set up, as an agency of the United Nations (UN). Soon after, though, it became evident that the refugee problem was not of temporary nature, and a permanent UN High Commissioner for Refugees (UNHCR) was created in 1950. As its predecessors, and due to the demands of the particular moment in history in which it acted, the UNHCR was unconcerned with population displaced within a country. In fact, the agency lacked a specific mandate to deal with such populations under its Statute<sup>3</sup>.

Article 9 of the Statute, though, did allow for the High Commissioner to “engage in such additional activities, including repatriation and resettlement, as the General Assembly

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<sup>3</sup> UN General Assembly (GA) Resolution 428 (V) of 1950. U.N. Doc. A/1775 (1950)



may determine, within the limits of the resources placed at his disposal”. As the tragedy of internally displaced people began to be evident, mainly outside Europe, the alternative offered by Article 9 proved useful. Thus, in the context of the Sudanese crisis of the early 1970’s, the UNGA “urged the organizations associated with the United Nations and all Government to render the maximum possible assistance to the Government of Sudan in the relief, rehabilitation of Sudanese refugees coming from abroad *and other displaced persons*<sup>4</sup>”. Since then, the UNHCR has seen its mandate with regards to IDPs become broader and broader, until 1997, when the now default formulation was established, which gave competence to the UNHCR to deal with the issue.

Despite the interest of the UNHCR as the organ of an international organization, IDPs are also (and perhaps, predominantly so) a domestic problem: IDPs are protected by domestic laws, human rights instruments of domestic application, and often are displaced by internal armed conflict, according to the 1948 Geneva Conventions. IDPs affect distribution of wealth, land ownership, gender and ethnic victimization, all within a single state. Ultimately, IDPs are first foremost a responsibility of the State within which the displacement occurs. But, as we have seen, the UNHCR has much to do and say about the problem. Reaction to the IDP challenge is, therefore, a point of contact between the agenda of an organ of a traditional intergovernmental organization (the UNHCR) with the agenda of national governments, their interests, and those of other national power structures. A contact often bound to become a clash, as internal

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<sup>4</sup> UNGA Resolution 2958 (XXVII) 12 December 1972. U.N. Doc. A/8918 (1972), para. 3 (emphasis added)

displacement becomes a sensible part of domestic politics, or is even caused by the very government primarily responsible for the victims.

The role of international law in IDP policy is a reflection of this circumstance. It has become common to argue that soft law plays an important role in the context of IDPs<sup>5</sup>. This all-important role of soft instruments can be explained by the middle ground between international and domestic politics where IDPs stand. Consider the central normative piece to be found in IDP policy: the Guiding Principles on Internal Displacement, issued by the UN's Secretary-General's Special Representative on IDPs<sup>6</sup>. The legal status of the Principles is rather ambivalent, considering that it is not a UN declaration, nor is it an attempt at codifying customary international law (Kälin, 2008: 6). Rather, it is a study of domestic legislation and analogous regulation (e.g., refugee law) which is, in the words of the Representative of the UN Secretary General for Internal Displacement, "consistent with international law" (Kälin, 2008: 6).

Now: at the heart of these principles is the realization that several matters affecting IDPs are indeed covered by traditional (hard) international instruments: say, the right to life in human rights treaties, or the principle of distinction in international humanitarian law. Such is the international aspect of the problem. However, there are other matters affecting IDPs that concern mainly domestic jurisdictions (for example, the problem of identification within the state, compensation for property or land lost during the

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<sup>5</sup> For a recent example, see P. Orchard, "Protection of internally displaced persons: soft law as a norm-generating mechanism" 36 *Review of International Studies* (2010) 281

<sup>6</sup> Available at. <http://www.idpguidingprinciples.org/>. The principles were recognized by the GA as "an important international framework for the protection of internally displaced persons." GA. Res. 60/L.1, para. 132, U.N. Doc. A/60/L.1

displacement, or the possibility of finding a safe place within one's own state). Facing such situation, norm entrepreneurs (*e.g.*, activist and academic networks, and the UN Representative of the Secretary-General for IDPs) quickly rose to support the drafting and adoption of the some sort of norm that would address the limitations of the international aspect of the problem (Orchad, 2010: 281). The answer was the Guiding Principles<sup>7</sup>. While no hard international instrument was available, and challenges fell under each state's sovereignty, still some degree of governance could be exercised through the principles. IDP governance, then, is not strictly national or international, but seems to include several layers of domestic governance, which is complemented by the international action of the UN, and several networks of activists. A certain balance was, in this way, stricken: while the primary responsibility still fell on States, international involvement remained possible. Francis Mading Deng, Representative of the UN Secretary-General on IDPs, clearly portrays this dynamics in his description of his work at the UN:

“In my dialogue with governments— one of the requirements of my mandate—the first five minutes with the head of state is crucial to assure them of my recognition of the problem as internal and therefore under state responsibility. Having emphasized my respect for their sovereignty, I quickly move on to present the positive interpretation of sovereignty and the supportive role of international cooperation. Once I establish a cordial climate, candid and constructive dialogue can follow with little or no constraint in the name of sovereignty” (Deng, 2001: 141)

And then Deng concludes:

“the critical issue becomes how the international community can intercede to overcome the obstacles of negative sovereignty and ensure access for the needy population” (Deng, 2001: 145).

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<sup>7</sup> On the role of international norm entrepreneurs in the IDP context, see R. Cohen and F. M. Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (1998) at 283 - 285

Such is indeed the challenge. IDP policy is a combination of binding and non-binding instruments that is developed, implemented and enforced by public, private and semi-public agencies of national and international origin. It is a paradigmatic example of a global regulatory regime. IDPs are a primarily domestic issue, and the reasons behind any international action are not presumed, but need to be carefully spelled out. In the case of the UNHCR, GA Resolutions 47/105 (1992), 48/116 (1993) and 49/169 (1994) put forward the basic requirement for the agency's involvement in an IDP situation, including the specific request from the Secretary-General or other competent UN organ, and the consent of the State concerned. This need for justification points to a larger point. Both global IDP policy in general and the UNHCR, in particular, have been perceived as too selective and too unpredictable in their approach to domestic crisis: why get involved in this context and not in that one? Why that action and not the other? Why this agency, here? Ultimately, having one foot in international and one foot in domestic politics, global IDP policy is in the constant need of proving itself rational and predictable, both to its international principals and to its domestic addressees.

Even though the global IDP regime joins hard and soft law, it just presents a non-binding proposal to the state authorities. They are free to pick and choose which aspects they adopt, as long as they respect the basic human rights deemed essential to the international community. This fact generates a special dynamic between global and local IDP government authorities. There is an ongoing dialogue in which the former try to seduce the latter to adopt the whole proposal or, at least, its main issues. The former Special Representative of UN Secretary General, now the special rapporteur on IDPs, has been

responsible for conducting the talks with national governments. Analysis of this dialogue reveals that global actors have prioritized some elements of the global proposal, which are considered basic to protect IDPs and relegate other issues to the background. Such was precisely the case in Colombia, as we now turn to see.

### *Colombian IDP policy as a species of global governance*

Despite internal displacement in Colombia has a long history (Roldán, 2003), it was only until the late 1990's that it became part of the public agenda as a specific problem that required a specialized response. Up to that moment, displacement was considered merely one effect, and not necessarily the most relevant one, of the “real” threats: natural disasters, terrorist activities and, especially, the internal armed conflict. Indeed, as early as 1995, the administration recognized its deficiency when dealing with the IDP issue<sup>8</sup>. It lacked a general view of the problem, and seemed (or at least appeared to be) unaware of its magnitude. At the time, very little government assistance existed for internationally displaced population (IDPs), and the few aids that were available worked in an isolated and uncoordinated manner. There was neither an articulate public policy nor a coordinated group of institutions to execute it (Rodríguez and Rodríguez, 2009: 19)

In July 1997, Congress enacted Law 387 of 1997 (the “Internal Displacement Attention Act”), which served as the legal framework for the integral aid that should be offered to

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<sup>8</sup> Conpes document 2804 of 1995. The Conpes (the National Council for Economic and Social Policy) is a legally established entity which serves as a consulting agency for the government in all of its aspects of economic and social policy. It produces several position papers named “Conpes documents”, which embody the decisions and recommendations taken by the national government regarding the areas of its jurisdiction.

IDPs, and was the first legal recognition of the rights they were entitled to<sup>9</sup>. The Act was in constant conversation with instances of global governance, and arguably had some impact on the drafting of Deng's Guiding Principles on Internal Displacement<sup>10</sup>, adopted only a few months after in February 1998<sup>11</sup>. The Act was significant, in that it finally established an actual policy that gave visibility to IDPs as a distinct group of the population, different from other victims of other "emergencies", that was entitled to attention to its special needs (Cepeda, 2009; 1-7).

Law 387 of 1997 laid the foundation for the construction of public policy dealing with IDPs, building on two pillars. These two pillars of this policy have been deeply influenced by the United Nations model for the care of this phenomenon, which has been reflected in the Guiding Principles on Internal Displacement (Sanchez, 2009). The first pillar was established by the enactment of several Laws by Congress, first Law 387 of 1997, which was then supplemented in 2008 by Law 1190 and the provisions of Law 1448 of 2011<sup>12</sup>. It was then developed by multiple executive decrees, establishing the institutional framework for the comprehensive care of people in forced exodus through the stages of prevention, humanitarian, economic stabilization and return or relocation. In spite the amount of legislation, regulation and executive measures to deal with IDPs, the late 1990's were critical for IDPs. Specifically, they were not enjoying their fundamental rights under the domestic constitution. Enter thus the second pillar, which consists of the

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<sup>9</sup> Law 387 of 1997 (July 18). Published in the Official Diary no. 43.091, July 24 of 1997.

<sup>10</sup> *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2, 11 February 1998.

<sup>11</sup> This argument has been suggested before in Rodriguez and Rodriguez, 'El Contexto: El Desplazamiento Forzado y la Intervención de la Corte Constitucional', at 21.

<sup>12</sup> Law 1448 of 2011 creates a mechanism that will facilitate the restitution of millions of hectares of lands abandoned or stolen as a result of human rights abuses and violations during the internal armed conflict. According to article 60, Law 387/97 complements its norms in IDPs issues.

extensive case law developed by the Constitutional Court, whose center piece is the judgment T-025 of 2004, which it introduced a rights-based-approach to the framework established by law. Consequently, IDPs are recognized as the "most miserable among the miserable", and authorities are required to provide special treatment and priority that would help overcome the state of particular vulnerability derived from forced exodus<sup>13</sup>.

To understand the context of the landmark T-025 decision, it is first useful to briefly explore how the debate on IDPs ended up in the hands of the Constitutional Court, and the role of indicators in that context. Under Colombian constitutional law, there is an exclusive constitutional jurisdiction, which is headed by the Constitutional Court: a high court with the final word on constitutional matters. Of relevance for our purposes, the constitutional jurisdiction decides *acciones de tutela*, a legal action that seek an immediate judicial injunction against the breach of fundamental constitutional rights (such as the right to life, the right to privacy, due process, etc.). Such action may be filed by any person who considers her fundamental rights are infringed, and has an expedite process, whereby judges must render a decision on the matter within ten days of its filing. A decision rendered on an *acción de tutela* has an appeal procedure, and may be eventually selected for *certiorari* by the Constitutional Court.

Given the severe conditions faced by IDPs, *tutelas* became a preferred mechanism of judicial protection. By 2004, the amount of *acciones de tutela* being filed by displaced persons reflected a general and structural problem, which is why the Constitutional Court decided to review them. When case file no. T-653010 reached its docket, involving a

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<sup>13</sup> Corte Constitucional [Constitutional Court] Decision SU-1150/00 (M.P. Eduardo Cifuentes)

petition for protection regarding a displaced person; the Court decided to join 108 files, which were filed by 1150 families (roughly 4000 claimants) all of which were under a similar situation of constitutional breach because of their displaced condition<sup>14</sup>. The result was Decision T-025 of 2004, which declared that internal displacement had become an *unconstitutional state of affairs*<sup>15</sup> and ordered many public institutions to undertake several changes in their policy, in order to give adequate coverage to IDPs, protecting their constitutional rights.

The decision taken by the Court is remarkable in that it falls neatly on the global governance nature of IDP policy. While clearly dealing with a matter of domestic law and policy, and addressed mainly to domestic bureaucracies, the decision drew heavily from international law; mainly, Deng's Guiding Principles on Internal Displacement. For the Court, the Principles were "pertinent for the interpretation" of rights provided in the domestic constitution<sup>16</sup>. Thus, the Court's methodology was to establish a series of IDP rights under domestic law that were threatened by the unconstitutional state of affairs (say, the "right to life in dignified conditions"<sup>17</sup>) and then find the Guiding Principles that were pertinent for interpreting such domestic rights (in our example, Principles 1, 8, 10

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<sup>14</sup> The decision to join these files is given by a writ dated November 10, 2003. I translate as "writ" the term Spanish term "Auto", which refers to a judicial decision that decides matters that are not of substantive importance for the conflict. Under Colombian procedural law, there are no specific writs ordered by the Court, but only a general term which serves to refer to every order of a Judge which is not the ruling of a case.

<sup>15</sup> Decision T-025 of 2004. An unconstitutional state of affairs is a legal doctrine under Colombian constitutional law whereby it is declared that a violation fundamental rights is systematic, widespread and due to structural causes, thus warranting a judicial intervention on general policy. Perhaps the closest notion would be that of structural injunction applied, *inter alia*, in US and South African constitutional law. An structural injunction is a "formal medium through which the judiciary seeks to reorganize ongoing bureaucratic organizations so as to bring them into conformity with the Constitution" (O. Fiss, 'The Allure of Individualism', *Iowa Law Review*, (1993) 78, 965 at 965).

<sup>16</sup> Decision T-025 of 2004., Section 2.1.3

<sup>17</sup> Decision T-025 of 2004., Section 5.2.1



and 13<sup>18</sup>). In that way, the Court skillfully articulates the global nature of its undertaking, and does so in a decision whose sheer ambition is remarkable. This is a decision of enormous implications, considering the number of people whose rights are protected, the number of public agencies called into action by the Court, and the amount of resources (economic and otherwise) required to comply with the Court's orders. Moreover, the Constitutional Court did not abandon the IDP problem merely by rendering its far-reaching decision. It decided to remain seized of the matter<sup>19</sup> and traced its effects and compliance strictly; quite an unusual move for this kind of rulings<sup>20</sup>. To do so, beyond simply deciding that certain rights were violated, the Court felt it necessary to hold that “No specific goals or indicators have been established, which can allow for a verification of whether the purposes of the policy have been fulfilled or not<sup>21</sup>”, thus ordering that indicators regarding IDPs were created<sup>22</sup>.

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<sup>18</sup> Ibid.

<sup>19</sup> Article 27 of Decree 2551 of 1991, which regulates the exercise of jurisdiction of the Constitutional Court, allows it to remain seized of a matter until the breach has ceased to exist.

<sup>20</sup> It is worth noting that the Court went beyond using writs as mere procedural orders, and implemented what it called “Autos de Seguimiento” (more or less: “Follow-up Writs”) under which the Court supervised compliance with the main decision. It is reasonable to say that, without these follow up writs, the Court's order of indicators would have remained dead letter.

<sup>21</sup> Decision T-025 of 2004, Section 6.3.1.1.(ii). In the same sense, according to Section 6.3.1.3.(ii) “(...) there do not exist systems to evaluate the policy. The policy does not include a system designed to detect mistakes or obstacles in its design and implementation, needless to say one that allows an adequate and timely correction of such failures. There are no systems or indicators for the verification, follow-up and evaluation of results, either at the national or territorial levels” (footnotes omitted, RU & BS)

<sup>22</sup> Specifically, the Court found that part problem was that there were deep institutional flaws in IDP policy, one of which was lack of indicators. Therefore, the Court ordered the relevant agencies “to adopt, within the three months following the communication of this judgment, a program of action, with a precise schedule, aimed at correcting the flaws in institutional capacity, at least with regard to the ones indicated in the reports that were incorporated to the present process and summarized in Section 6 and Annex 5 of this Judgment.” (Decision T-025/94, Order 4)

This complex policy, however, only deals with internal displacement produced by the armed conflict. Other kind of forced migration has been ignored, even by the Constitutional Court. Development induced displacement has been one of the forgotten.

### **3. Development based on extractive industries and forced displacement in Colombia**

Development projects often trigger unwanted migration on communities whose lands is affected. This well-established fact and numerous commentators have noted the disproportionate burden posed imposed on communities, who are expelled from their place of habitual residence. The issue is, then how to redress this inequity, and restore rights of the displaced (Cernea, 2000) (Cernea and Ravi, 2002) (Rajagopal, 2000) (Courtland Robinson, 2003). As mentioned before, this issue has been also taken up by international financial institutions, such as the World Bank<sup>23</sup> and the Inter-American Bank for Development<sup>24</sup>, which have established policies to minimize exodus and, if displacement is unavoidable, to minimize its negative effects by repairing the rights of those affected.

Even though forced migration generated by the development of infrastructure and economic projects is not new in the country, it is only from the early years of this century that this phenomenon has become gone from being a marginal effect of specific projects,

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<sup>23</sup> World Bank *Operational Policy 4.12 "Involuntary resettlement"*, last version April 2013, available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contenMDK:20064610~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html>

<sup>24</sup> Banco Interamericano de Desarrollo, *Política Operativa OP-710 "Reasentamiento involuntario"*, Octubre, 1998, available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=822554>

such as a hydropower dam<sup>25</sup>, to be a systemic concern connected linked to the economic model chosen by the authorities for the country. Indeed, from the early years of this century, government officials chose to design and implement a development model based on extractive industries, with special emphasis on mining and power generation, in order to enter international markets in biofuels and feedstock. The adoption of this decision was possible because the country had already come a significant way to adapt its rules and structure of economic production to the demands of the global economy. Since the nineties, Colombia had begun a process of transformation of the economy, through legal reforms and fiscal incentives to adopt neoliberal policies of structural adjustment imposed by international financial institutions (Sebastian and Steiner, 2008). The economy was der-regulated, public utilities were privatized, the labor market was made more “flexible”, and property rights were strengthened (Lemaitre, 2010: 15).

The combination of these factors has triggered the rapid growth of this sector of the economy, with large areas of the country integrated to such productive projects. Thus, between 2006 and 2011, the country's area planted with oil palm grew markedly, to the point that by 2009 it was estimated that more than 360 537 hectares were occupied by this crop (UNDP, 2011: 85). This means that slightly more than 7.25% of cultivated land in the country is engaged in agribusiness -- according to the annual report presented by the Ministry of Agriculture and Rural Development, the total cultivated area of the country that year amounted to 4,905,456 hectares (Ministry of Agriculture, 2010: 2).

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<sup>25</sup> For example, during the nineties emberá and zenú communities were forced to leave their ancestral lands in order to build the hydroelectric project Urrá. Their case was studied by the Constitutional Court. See decision T-652/98 (M.P. Carlos Gaviria). It is important to note that the court did not recognize this people as IDPs.

More dramatic still has been the growth of mining, which is reflected in the dynamics of mines licensing. Between 2000 and November 2010, the Ministry of Mining granted 7,264 mining titles and processed 17,479 requests throughout the country. This process affected 5.8 million hectares, which means that, today, Colombia has more land surface used or potentially used in mining than land used for food production (UNDP, 2011: 97). It should be noted, at this point, that this sector of the economy has been the most attractive to foreign direct investment, to the point of most of the resources that have entered the country in this respect have been located in this industry.

Such an extensive growth of the biofuels industry and mining was carried out in a country mired in armed conflict, facing complex problems of land distribution, and where the state management of the rural areas has been characterized by privileging interests of large landholders, and by supporting projects that are not sustainable in environmental terms, without making real spaces for most rural residents to have the opportunity to participate in decision-making processes (UNDP, 2011: 25-42). In this context, it is not surprising that the development of these two economic sectors exacerbated existing tensions, and deepened conflicts for land and territory and, leading to violent processes of dispossession and displacement.

It should be noted further that the areas with the resources necessary for the development of extractive industries are located, as a rule, on the outskirts of the country. This is, in areas where the control of the authorities is weaker and where armed actors impose their law. Also often coincide with the territories of indigenous and afro-colombians people.

These two ethnic communities have special fundamental rights to the lands they have traditionally occupied, as a result of the recognition of ethnic and cultural diversity made by the Colombian Constitution. These rights are reflected in the recognition of collective property, and the obligation of the authorities to consult when trying to undertake development or exploitation of natural resources in their territory (Sanchez, 2006). Despite the ownership of these rights, communities remain particularly vulnerable, living in poverty, excluded from processes of development, and victims of constant violence. Evidence of this is the fact that Afro-descendants account for 10.6% of the population, but constitute 22% of households displaced by force. Indigenous populations are 3.4% of the Colombian population, and amount to 6.1% of the population living in involuntary exodus (Monitoring Committee, 2010: 57).

The special effects on these groups reflects the failure of authorities to guarantee their rights, and the violent pressures that are being submitted to by various armed actors interested in gaining control of the land both for its strategic position, and for the wealth of the soil and subsoil. However, not only ethnic minorities are affected by displacement linked to the development model promoted by governmental bodies. Mestizo peasants living in these lands are also being victims of dispossession and displacement.

Forced migration in this context is generated in three different ways. The first and most common, occurs when illegal armed groups force communities to sell their land cheaply, or simply to give it up. Once control over the territories is gained, title is acquired, allowing them to act as the legal owners and negotiate with the authorities and private

investors the conditions for productive projects in these lands. The second way involves mining and biofuel companies directly employing armed groups to expel the local population, thus gaining control of the territories. Finally, the third way affects people, mainly indigenous, who are forced to leave their land as a result of the environmental pollution and destruction of resources in their territories, caused by the implementation of development projects. Thus, even if the development of agro-industry, in itself, does not generate any displacement, in a context like Colombia, the widespread introduction of a crop that requires large areas to be profitable, and where climatic conditions coincide with the areas peripheral country (where state control is weak), could lead to a process of dispossession of land, conducted through population displacement weaker.

Armed actors that undertake these tasks have been often identified as part of the paramilitary groups who participated in the armed conflict, as well as, more recently, the criminal gangs (“bandas criminales” that appeared after the demobilization of the paramilitaries. (Lemaitre 2010) (CODHES, 2011) (Vidal, Salcedo and Medina, 2011). Moreover, the of an up-to-date system of land registry in the country, coupled with the informality of land possession in most rural areas the country, has undoubtedly contributed to this dynamic, thus facilitating the appropriation of land and the legalization of its holding once accomplished by forceful means (UNDP, 2011:192) (monitoring Commission, 2009: 53).

This type of forced migration has been completely ignored by the state, which refuses to acknowledge even the possibility that the economic model it proposes triggers this effect.

There is neither an official record of people affected by this phenomenon, nor statistics to provide an approximate figure. The displacement linked to the development of biofuel projects has been reported by international and national NGOs (UNDP, 2011:91) (CODHES, 2011). It has also been analyzed through multiple case studies. Probably the situation faced by black communities of Jiguamiando and Curvarado, in the department of Chocó, is one of the most studied. It is worth making a brief account of the facts that make this case, as it illustrates the dynamics of this type of non-voluntary migration.

These communities comprise over a thousand families, who live in an area where paramilitary presence has been common since the mid-nineties. While attacks on civilians were, from the beginning, a constant in the activity of these groups, these were intensified after 1998, when several domestic and foreign companies initiated the development of a major project to produce of biofuels from oil palm. As a result of these actions the two communities were forcibly evicted and their land used for the cultivation of this species.

While these communities had achieved the recognition of their status as owners of the land on which they lived, titles failed to provide them with protection. Rather, the titling process seems to have intensified the violence with which they were expelled. The performance of the Colombian Ombudsman, who reported the serious human rights violations faced by these people and urged the authorities to take action on the matter, was not effective as it was not translated into action to stop the violation and bring reparation<sup>26</sup>. The intervention of the Inter-American human rights system, through provisional protective measures ordered by the Inter-American Court, proved ineffective

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<sup>26</sup> Defensoría del Pueblo Resolution 025/2002, and Resolution 39/2005

to guarantee the right of these people to return to their territories and restore land tenure<sup>27</sup>. Today most of the members of these communities continue in displacement and palm covers their properties (Lemaitre, 2010: 47-66) (Vidal, Salcedo and Medina, 2011: 59-76).

Although there are enough elements to establish a connection between paramilitary groups and at least one of the oil palm companies, these afro communities are officially considered displaced by the armed conflict. The authorities deny any relationship between the biofuel program and the forced exodus. In their minds this is just another sad case of internal displacement caused by the war.

The development of mining has also created situations of involuntary displacement. Once again, authorities do not recognize the new engine of the economy as a trigger of this type of migration. However, in a 2011 report, Peace Brigades International notes that while only 35% of municipalities in the country have mining energy resources, they represent 87% of the forced exodus generating locations, hinting to a link official agencies are bent on denying (Peace Brigades, 2011: 6). CODHES, in its report for the same year, also points to the relationship between displacement, and mining and oil (CODHES, 2011:3). Similarly, the shadow report on the implementation of the FTA between Colombia and Canada provides evidence of the way in which mining projects funded by Canadian companies have involved the expulsion of local population (Correa and Hoyos, 2012).

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<sup>27</sup> The Inter American Human Rights Court ordered provisional protection for this community in March 6 of 2003. Since then Court has produced twelve more provisional measures. The last one was decided on February 27 of 2012.



Before concluding this section, one should note that this type of shift-generated by the implementation of a particular economic model is strongly linked to both traditional dynamics, especially the struggle for land. It is, however, a different phenomenon to the extent that involves a missing element so far -- foreign investment. It assumes that the exodus not only responds to the logic of the local or national economy, but must be analyzed as part of the global deployment of a development model. Such a model has been adopted voluntarily by Colombia, or at least by its authorities, through public policy designed to benefit the public interest. Involuntary migration is, in this context, a price to be paid for the country's development. Thus, unlike those generated by armed conflict or expansion of large estates, this species of development could be managed in a less harmful way. This option, though, was never considered, as official discourse insists on denying its existence.

***Development – induced displacement -- Coincidences and divergences between the global and Colombian models***

Although it is possible to speak of a consensus on the relevance of development-induced displacement and on the dramatic consequences involved for the life of the people who are affected, there no such consensus in the global reaction to the situation—this, in sharp contrast with the standards that are applicable to displacement induced by armed conflict.

The Guiding Principles are not conclusive as to the prohibition of moving populations in order to implement a particular economic model, or to develop infrastructure or development projects. It assumes that these are carried out for the benefit of the whole

population. The Principles merely establish standards of necessity and proportionality, and prohibits discrimination (Kälin, 2008: 32-33). Thus, only people who displaced due to projects that fail to meet these conditions can expect to benefit from the special protection of their rights, as established by the international instrument.

This is a very limited recognition. However, it can still be considered a victory, as it was preceded by much controversy. The *travaux préparatoires* of the Guiding Principles show an important debate as to whether development-induced displacement should be included (Mooney, 2005: 11). While inclusion finally prevailed, fact is that this population has received little attention from UN bodies responsible for IDPs under the Guiding Principles. The successive mandates of the UN RSG for IDPs<sup>28</sup> have been focused their attention on the exodus caused by armed conflict and massive violations of human rights. Environment-induced displacement has gathered little traction<sup>29</sup> and development-induced displacement has gathered even less<sup>30</sup>. In fact, global statistics of displacement fail to even register development-induced displacement.

And yet, limited as the international definition may be, the Colombian adoption of the global standard managed to make it even more limited. Indeed, while the Colombian response adopts key issues of the international model, it leads to a more restrictive definition. The Guiding Principles encourage states to as displaced, and therefore as

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<sup>28</sup> Francis M. Deng was the first UN RSG for IDPs. He was succeeded by Walter Kälin who remained in office until 2010. Currently Chaloka Beyani is the Special Rapporteur on the human rights of internally displaced persons.

<sup>29</sup> Kälin showed special interest for this kind of displacement. He created and promoted the Operational Guidelines on Human Rights in Situations of Natural Disasters. See Doc. N.U. A/HRC/16/43/Add.5

<sup>30</sup> Just in 2010 report Kälin mentioned development-induced displaced should be protected under the same conditions as other displaced. See Doc. UN. A/HRC/13/21 Párr. 45 y 46.

subject to special protection, individuals who have seen their right to remain in peace in their place of habitual residence violated as a result of armed conflict, generalized violence, massive violations human rights, natural or manmade, as well as the implementation of development projects on a large scale, which are not justified by an overriding public interest. In contrast, the Colombian norm in this category only includes those who have been expelled from their homes in the first three situations<sup>31</sup>. While it is a broad definition, it has been read by the authorities only in reference to armed conflict. That is, the only recognized IDPs are those who leave their homes and property as a direct or indirect result of the confrontation between various armed groups fighting for control of the state.

This reading has been subject to constant criticism from civil society, as it reduces the scope of internal displacement, and stigmatizes the victims of the armed conflict (Vidal, 2007: 216 and 217). And yet, it has been endorsed by the Constitutional Court. In decision SU-1150/00 of 2000, the Court defines forced displacement as "a social phenomenon that gives rise to multiple, massive and continuous fundamental rights violations of Colombians forced to migrate internally". To be sure, the origin of the violation lies in armed conflict affecting the country. The Court thus performs a restrictive interpretation of the causes of involuntary movements by the population set out in the first article of the Law 387/97, excluding from the standard displacement caused by conflict over land, or by fumigations of illegal crops<sup>32</sup>. Subsequent decisions confirm this

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<sup>31</sup> Article 1, Law 387 of 1997

<sup>32</sup> Constitutional Court. Decision SU-1150/00 '42. The problem of forced displacement is derived mainly from the armed conflict taking place in the country. The longed-for peace can take many more years to crystallize. In view of this, it is imperative to make every effort to ensure that all armed actors respect

perception – the clearest example being Decision T-025/04, which frames the struggle for control of the state as the sole cause of forced population movements in Colombia.

This definition has only been partially revised by the Court itself. Writ 005 of 2009, which addresses the special protection required by the communities of African descent, acknowledges that such populations may be subjected to displacement derived from “the existence of mining and agricultural processes in certain regions that impose severe strains on their ancestral lands and facilitated their taking”. This factor, combined with the structural marginalization to which these communities have been subjected, makes them particularly vulnerable to displacement by armed actors. This Writ could have opened the door for full recognition of the condition of IDP to people who were driven away from their homes by economic development plans. However, it has had no impact on the design and implementation of IDP policy. So far, the main achievement has been the inclusion of part of the Afro-descendant communities in the protection and assistance programs developed within the framework of Law 387 of 1997. Beyond promoting such inclusion, it has triggered very little developments on the policy level.

Rather, the tendency of both the legislator and the government has been to restrict the IDP category. Law 1448 of 2011 clearly states that IDPs are only those persons who have left their place of usual residence for events directly related to the internal armed conflict.

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civilian population. It is, therefore, essential to impose the observance of human rights and international humanitarian law. It is up to the Government to come into contact the actors of the armed conflict and link them to respect international humanitarian law, and to ensure that the forced displacement of Colombians no longer constitutes a military strategy. On the other hand, it is necessary that the peace talks being conducted by the government gives priority to the humanization of war, and to the repudiation of displacement. Without denying the importance of all other points of debate, fact is that the need to put a stop to the barbarity that represents the sacrifice of civilians in the context of armed conflict should immediately become part of the negotiation with the armed groups."

Since this rule is intended to subsume, with the passage of time, the policy established by Law 387 of 1997, it ends up closing the possibility of achieving a more inclusive definition by way of judicial interpretation. Moreover, as noted above, the norms dealing with the two core economic activities promoted by Government fail to consider involuntary exodus as a possibility. Consequently, they provide no regulation to prevent displacement, or to restore the rights of those affected.

Consider African palm cultivation. Aimed at producing biofuels, this crop has led to a sophisticated policy whose main instrument is the CONPES 3510 of 2008, "Guidelines for policies to promote sustainable production of biofuels in Colombia", whose key elements were developed in Law 939 of 2004 "Stimulus biofuel production." The first document provides a detailed analysis of the advantages and disadvantages of introducing this crop extensively in the country. Clearly, this agribusiness development, per se, does not generate any exodus. However, as noted in the previous section, in a context like Colombia, the large-scale introduction of a crop that occupies a wide area to be profitable can give rise to processes of land dispossession. Nevertheless, this effect was not anticipated. In fact the CONPES document only refers to environmental risks such as loss of biodiversity, increased water pollution and soil erosion increased, and the increase in food prices (CONPES, 2008: 23 - 24 and 33). Similarly, regarding mining, the basis to adopt this sector as the cornerstone of the development model in the country is to be found in the National Development Plan for 2010-2014, which was approved by Law 1450 of 2011. This document highlights, once again, the environmental risks that this proposal entails, and outlines the steps to tackle such risk. It also identifies the need to

establish channels of participation with the communities affected by the development of mining projects (DNP, 2010: 231-232). The displacement of the population living in the areas to be exploited is not considered as a possible risk.

#### **4. Development – induced displacement and foreign investment protection**

The adoption of the mining and agroindustry model of development in Colombia was complemented by a firm commitment in favor of foreign investment. The government of President Álvaro Uribe Vélez (2002-2010), made "investor confidence" one of its flagship programs, by linking foreign capital inflows to the country with the growth and development of the national economy. It thus developed a series of measures to attract this type of investment, which have been extended by the current government of President Juan Manuel Santos (2010-2014). The development plan of the last government also notes that the growth of the energy sector and mining, destined to become the engine for short-term development in the country, is subject to increased foreign capital inflows, which makes it inevitable the development of new measures to facilitate their entry and stay in the country. As part of this openness to foreign investment the country has embarked on a process of negotiation and signing of free trade agreements, in which the foreign investment protection occupies a central chapter<sup>33</sup>.

Now: International investment agreements (IIA's) may be the single most important factor transforming the global economic landscape today. A tightly-knit net of almost 5500 IIA's covers the planet (UNCTAD, 2006: 1), crucially influencing decisions with a

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<sup>33</sup> Currently Colombia is part of free trade agreements with Mexico, Chile, MERCOSUR, Salvador, Guatemala, Honduras, United States and Canada. Also has signed two FTA with the European Union and South Korea, and has been involved in negotiations with Turkey, Panama, Costa Rica, Japan and Israel.

potential impact in sustainable development. However, despite their great importance, the specific scope and risks of this phenomenon seem to be hardly grasped by governments and the general public. One reason for this is the decentralized nature of the current IIA wave. Unlike work at institutions like the WTO or the World Bank, investment deals are commonly stricken on a bilateral basis<sup>34</sup>: there is no single decision-making centre to follow. Moreover, a considerable part of international investment regulation is developed through arbitration awards; consequently, important legal principles have to be inferred from bits and pieces of awards that are, in any case, adopted under a veil of secrecy. There is no one decision or instrument that can be singled out as the cause of change. And yet, a general change is indeed taking place.

As hinted by their name, an IIA is an agreement between two or more States setting down rules that govern investments by their respective nationals in the other's territory. IIA's are not overviewed by a single treaty organ, and come in different forms and shapes. The most common presentation is the BIT, such as that concluded between the US and Singapore (UNCTAD, 2006: 4), which is a self-standing instrument dealing integrally with investment. Furthermore, IIA's are also included as 'investment chapters' in free trade agreements – NAFTA's Chapter 11 being the most well-known of them all.

Substantively, the standard IIA provides investors with protection in four areas: market access, non-discriminatory treatment, ban expropriation and dispute settlement. The first three standards give investors fair conditions to participate in the new market. The last one ensures its compliance, through exceptional mechanisms of adjudication. Investment

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<sup>34</sup> Half of all IIA's are bilateral investment treaties (BITs) (UNCTAD, *supra* note 6, at 3)

agreements usually give jurisdiction to arbitration tribunals over disputes between private investors and the Host state, giving private parties right to stand before such international tribunals. (Schreuer, 2005: 1) (UNCTAD, 2000: 12) (Vasciannie, 2000: 99).

The combination of these four pillars makes investment arbitration a controversial formula of global governance (Van Harten and M. Loughlin, 2006: 121) (Kingsbury and Schill, 2008). Through IIA's, investment arbitration tribunals have the jurisdiction to decide on projects of great importance for local communities – normally deciding between a government and a private actor, in the midst of starkly opposed interests. The controversy surrounding indirect expropriation is case in point. Protection from of foreign property is a central trait of IIA's, and all agreements include language to that effect. Expropriation, though, is not prohibited under IIA's (and, for that matter, under general international law (Brownlie, 2003: 507)) if it is done for a public purpose, on a non – discriminatory basis, against payment of compensation and, in some cases, according to a due process. Hence, problems arising from expropriation derive not from the taking itself, but on how it was done - Was it discriminatory? Was it for a public purpose? Those are the issues that will arise in litigation. Only then may an expropriatory act be deemed as 'unlawful'.

One specific technique of convergence has emerged, in the form of investment arbitration awards. Arbitration tribunals interpret the open-ended clauses included in the agreements, and their interpretation is then adopted by other tribunals as the law in force. In a distinctively performative fashion, certain rules of investment law become the law



because they are the law. Foreign investment law can be read, in effect, as a global constitution. For instance, David Schneiderman, in his “*Constitutionalizing Economic Globalization*“, argues that investment arbitration is indeed constitutional as it limits state power, yet it does so by carving into stone disciplines that give special protection to investors over citizens. Moreover, the regime “freezes existing distributions of wealth and privileges “status quo neutrality”; enshrines neoliberal principles of governmental self-restraint as law; and is fundamentally “out of balance” in democratic terms (Schneiderman, 2008: 2, 9, 37, 180 and 191).

Now: the basic premise of investment law is its distrust in the domestic legal system of states that host investments. Investment arbitration features an underlying narrative that features domestic law as *failed* (or about to be), and therefore in need of correction or complement by the international investment tribunal. This corrective process is, however, not formal: it is well known that investment tribunals have no formal power of striking down domestic law. However, the underlying consciousness is that investors need to be protected from arbitrary treatment by the host state, and that domestic law is not up to that task. Hence, the need for international standards of protection, adjudicated by international judges, instead of the domestic judiciary. The very existence of the investment regime lays upon the presumption that domestic law fails at protecting foreign investors.

This premise has been explored before by Jorge Esquirol, who noted that certain specific problems of Latin American legal systems have been consistently generalized by

commentators and officials of multilateral institutions, creating the image of a *failed law* in the region. Such image serves, in turn, as the justification for radical legal reforms implemented in the region. However, Esquirol argues, many of the alleged “failures” of the failed law are, in fact, problems inherent to any legal system (unpredictability, uncertainty, etc) that were identified and demonstrated convincingly by critics elsewhere (e.g. in the United States), without questioning the overall viability of these legal systems. And yet, says Esquirol, when it comes to Latin America, these same problems become systemic, evidence of a *failed law*, and justify radical legal changes in all areas of the legal systems in the region (Esquirol, 2008: 75).

The same can be gleamed in investment arbitration. The idea that domestic law fails at protecting foreign investors is a powerful aspect of investment law. If we generalize the specific failures of the domestic law of host states, and create the presumption that it is a failed law, it then becomes logical that investment arbitration is needed, and that the role of such arbitration is to right the wrongs of domestic legal systems. Thus, the failed law premise is ideological, as it deploys meaning to perpetuate the distribution of powers between host states and investment tribunals. Ultimately, the presumption of being a failed right is hardly rebutted – and becomes almost a prejudice.

This issue is intimately connected with development-induced displacement. Displacement can be read, simultaneously, as a problem of IDP policy or as a negative externality of the investment law regime. This is a classical fragmentation problem, where the structural bias of each specialized system is deployed (Urueña, 2012).

Development induced displacement is both *and* IDP and an investment law issue. Each provides a somewhat different answer that complements each the other. The IDP regime squarely places the issue of IDPs on the domestic level: lacking legitimacy to intervene, global governance institutions rely on the domestic interpretation and implementation of global standards (for example, the Guiding Principles), and thus strike a balance by relying on domestic politics to do the heavy lifting on whether development-induced displacement should be considered as part of the global IDP agenda. As we have seen, that is not the Colombian case. In Colombia, domestic IDP policy has closely followed global IDP principles, but has specifically rejected the possibility of including development-induced displacement in its policy.

This decision becomes intertwined with the global investment regime. From the perspective of such regime, displacement could be arguably read as a potential risk to be considered – much as other human rights have found their way into the investment regime rationale. Cases abound: environmental standards, the right to water, labor rights, all of them have in one way or the other being considered (however marginally) by investment arbitration tribunals and instruments<sup>35</sup>. Why not development – induced displacement? Perhaps the answer lies in the failed law premise discussed above. The investment regime presumes that domestic laws are fundamentally unreliable. Decision-making remains on the international level with other human rights, thus making it

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<sup>35</sup> See David Wheeler, 'Racing to the Bottom? Foreign Investment and Air Pollution in Developing Countries', *Journal of Environment & Development* 10, no. 3 (2001): 225–245. Nathalie Bernasconi-Osterwalder and Edith Brown Weiss, 'International Investment Rules and Water: Learning from the NAFTA Experience', in *Fresh Water and International Economic Law*, ed. Laurence Boisson de Chazournes, Nathalie Bernasconi-Osterwalder, and Edith Brown Weiss, International Economic Law Series (Oxford, England) (Oxford: Oxford University Press, 2005). M. Sornarajah, *The International Law on Foreign Investment*, 3rd ed. (Cambridge University Press, 2010). Michael Waibel, *The Backlash Against Investment Arbitration : Perceptions and Reality* (Austin, Tex.: Wolters Kluwer Law & Business ;, 2010).

controversial but still reliable. However, the IDP regime shifts the responsibility of considering development – induced displacement to domestic authorities. In this sense, whatever definition made on the domestic setting will be subject to suspicion from the foreign investment regime, as it derived from a failed legal system.

The consequence of this move is not that the neo-liberal ideology of the investment regime prevents development-induced displacement from being considered. And neither is it that foreign investors (the protected subjects of the investment regime) press for a regime that excludes the legal protection of development-induced displacement. If asked, most would probably accept some level of protection. The point is that the deep structure of the international investment regime has no way of registering an issue such as development induced displacement, which is left by default to domestic decision-makers.

The issue then becomes a never ending spiral of delegating responsibilities from the domestic to the global level, and then back. Domestic IDP policy in Colombia has traditionally relied on global standards to justify its approach (hence, the Court's reliance on the Guiding Principles). But reliance on global governance implies that the decision is placed on the domestic level, which is in turn dependent on global policy, which further places decision making on the domestic level. Faced with this, the investment regime cannot but shrug and frame the development – induced displacement as a non – issue.

## 5. Conclusion

Rules governing foreign investment are created at the international level, displacing domestic legislation, and targeted at full protection of foreign investors. It allows us to ignore the uncomfortable issue of displacement caused by development projects on the agenda and the need for regulation of this subject. In conclusion, it can be said that the absence of development induced displacement in the Colombian IDP policy is the result of a number of reasons, which respond to both process developed domestically, and globally. These causes include:

At the national level:

- Pressures of multinational and national companies to exclude this type of exodus from the agenda.
- Budget reasons, as the government seems reticent to expand expensive IDP benefits to a whole new group of the population; and
- Image reasons. The armed conflict is presented as the only cause of massive human rights violations.

At the international level:

- The absence of a real commitment to development induced exodus by the global IDP policy. As these people are not perceived as a risk to international peace and security they are not really a concern of the international community. As a consequence little efforts has been made by the international actors, such as the former Special Representatives of the UN Secretary-General or the current special rapporteur, to persuade state authorities of the need to include this population in the IDPs policy.
- The current rules on foreign investment, which binding for Colombia, undervalue domestic law and are based on the idea of the fragility of the foreign investor. Therefore omitting the inclusion of items such as displacement which can be generate by the activity they protect.

All these factors explain but do not justify the exclusion of the development induced displacement from Colombian public policy. Extensive palm oil cultivation has produced an unknown number of IDPs that have not yet received protection or

assistance. Large scale mining is just beginning in Colombia, but it seems very likely that it will produce the same effect. This is the time to recognize the dark effects of these kinds of projects, and start developing laws and effective policies in order to avoid them. Displacement must not be the price of development.

## Bibliography

Alonso, Manuel y Valencia, Germán (2008). “Balance del proceso de Desmovilización, Desarme y Reinserción (DDR) de los bloques Cacique Nutibara y Héroes de Granada en la ciudad de Medellín” (2008) in En *Estudios Políticos*, N° 33 (julio-diciembre), Instituto de Estudios Políticos, Universidad de Antioquia,

Barnett L. “Global Governance and the Evolution of the International Refugee Regime” 14 *International Journal of Refugee Law* (2002)

Brownlie I., *Public International Law* (2003) at 507

Bushnell, *The Making of Modern Colombia: A Nation in Spite of Itself* (1993)

Cepeda, M. J ‘The Constitutional Protection of IDPs in Colombia’, in Rodolfo Arango (ed.) *Judicial Protection of Internally Displaced persons: The Colombian Experience* (Washington: The Brookings Institution – University of Bern Project on Internal Displacement, 2009)

Cernea, Michael (2000), “Risks, Safeguards and Reconstruction: A Model for Population Displacement and Resettlement.” In M. Cernea and C. McDowell (eds) *Risks and Reconstruction: Experiences of Resettlers and Refugees* (Washington, DC: World Bank).

Cernea, Michael M. and Ravi Kanbur (2002) *An Exchange on the Compensation Principle in Resettlement*, Working Paper, Department of Applied Economics and Management, Cornell University, New York, WP 2002-33, October 2002.

Chimni, B.S. “Co-option and Resistance: Two faces of Global Administrative Law” 37 *New York University Journal of International Law and Politics* (2005)

CODHES (1999), *Un país que huye. Desplazamiento y violencia en una nación fragmentada*, Editora Guadalupe. Bogotá, 1999.

CODHES (2011), *Boletín informativo de la Consultoría para los Derechos Humanos y el Desplazamiento*, Número 77, Bogotá, 15 de febrero de 2011

Comisión de Seguimiento a la Política Pública sobre Desplazamiento Forzado (2008) *IV informe a la Corte Constitucional*. en <http://www.codhes.org/>

Comisión de Seguimiento a la Política Pública sobre Desplazamiento Forzado (2009) *El reto ante la tragedia humanitaria del desplazamiento forzado: Reparar de manera integral el despojo de tierras y bienes*, Bogotá, CODHES.

Comisión de Seguimiento a la Política Pública sobre Desplazamiento Forzado (2010) *Tercer informe de verificación sobre el cumplimiento de derechos de la población en situación de desplazamiento*. (diciembre). Disponible en [http://www.codhes.org/index.php?option=com\\_content&task=view&id=39&Itemid=52](http://www.codhes.org/index.php?option=com_content&task=view&id=39&Itemid=52)

Correa, Guillermo y Hoyos, Yessika (Coords.) *Impactos en los Derechos Humanos de la implementación del Tratado de Libre Comercio entre Colombia y Canadá. Línea base*. Project Accompagnement Solidarité Colombie, junio 2012. Disponible en <http://www.pasc.ca>

Cohen, R and Deng F.M. , *Masses in Flight: The Global Crisis of Internal Displacement* (1998)

Courtland Robinson W (2003) *Risks and Rights: The Causes, Consequences, and Challenges of Development-Induced Displacement*, Occasional Paper, The Brookings Institution-SAIS Project on Internal Displacement, May 2003.

Cruces, Guilermo, Gasparini, Leonardo y Carbajal, Fedora (2010), *Situación socioeconómica de la población afrocolombiana en el marco de los Objetivos de Desarrollo del Milenio*, Panamá: PNUD.

Deng, F.M “The Global Challenge of Internal Displacement” 5 *Washington University Journal of Law and Policy* (2001)

DNP Departamento Nacional de Planeación, (2010), *Plan Nacional de Desarrollo 2010-2014. Prosperidad para todos*. Bogotá, DNP, tomo II.

Esquirol, J “The Failed Law of Latin America” 56 *American Journal of Comparative Law* (2008)

Fiss, O ‘The Allure of Individualism’, *Iowa Law Review*, (1993) 78, 965 at 965  
Ibañez, A.M *El Desplazamiento Forzoso en Colombia: Un Camino Sin Retorno Hacia a Pobreza* (2008)

IDMC Internal Displacement Monitoring Centre (2005) *A Global Overview of Trends and Developments in 2004*. Norwegian Refugee Council. Disponible en <http://www.internal-displacement.org>

IDMC Internal Displacement Monitoring Centre (2012) *Global Overview 2011. People internally displaced by conflict and violence*. Norwegian Refugee Council. Disponible en <http://www.internal-displacement.org>

Holborn, L. W. “The League of Nations and the Refugee Problem” 203 *Annals of the American Academy of Political and Social Science* (1939)

Kälin, Walter (2008), *Guiding Principles on Internal Displacement. Annotations* The American Society of International Law, The Brookings Institution – University of Bern Project on Internal Displacement Studies in Transnational Legal Policy • No. 38 The American Society of International Law Washington, DC.

Kingsbury B. and Schill S., ‘Investor-State Arbitration, Fair and Equitable Treatment, Proportionality, and the Emerging Administrative Law of Global Governance’ in *ICCA Congress Series 2008* (International Council of Commercial Arbitration, forthcoming)

Lemaitre Ripoll, Julieta (Comp.) (2010) *Derechos enterrados. Comunidades étnicas y campesinas en Colombia, nueve casos de estudio*. Bogotá: Colección CIJUS-Universidad de los Andes.

Ministerio de Agricultura y Desarrollo (2010) *Balance de Gobierno Logros y Retos del Sector Agropecuario 2002 – 2010. Dinámico Avance del agro colombiano en los últimos ocho años*. Documento disponible en la web <http://www.minagricultura.gov.co/archivos/logros.pdf>

Molano Bravo, Alfredo (2000), “Desterrados”, in *Papeles de Cuestiones Internacionales*, Centro de Estudios para la Paz , N° 70, Spring.

Mooney, Erin (2005) “The concept of internal displacement and the case for internally displaced persons as a category of concern” *Refugee Survey Quarterly*, Vol. 24, Issue 3

Naciones Unidas E/CN.4/2002/95 *Informe del Representante del Secretario General sobre los desplazados internos*, Sr. Francis M. Deng, presentado de conformidad con la resolución 2001/54 de la Comisión de Derechos Humanos, 16 de enero de 2002.

Naciones Unidas A/HRC/13/21 *Informe del Representante del Secretario General sobre los derechos humanos de los desplazados internos*, Sr. Walter Kälin, 5 de enero de 2010

Orchad, P. “Protection of internally displaced persons: soft law as a norm-generating mechanism” 36 *Review of International Studies* (2010) 281

Palacio, M *Between Legitimacy and Violence: A History of Colombia 1875 – 2002* (2006) D.

Pallis, M. “The Operation of the UNHCR’s Accountability Mechanisms” 37 *New York University Journal of International Law and Politics* (2005) 869.



Peace Brigades International (2011). *Minería en Colombia: ¿A qué precio?* PBI Colombia. Boletín Informativo N° 18, Noviembre.

Peral Fernández, Luís, (2001) *Éxodos masivos, supervivencia y mantenimiento de la paz*. Editorial Trotta, Madrid.

Programa de las Naciones Unidas para el Desarrollo (2011) *Colombia rural 2011 Razones para la esperanza*. Bogotá: INDH, PNUD.

Rajagopal, Balakrishnan , (2000), *Human Rights and Development* (World Commission on Dams, Thematic Review V.4, Working Paper).

Reyes, Alejandro (1994) "Compra de tierras por narcotraficantes", in Thoumi, Francisco (Ed), *Drogas ilícitas en Colombia: su impacto económico, político y social*, Bogotá: Ariel-PNUD.

Rodríguez C and Rodríguez, D 'El Contexto: El Desplazamiento Forzado y la Intervención de la Corte Constitucional (1995-2009)', in Cesar Rodríguez (ed.), *Más allá del desplazamiento: políticas, derechos y superación del desplazamiento forzado en Colombia* (ed.) (Bogotá: Ediciones Uniandes 2009)

Roldán, M A *Sangre y Fuego: La Violencia en Antioquia, Colombia, 1946-1953* (2003).

Sánchez, Beatriz Eugenia (2006) "Estado multiétnico y entidad territorial indígena" en *Estudios sobre descentralización territorial: El caso particular de Colombia*, Cádiz: Universidad de Cádiz.

Sánchez, Beatriz Eugenia (2009) "Cuando los derechos son la jaula. Trasplante rígido del soft law para la gestión del desplazamiento forzado." en *Estudios Políticos* N° 35, julio-diciembre.

Sánchez, Gonzalo y Peñaranda, Ricardo (Comp.) (1995) *Pasado y presente de la violencia en Colombia*, Bogotá: Fondo Editorial CEREC.

Schreuer, C., 'Calvo's Children: The Return of Local Remedies in Investment Arbitration' 4 *The Law and Practice of International Courts and Tribunals* (2005)

Sebastian, E y Steiner, R *La Revolución Incompleta: las reformas de Gaviria*. Norma, Bogotá, (2008).

Schneiderman D., *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (2008)

UNHCR, *Desplazamiento en Colombia*, available at <http://www.acnur.org/t3/operaciones/situacion-colombia/desplazamiento-interno-en-colombia/> (Last visted April 18, 2013)

UNHCR, *Tendencias Globales 2010*, (2011). available at <http://www.acnur.org/t3/fileadmin/scripts/doc.php?file=biblioteca/pdf/7557> (Last visted April 18, 2013)

UNCTAD, *Taking of Property: UNCTAD series on Issues in International Investment Agreements* (2000)

UNCTAD, 'Developments in International Investment Agreements in 2005' in *International Investment Agreements Monitor* No. 2 (2006)

Urueña R., *No Citizens Here: Global Subjects and Participation in International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2012).

Van Harten G. and Loughlin, M. 'Investment Arbitration as a Species of Global Administrative Law' 17 *European Journal of International Law* (2006)

Vargas, Alejandro (1999), *Drogas, máscaras y juegos*. Tercer Mundo Editores, Bogotá.

Vasciannie, S 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' 70 *British Yearbook of International Law* (2000) 99

Vidal López, Roberto (2007), *Derecho global y desplazamiento interno. La creación, uso y desaparición del desplazamiento forzado por la violencia en Colombia*. Bogotá: Pontificia Universidad Javeriana, Facultad de Ciencias Jurídicas.

Vidal Roberto, Salcedo Jorge and Medina Adriana (2011) *Desplazamiento forzado y construcción de paz en Colombia 2009-2010*. Bogotá, Antropos Ltda.