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Forced displacement in Colombia and its international obligations

Abstract

The historical context of Colombia with more than 60 years of armed conflict (1948 - present) reveals that the phenomenon of forced displacement and migration has occurred in various periods. This phenomenon has not ceased and on the contrary continues to present itself today and therefore represents a significant role in various national and international scenarios, associated both with public policies for its prevention and mitigation and in the prosecution of crimes that are associated with this phenomenon. This article analyzes the various phenomena of migration and displacement and their causes that make it irrepressible at present and that imply new alternative mechanisms of solution, different from punitive repressive aspects. The data is developed through a hermeneutic, analytical and jurisprudential analysis method. For this purpose, the document was prepared using historical, descriptive, teleological and reflective instruments.

Keywords: forced displacement, migration, guiding principles, consensus, protection, reintegration, crime, IHL violation

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Introductory concepts: current displacement and internal migrations

Prior to the analysis of the specific case of forced displacement in Colombia, it can be stated that displaced persons are those persons or groups of persons who have been forced and obliged to escape, or to flee their home or place of habitual residence, in particular as a result or to avoid the effects of armed conflict, situations of generalized violence, human rights violations or natural or human -made disasters, and who have not crossed an internationally recognized state border. This is in accordance with Resolution 50 of the United Nations Commission on Human Rights of 17 April 1998.[1]

The Global Hunger Index 2018 analyses how hunger and displacement are closely related to political issues and, as such, should be addressed by the international community. In other words, a provision of International Human Rights Law (IHRL) appears that implies a condition of solidarity and human dignity that prevails as a special condition in this aspect.[2] To this end, it was established that the nations with the highest incidence of hunger in 2018 are, in fact, also victims of conflict, politic al violence and displacement.[3] But in addition, it is not only about this event but also about the multiple causes that have been analyzed in the Colombian phenomenon in the previous point, where other causes associated with the armed conflict and national violence concur with this cause. In addition, at the international level, those displacements associated with internal armed conflicts are prevented by the prohibitions of international humanitarian law.[4] In this sense, it is prohibited in IHL to intentionally target "food and agricultural areas that produce, crops, livestock, drinking water facilities and reserves, and irrigation works, with the deliberate intention of depriving them, due to their subsistence value. The civilian population or the opposing party, whatever the objective pursued, whether it be to starve people, to cause them to move or for any other purpose" First Additional Protocol to the Geneva Conventions, 1977: Article 54.2.[5] Not only can it constitute a serious violation of IHL, but also a crime at the internal level (Art. 159 Colombian Criminal Code) and a war crime at the international level *(Art. 8, paragraph 2 (a), numeral VII, Rome Statute of 1998)*.[6] This prohibition is reiterated in UN Security Council Resolution 2417 on Hunger in Conflict, adopted on 6 June 2018, which condemns the use of hunger against civilians and the prevention of humanitarian aid as a tactic of war.[7]

[1]Guiding Principles of Forced Displacement Charter of Nations. Article 1, Nos. 2 and 3. Article 2, No. 1.

[2]As is evident from the scope and purpose of the Guiding Principles on Forced Displacement. Idem.

[3]Global Hunger Index 2018.

[4]The development and evolution of the concepts of grave violations of International Human Rights Law and IHL are developed in the text of Sandoval Mesa Jaime Alberto. The criminal guarantee in international criminal and penal matters. Editorial Tirant Lo Blanche. Valencia Spain 2018;133–137.

[5]Protocol I Additional to the 4 Geneva Conventions of 1949.

[6]http://www.hchr.org.co/documentoseinformes/documentos/html/pactos/estatuto_roma_corte_penal_internacio nal.html

[7]Safety Advice. Resolution of 6 June 2018.

In other words, there is a whole legal framework associated with the defense of persons in the context of violence and internal conflicts that, at the international level, protect the displaced. In these cases, all international norms in Colombia are protected by Article 93 of the 1991 Constitution, known as the Constitutionality Block,[8] which allows the integration of IHL and Human Rights protection instruments into domestic law, under the same conditions as the fundamental rights consecrated in the Constitution,[9] hence their enforceability for humanitarian protection reasons, as in this case regarding internal displacement. However, in some cases the Colombian Constitutional Court has considered that these are rigid *soft law* norms (Ruling T 025 of 2004. Constitutional Court), a questionable matter if one observes that many of these elements appear in the primary source of the international instruments mentioned. In other words, they are hermeneutic tools of constitutional rights and duties and the greater use of such sources in the local courts.[10] This framework does not mean that it is effective and that its compliance is effective; on the contrary, the court has on several occasions declared the problem of internal displacement to be unconstitutional, that[11] is to say, that the measures have not fulfilled their purpose and the problem is based on its lack of resolution and even beyond the impossibility of achieving a solution.

Principles associated with displacement

In this discussion, it is relevant to recall the principles that govern the problem under consideration, since they address the specific needs of IDPs around the world. They define rights and guarantees relevant to the protection of persons from forced displacement in the first place, their protection and assistance during displacement in the second place, and their protection during return or resettlement and reintegration in the third place.[12] In other words, in all these areas, a general principle of comprehensive protection for the displaced prevails over their care, assistance, resettlement and reintegration. These principles are the basis both of the right to establishment and of the minimum elements that must be agreed upon for the protection of the displaced person.

The above principles can be grouped into the following notions: Firstly, those that preserve the equality of the displaced person and his/her sense of protection and prevention (principles 1 to 9). Secondly, principles derived from the situation of displacement in which the displaced will not be subject to serious human rights violations, crimes of murder, genocide, slavery, crimes against their freedom, among others. Likewise, the protection that should be provided during displacement such as humanitarian attention, education, housing, location, etc. (Principles 10 to 24). Next, principles of humanitarian assistance (Art. 25 to Art. 27). Finally, the principles relating to return, resettlement and reintegration are presented.[13] In other words, in the process of constructing the right to establish the displaced person, beyond the possession of a place to live from a land tenure, the will to attend to these three moments of displacement is required. Finally, if there is to be a right to settle, it is first necessary to reach agreements on these three stages, that is, the protection and prevention of the displaced person, the measures required at the time of displacement and then at the end when the return, resettlement or reintegration occurs.

Legislative elements and legal measures in the field of displacement

Evolution of the attention to internal displacement

At the national level, the characteristic of current displacement is presented by internal mobilities originated by the evolution of the armed conflict and characterized by phenomena of violence associated with displacement, by the actions of organized crime groups, by aspects of displacement derived from social conditions such as work, education, etc., and finally, in recent years, by migration from Venezuela. These four elements of internal migration and forced displacement in Colombia's domestic law, after analyzing all the variables proposed above in the evolution of the various stages of development, reveal that it is difficult to distinguish in a specific case, the phenomenon originated by systematic and widespread policies, derived from human rights violations, from displacement caused by actions arising from hostilities inherent in IHL[14] In the context of the national conflict, it is likely that the two types of behaviour will take place in the same setting, which makes the distinction complex if one takes into account that the two rules mentioned above present the noted difficulties of interpretation, which can only be defined by analyzing the subject of the action.[15]

Furthermore, it is important to take into account the nature of the crime of permanent execution, which implies that it is only consummated when the person is reintegrated, returns or manages to resettle in the place of displacement or when the last act that implies the impossibility of return is generated.[16] For the crime analyzed, this refers to a context of violence for the execution of the crime.[17] That is to say, a massive, concerted and generalized context is required, which can also be said to include displacement caused by the action of organized groups outside the law, such as the so-called emerging gangs, drug-trafficking crime groups, etc. At the international level, this reiterates the need for measures to provide care or support for the return of displaced persons, or to take root and settle, which are effective or have been fulfilled, before the exercise of criminal action, through preventive measures. This is because the punitive scenario also denotes the lack of judicial

[8]Ramelli Arteaga Alejandro. Jurisprudencia Penal Internacional Aplicable en Colombia. Embassy of the Federal Republic of Germany. Editorial GIZ. Bogotá: University of the Andes. 1st edn. 2011. p. 32.

[9]Younes Moreno Diego. Colombian Constitutional Law. 13th edn. Bogotá D.C:Editorial Legis. 2010. p. 115.

[10]Lopez Medina, Diego Eduardo, Sánchez Mejia, et al. The Harmonization of International Human Rights Law with the Colombian Criminal Code. International Law Magazine. No. 12: Special Edition, Pontificia Universidad Javeriana. Bogotá (Colombia) 2008. p. 320.

[11]Colombia Constitutional Court, Ruling T 025 of 2004. Presiding Judge, Manuel José Cepeda. 22nd January 2004.

[12]Guiding Principles For Internal Slippage. The Commission on Human Rights - CHR Resolution 50 of 17 April 1998.

[13]IDEM, Guiding Principles For Internal Displacement.

[14]Increasing displacement and humanitarian crisis. Codhes document. Edited by AECI-Codhes. Bogotá DC. 2018.

[15]Ramelli Arteaga, Alejandro. Ob. Cit. APONTE Cardona, Alejandro, El desplazamiento forzado como crimen internacional: nuevas exigencias a la dogmática jurídico-penal, 125 Vniversitas, 15-51. (2012). Page 404.

[16]Aponte Cardona Alejandro. Forced displacement, the inter-american system and domestic criminal law: towards a rational and consistent confluence of various areas of human rights protection. Inter-American System for the Protection of Human Rights and International Criminal Law. Konrad Adenauer Foundation. University of Gottingen. Montevideo Uruguay. 2003. p. 122.

[17]Aponte Cardona Alejandro. 2012. Ob. Cit. Pages 22–24.

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action to suppress these crimes and the scarce jurisprudence of the Supreme Court of Justice that establishes this.[18] All of this is in contrast to the multiplicity of norms adopted in this sense that have had a limited scope or that are in the process of execution and implementation, such as the law on victims and land restitution (Law 1448 of 2011), Legislative Act 01 of 2012 and the norms of the 2016 peace agreement themselves, etc.

Also, in the face of internal displacement, what can be called here the process of double victimization of the displaced must be avoided: on the one hand, they are victims of the behavior as such and, on the other hand, they generally receive a social reproach in the place where they are forced to settle.[19]

On this point, at the end of the 1990s, the situation of displacement in Colombia became particularly difficult, so regulations were issued such as Law 387 of July 18, 1997, through which measures were adopted for the prevention of such behavior.[20] This law was later complemented in 2000 with the issuance of Decree 2569, which created the Social Solidarity Network for the Care of Displaced Persons.[21] Similarly, at the time of such measures, Gómez López mentioned the consequences of forced displacement on the civilian population, in particular those caused by the armed conflict, consisting of a series of damages such as the following: The disintegration of the family, the loss of housing, flight and uprooting, unemployment, as well as serious problems in the receiving areas where the displaced persons could not be provided with favourable conditions of subsistence.[22] In the case analyzed, among other examples, the events that occurred between March and April 1997 in Riosucio Chocó, where armed paramilitary groups established a series of threats against the civilian population, provoking the exodus of peasants who went in masse[23] to the village of Paravandó, municipality of Mutatá, Antioquia. In this case, the figure of 9,000 displaced persons was mentioned.[24].

In any case, the examples cited above, as well as the developments described, face a legal development that began to conjure up the situation, by the time they began to be addressed between 1997 and 1998 and were intended to prevent forced displacement regardless of its nature[25]. This object of treatment of the problem becomes evident too late after almost a century of internal migration and internal displacement.

Subsequently, with the issuance of the 2000 Criminal Code (Law 599), both the administrative prevention measures in the field of human rights received criminal support, with the development of the conduct of forced displacement described and accepted in domestic law, both for the events of Article 180 and Title II of the CP.[26]

In accordance with these provisions, the phenomenon is associated to a greater extent with displacement caused by armed conflict, which means that its nature in domestic law would be more focused on conduct against persons and property protected under Title II than on war crimes under the Rome Statute (Art. 8 RS). However, they are also described in accordance with art. 180 CP., for situations of lesa humanity and in a specific case it will be necessary to analyze the foundations and circumstances of time, manner and place, to define exactly the nature and context of the conduct.

Concept of International forced displacement and its interference in the Colombian internal problem

Following the analysis of the criminal aspect of the phenomenon in question, in the case of forced displacement regulated by domestic law, the rule in Article 180 of the Constitution should be read systematically with Article 159 (Displacement during and in the course of an armed conflict, Title II of the Colombian Criminal Code), in accordance with the condition established in the second paragraph of Article 180.[27] This element regulates that forced displacement for imperative reasons of a military nature for the movement of the civilian population, in order to keep them safe, shall not be understood. However, this requires another condition that arises from the previous one, which is the return of the population when hostilities cease, an aspect that is also not effectively fulfilled, as indicated in cases cited in the previous point.[28]

In other words, the systematic reading of the rule on displacement must be done not only in the light of those precepts that strictly refer to displacement within criminal law, but also in relation to other rules such as those relating to international humanitarian law. In this case, all aspects of Protocol II for the Protection of Civilian Populations in the Event or Development of Internal Armed Conflict are applicable, along with the entire international component of humanitarian assistance in cases of displacement, which refers to national territorial limits where displacement must otherwise take place, becoming a refuge.[29]

In this order the conduct of Article 159 of the Penal Code for the purposes of forced displacement carried out on the occasion or in the

[18]Supreme Court Of Justice. Sentence. SP8753-2016 of June 29, 2016 MP. José Francisco Acuña Viscaya. Rad: 38795 | Date: 26/03/2014 | Subject: Forced Displacement - Concept Rad: SU-1150 | Date: 30/08/2000 | Subject: Forced Displacement - Permanent Crime Rad: SU-1150 | Date: 30/08/2000 | Subject: Forced Displacement - Scope Rad: T-025 | Date: 22/01/2004 | Subject: Forced Displacement - Scope Rad: T-321 | Date: 10/04/2008 | Subject: Forced Displacement - Scope Rad: A-219 | Date: 13/10/2011 | Subject: Forced Displacement - Scope Rad: C-579 | Date: 28/08/2013 | Subject: Forced Displacement - Scope Rad: T-323 | Date: 26/03/2001 | Subject: Forced Displacement - Appraisal of evidence Rad: 32120 | Date: 23/02/2011 | Subject: Testimonial - Appraisal of evidence: the condition of the witness does not imply his lack of credibility, displaced Rad: 42241 | Date: 30/09/2015 | Subject: Disabilitation For The Exercise Of Public Rights And Functions - Punitive measure: competition, when for a crime it is the main penalty and for the other(s) it is accessory

[19]Aponte Cardona Alejandro.2003. Cit. p. 122.

[20]Compilation on forced displacement. Norms, Doctrine and National and International Jurisprudence, Office in Colombia of the United Nations High Commissioner for Human Rights. First Edition. Bogotá D.C. 2001.

[21]Constitutional Court. Judgment SU 1150 of 30 August 2000 M.P. Eduardo Cifuentes Muñoz

[22]Gómez López Jesús Orlando. Crimes Against Humanity. Ediciones Doctrina y Ley LTDA. Bogotá D.C. 1998. p. 78.

[23]IDEM. p. 78.

[24]GOMEZ López Jesús Orlando. Ob. Cit. 1998 p. 81.

[25]Compilation On Forced Displacement. Ob. Cit. 2001.

[26]Article 180 of the Colombian Criminal Code. Available at http://www.secretariasenado.gov.co/senado/basedoc/ley_0599_2000_pr006.html#180. Consulate on March 29, 2020.

[27]IDEM.

[28]Forced displacement: Anyone who arbitrarily, by means of violence or other coercive acts directed against a sector of the population, causes one or more of its members to change the place of their residence, shall incur a prison term of ninety-six (96) to two hundred and sixteen (216) months, a fine of eight hundred to two thousand two hundred and fifty (2).250) legal monthly minimum wages in force and in interdiction of rights and public functions from ninety-six (96) to two hundred and sixteen (216) months. Forced displacement shall not be understood to mean the movement of the population by the public forces when its purpose is the security of the population, or when it is for compelling military reasons, in accordance with international law. Aponte cardona, alejandro, ob. Cit. 2012.

[29]IDEM.

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course of the armed conflict describes a specific type of crime against persons and property protected by IHL.[30] On the other hand, the figure of Article 180, Idem, is produced by means of violence or other coercive acts, which can be different from the development of actions derived from the armed conflict or other situations that violate human rights. In other words, in this case, the concept of serious human rights violations being prosecuted through criminal conduct, which is more common in the inter-American sphere, is developed.[31]

Even if this difference is present, it may be difficult to distinguish in a specific case, as indicated, from one or another conduct, considering that actions of displacement can almost always concur with such facts. This fact is evident if one takes into account the second paragraph of Article 180, which establishes the exception to cases of displacement in situations of population movement carried out by the public forces to safeguard the civilian population or when imperative military reasons so require, which also implies a joint analysis with Article 180. Córdoba J. agrees with this thesis and points out that, due to a legislative error, both Article 159 and Article 180 allow for the proclamation of two crimes of forced displacement that belong to the conduct of war and not to the distinction drawn in the Rome Statute.[32]

In this case the Rome Statute of 1998, refers to the following situations:

First, the conduct of forced displacement that is harmful to humanity is regulated in the following terms:

"Article 7 Crimes against humanity 1. For the purposes of this Statute, "crime against humanity"means any of the following acts when committed as part of a widespread or systematic attack direc ted against any civilian population and with knowledge of the attack

(d) Deportation or forcible transfer of population

Then, in the second paragraph of article 7, the Rome Statute develops some interpretative clauses in the following terms:

"...Art. 7º 2.. For the purposes of paragraph 1: (d) "Deportation or forcible transfer of population" means the forced displacement of the persons concerned, by expulsion or other coercive means, from the area in which they are lawfully present, without grounds authorized by international law.[33]

Similarly, the elements of crime provide the necessary elements for understanding the national problem, since they are added to the interpretation factors that determine the phenomenon in a concrete manner in the following terms:

"...Crime against humanityof Deportation or forcible transfer of population - Article 7(1)(d).

Depending on the elements of the crime, "deported or forcibly transferred" is interchangeable with "forcibly displaced". The term forcibly"is not limited to physical force, but may include the threat of force or coercion, such as that caused by fear of violence, intimidation, detention, psychological oppression or abuse of power, against such person or persons or by taking advantage of a coercive environment. The figure that may have correspondence in domestic law appears in article 180 of the C.P., called displacement[34]..."

From the above, it can be seen that the clauses noted in this international forum, from the nature of international crimes, coincide with the elements described above, that is, the facts associated with the armed conflict or serious human rights violations find a correspondence with the phenomenon of forced displacement. In other words, the punitive nature of the matter does not imply that measures are adopted to determine its effective repression or the cessation of its effects. On the contrary, the matter is rendered ineffective by judicial and punitive measures and to some extent also ineffective by humanitarian assistance measures, which means that in this case the possibility of additional jurisdiction under domestic law, with all its effects, is always present.[35]

Forced displacement versus consensus theories in the strict sense. Beyond formal structural plans

Finally, the elements of displacement addressed so far reveal measures of various kinds to solve the problem. However, in all the sections analyzed, the conclusion is reached that it is difficult to solve, which means that alternative ways must be explored at least to stop its effects, but also to lay the foundations for the real establishment of the displaced person. Beyond a right to land tenure or property is the right not to emigrate as stated in this paper. In other words, there must be three moments before final decisions are made: first, the viability with the necessary consensus for that purpose; second, to execute the measures that have been agreed upon; and third, to achieve tenure and effective ownership, beyond the legal measures that actually promote title and ownership, as is proposed at the time. To this end, the following situations can be raised, firstly, with a brief review of the status of the issue, as shown below.

The current Humanitarian situation with regard to displacement

It is necessary to remember, in view of the phenomenon under study, that the situation has not changed much despite the peace process held in November 2016. The situation of violence in the country continues and the reports of the Consultancy for Human Rights and Forced Displacement reveal that this factor is still associated with the phenomenon. In any case, it is necessary to take into account that Colombia has 32 departments, of which 8 concentrate 70 per cent

[30]Alvarez Díaz Jorge Luis. Social State of Law, Constitutional Court and Forced Displacement in Colombia. Ediciones Siglo del Hombre. Bogotá Colombia 2008. p. 86.

[31]Sandoval Mesa Jaime Alberto. Constitutional interpretation and criminal legality of international crimes. Editorial Dike. Medellín Colombia, 2019 p. 122.

[32]Cordoba Triviño Jaime. International Criminal Law. Editorial Ibáñez. Bogotá D.C. 2001. p. 226. It is a problem of constitutionality block, however, both in the one and in the other sense, it will be necessary to resort to the interpretation of such institution when it is a matter of serious human rights violation or serious breach of International Humanitarian Law.

[33]This type of crime includes offences under the four Geneva Conventions and the two Additional Protocols of 1977. In addition, customary elements derived from IHL are described. Gutierrez Posse Hortensia D.T. Elements of international humanitarian law. Editorial EUDEBA. Buenos Aires 2004. Pages 270, 271.In this case, elements are established that reside in acts without grounds authorized by international law, such as military necessity. Sandoval Mesa Jaime Alberto. Ob. Cit. 2019. p. 51.

[34]Elements of Crime. 2003, p. 11.

[35]Colombia, Constitutional Court, Sentence C-578 of 2002. M.P. Manuel José Cepeda. Sandoval Mesa Jaime Alberto. La Garantía Criminal en materia penal y Penal Internacional. Editorial Tirant lo Blanche, Valencia, Spain 2018. p. 216.

of the massacres (*Cauca, Antioquia, Nariño, Norte de Santander, Valle del Cauca, Chocó, Córdoba and Putumayo*).[36] They also have in common the marked presence of illegal mining, illicit crops and drug trafficking that have allowed the conflict to continue with its effects.

This is because the peace agreement (24 November 2016) simply provides the elements to order the resolution of the conflict, but its effects are not immediate. Moreover, as the Semana report warns, there is a cause-effect between the absence of the state in these areas and the emergence of increasingly entrenched leaderships.[37] Of course, new leaderships, which generate new structures of violence that will produce displacement. As described in the report, the problem is that the new phenomena of violence mentioned above do not coexist alone, but are formed with the threat of strong illegal economic structures driven by the ELN, the EPL, FARC dissidents and the Gulf Clan (organised crime groups).[38]

For this reason, Colombian society and especially the media have reached a consensus that asks the national government to attack the root of the problem, through legitimate means that attack the clandestine drug economy and through efficient means that guarantee the state's presence in some territories.[39] This would imply a presence in at least 4,000 areas that are difficult to access and where there are ethnic groups that are asking for non-violent responses from the government, asking the government for human rights, such as health, education, security and communications.

Among the statistics of the murdered, the most worrying is that of 47 former FARC combatants killed and 5 of them reported missing. The loss of social leaders is very serious for the community not only because of the value of their lives, but because of what they represent. They are the ones who fight for the rights of marginalized social groups.[40] They are the ones who call on the government or organizations to meet their needs and help them solve problems. They are the ones who confront the armed groups that oppress them. And they are the ones who denounce acts of violence that would otherwise be invisible. For all these reasons, they are uncomfortable and a favorite target for irregular groups seeking to control their areas (Figure 1).[41]

A study by the National Consulting Center has found that a crime affects the continuity or permanence of social organizations by 92 percent; this is called displacement by fear. Moreover, it occurs because the community is weakened and divided, and therefore the percentage of complaints against actions and/or aggressions ranging from intimidation to sexual violence or other homicides is reduced.[42]

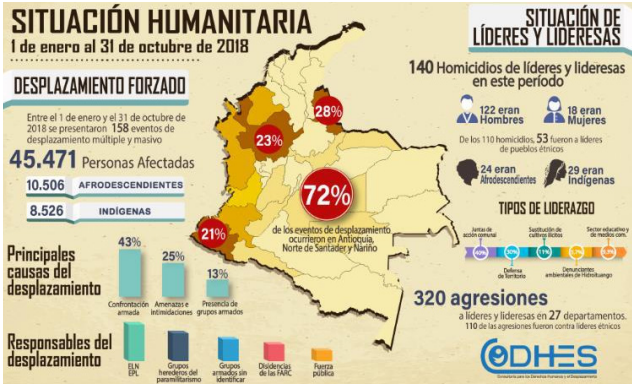

Figure 1 Humanitarian situation.

The thesis of consensus on forced displacement in Colombia

In general, the humanitarian situation of displacement remains at its previous levels, which means that the unconstitutional situation remains in place. To that end, it is assumed that, given the magnitude of the problem, new avenues of dialogue must be addressed, since formal structural plans will continue to be insufficient. This is necessary because the factual aspect described cannot be solved if there is no awareness of real solutions on the ground, which are favoured on the one hand by those who own the land and must give up their share of land to house displaced persons, even in the face of measures that establish it. The same applies to those who have the capital and must provide employment opportunities and to the State in order to protect the displaced in their prevention, during displacement and at the time of resettlement and reintegration.

On this aspect, consensus implies a new society that must face a new mechanism of dialogue and a multicultural sector that has perhaps not been taken into account. In this sense, it can be observed that the indigenous community has not been a reference point in the dialogues as a special point and furthermore, the victims are still waiting for concrete answers because from there the agreements reached must be made evident (Peace Agreement of 24 November 2016. Point 5).[43]

According to Kaufmann's Model of the Covenant. (Jhon Rawls), is presented through a fictitious entity about how one has to reflect about a free and fair order. It is a matter of obtaining universal rules on the basis of which fictitious legal persons who judge are placed in an original state of nature that is equally fictitious and from there the fundamental rules for the legal community are decided.[44] For example, the universal rules of the principles of displacement noted above rest on a basis that either derives from IHL or from International Human Rights Law (IHRL). All of this would also imply constitutional support in Colombia through Article 93 of the Charter, which supports the concept of the legitimacy of human rights and integrates the inter-American and international vision into the constitutional

[36]Revista Semana . *Who's killing them?* Over 80 social leaders have been killed in the country in the past year: One every three days. What's going on? Edition Bogotá; 2018. Between January and October 31, 2018, 45,471 people have been victims of forced displacement. National consulting center and the codhes. Radiografía de la Infamia (311 Leaders have been assassinated from January 2016 to June 30, 2018). Types of leaders: community, ethnic, peasant, union, social, LGTBI, victims, land restitution, youth, women, environmentalists and miners.
[37]Revista Semana. *Who's killing them? Ob. Cit.*
[38]IDEM
[39]IDEM
[40]National Consulting Center And The Codhes. Ob. Cit.
[41]Revista Semana. *Who's killing them? Ob. Cit.*
[42]IDEM.

[43]Sandoval Mesa Jaime Alberto and Moreno Duran Alvaro. Socio-legal aspects of transitional justice in the peace process in Colombia with the FARC. Compiled article. Book Constitutional Justice for the Post Conflict. USTA Editions. Bogotá D.C. p. 123.
[44]Kaufmann Arthur. Philosophy of Law. Translation Luis Villar Borda. Ana Maria Montoya. Externado de Colombia. Bogotá D.C. 2001. Scribd version. pp. 437–439.

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framework.[45] In this sense, the consensus seeks a new order that can be verified through a special process such as a legislative act or others of a participatory nature (Art. 40 Political Constitution of Colombia of 1991). Another development of the consensus is suggested by Kaufmann on the basis of the Discourse Model (Jürgen Habermas), as a process that is presented in a communicative way. The rules are obtained from the ideal fictitious dialogue situation. Consensus is something thought out.[46] This aspect is relevant in the Colombian case since all the measures and issues warned against are derived from the model of the lack of capacity for dialogue between the State, civil society and the victims of displacement. If we take into account the first peace process in Colombia that was signed in 1955, it only involved a part of the groups in arms and furthermore, these groups did not represent all the conflict situations at the national level but only a part of the problem. However, it was the peace pact of the whole conflict, which was only real for the liberal guerrillas of the eastern plains of Colombia.[47] Furthermore, these dialogue practices were abandoned until 1982, when another process was opened with the FARC, and then the consolidation process was achieved with the M19 in 1990, until the 2016 peace process talks.[48] However, in all of them, the need for dialogue was observed, and only until the last process mentioned, did it address the issue of victims and land, including those of forced displacement.

In other words, consensus, as can be seen in these processes, can serve as a basis through civil society by means of transparent meetings in order to know the full scope of the agreements reached.[49] For example, how can society and the State participate in the solutions for the displaced?

In summary, both the pact and the consensus model require in-depth knowledge of the measures reached in the agreements, their visibility and knowledge of civil society, and they are very useful for achieving this dual path between pact and discourse. Among other things, it must be real, it must not motivate formal solutions but material ones. In this sense, it should be established how civil society can contribute in the field of housing, education, livelihoods, etc.[50]

All of this would imply a base of pacts or consensus of local scope, so that through each situation problem a solution is achieved that leads to fulfilling the principle of integral protection of the displaced, but it is more viable from the local level. If we take into account that the national consensus requires more infrastructure and has also been unsuccessful as seen in the historical analysis of displacement dating back a century in Colombia as described in the first part of this article.

In both cases, consensus is an important indication of truth and correction. In the case of the rule of law (normal case) it is possible to support the validity of the legal order on the consensus of society. In this case, it is inevitable that a new order will inevitably emerge, and it is necessary to arrive at two points which are the object of definition of both truth and correction of the previous system.[51] In this sense, both the implementation measures of the 2016 agreements (Peace Process) on the issue of the victims of displacement allow for the beginning of both the pact and the consensus in the discourse. The above, insofar as it is necessary to provide the basis for the will of civil society, which must really participate in the integration of the displaced, otherwise a solitary task of the state, as has been the case until now, implies little progress as can be seen at present, not only with regard to the prevention of displacement due to fear, which is overwhelming, but also for reintegration and resettlement, which in this case is more than necessary.[52]

Finally, it is necessary to point out that, despite the fact that in many episodes in Colombia the State of Emergency was presented, after multiple political variations we can determine that the Colombian State is sometimes a State of Law, but in others it acts under acts of a State that is not of law. In this case, according to Kaufmann, the criterion of consensus fails.[53] This is due to the fact that in matters of displacement the courts finally arrive at the conclusion of the so-called Unconstitutional State of Things that are not in accordance with the constitution as a good and correct right. On the contrary, it is an incorrect right that does not comply with its measures of effectiveness.[54]

It is also possible to show that at some point a regime could have been produced that was not the rule of law as it was during the Rojas Pinilla dictatorship of 1953-1957 and somehow it could have been understood that the national front or the measures of the Security Statute undermined the law in Colombia and therefore the State.[55] However, what can be deduced is that formally it is a State governed by the rule of law and materially it does not comply with the standards of the social rule of law, including avoiding the problem of displacement. In light of this, we have the problem of a state that is not governed by the rule of law, a situation that places us before a hybrid state, as mentioned at the beginning, since the validity of the law is affected in its material legitimacy.[56] This is because its effects, especially in the case of forced displacement, cannot reside in the will of the legislator or in the consensus of society,[57] since something unjust is accepted as binding law, especially if it is inoperative, as the Constitutional Court recognizes (Ruling T 025 of 2004).

What is certain is that this occurs due to a lack of legitimacy that suggests serious problems such as the lack of prevalence of human rights, of formal legality and only in very few cases, material; of some elements that provide for legal security and the rights of the victims at the level of material justice, but that in practice allow for the unconstitutional state of affairs as in Forced Displacement.[58] In other words, in the face of this value of legitimacy, it could be said

[45]Sandoval Mesa Jaime Alberto, Ob. Cit. 2019. pp. 34 and 35

[46]Kaufmann Arthur. IDEM Page 439

[47]However, the document highlights that it is only signed by members of this group who belong to the eastern plains in the current departments of Arauca, Casanare, part of Cundinamarca and Meta. This corresponds to approximately 30 percent of the country, while the rest continued in the midst of conflict and violence groups, almost until 1962. Minutes of the conference held between the Revolutionary Forces of the Eastern Plains and Dr. José Gneco Mozo, national government delegate for the pacification of El Llano, 19 April 1952. GROUP OF Historical Memory. Basta Ya Report. Chapter II. The origins, dynamics and growth of the Armed Conflict. National Centre of Historical Memory of the Republic of Colombia. Editorial - Department of the Presidency of the Republic - 25 International Cooperating Entities - Swiss Embassy. Second Edition August 2013. First Reprint. Bogotá D.C. Colombia, May 2014. pp. 110–135.

[48]Iturralde Manuel. *Punishment, authoritarian liberalism and exceptional criminal justice*. (First Edition). Bogotá: Siglo del Hombre Editores, Bogotá 2010. p. 62. Historical Memory Group. Basta Ya Report. Cit. p. 110–135.

[49]Kaufmann Arthur. Ob. Cit. pp. 444–446.

[50]IDEM. pp. 444–446.

[51]Kaufmann Arthur. Ob. Cit. pp. 444–446.

[52]Sandoval Mesa Jaime Alberto and Moreno Duran Alvaro. Ob. Cit. Page 123.

[53]Kaufmann Arthur. Ob. Cit. p. 447.

[54]Colombia. Constitutional Court. Decision T. 025 of 22 January 2004. M.P. Manuel José Cepeda.

[55]Sandoval Mesa Jaime Alberto Ob. Cit. 2019. Pages 24 and 25.

[56]Kaufmann arthur. Ob. Cit. p. 447. Sandoval Mesa Jaime Alberto and Moreno Duran Alvaro. Ob. Cit. p. 137–139.

[57]IDEM.

[58]Colombia. Constitutional Court. Decision T. 025 of 22 January 2004. M.P. Manuel José Cepeda.

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that we are dealing with a situation of a weak state in the process of consolidation. The answer can be suggested from the pact or consensus to create channels of local legitimacy, so that all the measures that are always suggested from the local scope have the articulation and execution that in many plans in this sense are asserted. In other words, the means to carry out such effects are lacking.

Conclusion

The Colombian State can be defined as a rule of law with weak legitimacy. In this sense, according to the theory of Arthur Kauffman, there is an indirect non-conscious recognition of the situation of forced displacement and internal and external migration, without currently adopting a state solution. That is, it is a permanent, habitual and lasting behavior, without state mitigation measures, materially accepted by society. Only minimal official containment measures have been adopted in this regard.

Following the recognition of human rights, particularly since the 1991 Constitution in Colombia, the State has been strengthened, perhaps most strongly by the decisions of the Constitutional Court, with the adoption of mechanisms for dialogue between the State and civil society as mechanisms of legitimacy. However, on the issue of migration and forced displacement, there are no instruments of dialogue with civil society to mitigate the effects of the state of affairs that seems unsolvable in the long term.

In accordance with the above, these are not abstract solutions, but operations of concrete dialogue in a society that does not engage in dialogue, since all possible plans would be fruitless if no dialogue tables were proposed for displacement with real alternative solutions that not only involve the State but also the relationship between civil society and the State.

Finally, following Kaufmann, we find ourselves at a time when real consensus is not a criterion of validity for the law but its capacity for consensus. (Gustav Radbruch). To this extent, we do have all the instruments to implement the agreements and the important thing is to achieve their consolidation, with a view to obtaining their approval. This is necessary in order to implement the agreed measures, for example, with regard to land and victims, forced displacement or forced migration, and thus to meet the demands not only of prevention but also of implementation in resettlement and reintegration. It is a foundation that appeals to the will through compromise or consensus, without which all humanitarian assistance measures are repetitive and insufficient. Moreover, all of this eventually allows for enduring and acceptable channels in international consensus. Without the basis for dialogue, there is no solution to the unconstitutional state of affairs of forced displacement, and it must be carried out, rather than ambitious formal plans that would have no chance of implementation.

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Conflicts of interest

The author declares no conflicts of interest.

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