

Summer 2017

## **Vulnerable Insiders: Constitutional Design, International Law and the Victims of Armed Conflict in Colombia**

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### **Recommended Citation**

David Landau, *Vulnerable Insiders: Constitutional Design, International Law and the Victims of Armed Conflict in Colombia*, 57 *VA. J. INT'L L.* 679 (2017),  
Available at: <https://ir.law.fsu.edu/articles/547>

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# Vulnerable Insiders: Constitutional Design, International Law, and the Victims of Internal Armed Conflict in Colombia

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*This article, prepared for a conference on “The External Dimensions of Constitutions” held at the University of Cambridge in September 2016, explains how the Colombian Constitutional Court constructed a set of rights for a group of vulnerable insiders—victims of the country’s long-running internal armed conflict. The Court based its jurisprudence on a 1991 constitutional design that turned towards international law as a way of resolving a severe domestic crisis of violence and legitimacy. The Court has drawn heavily on principles of international human rights law and international humanitarian law to develop a set of protections for Colombia’s massive population of internally displaced persons, as well as to protect the rights of victims to receive adequate access to truth, justice, and reparations during peace processes with illegal armed groups. The Court has generally developed a model of intervention that emphasizes the rights of victims while preserving flexibility for the state in order to avoid disruption of delicate peace processes. It has also successfully drawn on a logic of solidarity that identifies victims as deserving and overlooked recipients of aid by the Colombian state. This very logic may identify a potential limit of the model: a strategy based on solidarity may successfully incorporate overlooked insiders, such as internally displaced persons, but it is unclear whether it will prove as successful with outsiders such as cross-border refugees.*

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## I. INTRODUCTION

Much work has focused on the conditions under which domestic constitutional law will provide international law protections for migrants and other “outsiders.” This article uses the example of the Colombian Constitutional Court to examine an important variation on this trend: the use of these constructs of international law to protect victims of the country’s long-running internal armed conflict.

Part I locates the origin of the internationalization of Colombian constitutional law at the politics of the Constituent Assembly of 1991, and particularly the sense of the President and key members of the Assembly that the country’s international and domestic public image had suffered because of frequent crises of order and the draconian emergency measures intended to restore it. The domestic political class believed restoring the government’s reputation would require an explicit declaration to signal Colombia would now play by the rules of a “good” state. The Constituent Assembly thus passed a series of reforms intended to tether Colombian constitutionalism more strongly to international standards. These included provisions giving international law a high status in the constitutional order and others specifically granting benefits under international law to defined groups, such as the inclusion of a constitutional right to asylum. Colombian constitutionalism thus turned outwards as a way to deal with a series of intractable internal crises.

Part II shows how the Constitutional Court used these provisions to build a muscular set of protections for the country’s massive number of victims of internal armed conflict. The construction of victims of armed conflict as a protected class has been one of the central achievements of the Court and has had significant impact on both public policy and the ongoing peace processes. For example, the Court issued large-scale structural remedies that forced the state to provide more assistance to the country’s large population of internally displaced persons. This remedy drew heavily from international standards and guidelines while incorporating protections traditionally found in Colombian constitutional law. The Court has also drawn heavily from international humanitarian law in constructing the rights of victims to learn the truth about what happened to them, to get justice for crimes committed against them, and to receive reparations, either from wrongdoers or the state itself, for those acts. It has used these standards to shape the peace process, first with paramilitaries, and now with the Revolutionary Armed Forces of Colombia (FARC) guerrilla group, in order to ensure that those processes do not disregard the interests of victims.

In effect, the Court has used a set of international principles to define and protect a population of insiders who have often been rendered invisible by existing public policy. Invocations of international law have helped give

more authority to the Court's project. At the same time, the Court has preferred a relatively flexible approach, which incorporates international law as a fairly ambiguous set of standards. The goal is to require the state to account for vulnerable groups, rather than requiring that it adopt any particular stance with respect to those groups. Such an approach—emphasizing a flexible but robust vision of international law—may be useful for other courts facing crises involving internally-displaced persons or refugees.

Part III explores both the promise and limits of the Colombian Constitutional Court's strategy. It shows that the Court has successfully drawn on a logic of solidarity to increase inclusion rather than exclusion of the vulnerable groups it has sought to aid, and moreover that it has generally used careful and flexible strategies of intervention that have provided important input into the peace process without threatening it. However, it is less clear whether the logic of using international law to protect a vulnerable group of insiders such as internally displaced persons (IDPs) will carry over to true outsiders such as asylum seekers; social and political groups may experience solidarity with the former but not the latter. Indeed, recent Colombian experience offers some support for such a position. Despite the extensive jurisprudence on IDPs, the 1991 Constitution's right of asylum is one of the less developed rights provisions in the text, and overall the Court has developed a relatively deferential analysis to the rights of foreigners. The Court's recent reaction to migration related to the Venezuelan crisis illustrates the ambiguities inherent in seeking to extend IDP jurisprudence to a group of "outsiders." As Part IV concludes, it is thus unclear whether the Colombian approach offers a viable strategy for courts or actors confronting a refugee crisis that crosses national boundaries.

## II. INTERNATIONALIZATION FOR INTERNAL PURPOSES: THE COLOMBIAN CONSTITUTION OF 1991

The dominant ethos of the Constituent Assembly of 1991 was the need to respond to the country's long-running internal armed conflict. The Assembly itself was sparked by a sense of institutional crisis and inability to effect needed changes in order to respond to that crisis: what some analysts called a "blocked society."<sup>1</sup> The inability to change carried with it the cost of increasingly high levels of political and social violence in the country. In 1985, for example, the country's Supreme Court was stormed by a guerrilla group (the M-19), and a military operation to reclaim the building ended in

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<sup>1</sup> See Fernando Cepeda Ulloa, *Colombia: The Governability Crisis*, in CONSTRUCTING DEMOCRATIC GOVERNANCE IN LATIN AMERICA 193, 196–97 (Jorge I. Domínguez & Michael Shifter, eds., 2d ed. 2003).

the death of about half the justices on the Court.<sup>2</sup> In 1989, the Liberal presidential candidate Luis Carlos Galán was assassinated as part of a string of political killings and is viewed as the catalyst for the student movement that would eventually culminate, after several presidential decrees, referendums, and Supreme Court decisions, in the Constituent Assembly.<sup>3</sup>

The Assembly itself was elected through a form of proportional representation that included a large number of different political movements, some of whom were newcomers to the political systems. The Assembly included representatives of several different, demobilized guerrilla groups including the M-19, which represented the second-largest political party in the Assembly.<sup>4</sup> The inclusion of these groups and other traditionally-excluded actors, such as indigenous groups, in addition to the country's traditional parties, was a core part of the Assembly's legitimacy.

In order to deal with the internal conflict prior to the drafting of the 1991 Constitution, Colombian presidents had increasingly turned towards "states of exception," a term used to describe utilizing emergency as the major tool to govern and maintain social order.<sup>5</sup> This state of exception is particularly evident in the instrument found in the 1886 Constitution called the "state of siege," which could be called unilaterally by the president for a broad set of purposes related to public order.<sup>6</sup> Indeed, Colombia lived under a state of exception almost all of the time in the 1970s and 1980s.<sup>7</sup> Using these devices, the president rather than the Congress issued most major pieces of legislation. Presidents also used these advantages to limit or suspend basic rights, such as the right to a civil trial, and to create new crimes related to national security concerns, practices with which the judiciary rarely interfered.<sup>8</sup>

Concern about the state of siege was one of the core issues at the 1991 Constituent Assembly. The device had come to be seen as emblematic of the total failure of the Colombian state to contend with the threat of violence and establish peace.<sup>9</sup> Many delegates to the Assembly, as well as President Cesar Gaviria, argued that the state of siege encouraged repression by allowing executive officials to carry out arbitrary acts in an unrestrained way. At the same time, they argued that the instrument allowed "the worst

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2 See Manuel Jose Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH U GLOBAL STUD L REV 529, 549 (2004)

3 See Cepeda Ulloa, *supra* note 1, at 197

4 See Renata Segura & Ana Maria Bejarano, *¿Ni una asamblea más sin nosotros!* Exclusion, Inclusion, and the Politics of Constitution-Making in the Andes, 11 CONSTELLATIONS 217, 220 tbl 1 (2004)

5 See Rodrigo Uprimny, *The Constitutional Court and Control of Presidential Extraordinary Powers in Colombia*, 10 Democratization 46 (2003)

6 See *id.*

7 See *id.* at 65 tbl 3

8 See *id.* at 51

9 See Antonio Barreto Rozo, LA GENERACION DEL ESTADO DE SITIO: EL JUICIO A LA ANORMALIDAD INSTITUCIONAL EN LA ASAMBLEA NACIONAL CONSTITUYENTE DE 1991 (2011)

of both worlds” because it had proven ineffective—it was used in an increasingly chronic way without any discernible improvement in the security situation.<sup>10</sup> Those around the Assembly were also concerned that the frequent resort to states of exception had worsened the image of the country internationally. In his address opening the Assembly, President Gaviria stated that the state of siege had “harmed the prestige of our democracy.”<sup>11</sup> In a subsequent address, he elaborated on this theme as follows:

While Colombians want to overcome an institutional deficit at all costs, in the exterior it is thought that our state is so weak that we live in a permanent state of martial law. Our democracy is discredited before international opinion by the distorted image of a powerful state of siege.<sup>12</sup>

The government and Assembly’s solution to this problem was to create a greater and more effective set of regulations on the use of states of exception.<sup>13</sup> They were maintained in the new constitutional text—the crisis of public order that spurred the calling of the Constituent Assembly virtually guaranteed that this would be the case. But the Assembly sought to rejuvenate ordinary institutions like the Congress in order to make the invocation of emergency powers less frequent. The thought was that many situations previously dealt with by the executive calling a state of exception could now be dealt with by ordinary powers. Moreover, it created a number of new limitations and regulations on the states of emergency found in the new constitutional text, particularly the “state of internal commotion” designed to deal with threats related to the internal armed conflict.<sup>14</sup>

The richest set of new limitations were those that tied Colombian constitutional law to international legal standards, particularly during states of exception. One revised constitutional article states that norms of international humanitarian law must be observed “in all cases” during states of exception.<sup>15</sup> The Colombian Constitutional Court since 1991 has been vigilant in policing the boundaries of states of exception, and thus the percentage of the time that the Court is under a state of exception decreased

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<sup>10</sup> See Speech of the President of the Republic, Doctor Cesar Gaviria Trujillo, at the Installation of the National Constituent Assembly, Feb 5, 1991, in MANUEL JOSE CEPEDA, INTRODUCCION A LA CONSTITUCION DE 1991: HACIA UN NUEVO CONSTITUCIONALISMO 313, 324 (1993)

<sup>11</sup> *Id.*

<sup>12</sup> See Speech of the President of the Republic, Doctor Cesar Gaviria Trujillo, before the “General Santander” School of Police Cadets, May 16, 1991, in *id.* at 425, 426

<sup>13</sup> See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C P ] arts 212–15

<sup>14</sup> See *id.* art 213

<sup>15</sup> See *id.* art 214, cl 2

very sharply after 1991.<sup>16</sup> No state of internal commotion has been successfully invoked since 2002.<sup>17</sup> Thus, the 1991 constitution changed the way the country governed itself during periods of crisis and conflict, making legal states of exception far less frequent.

Beyond the key issue of states of exception, much of the 1991 Constitution adopted an orientation that was designed to achieve peace and to make the Colombian state's actions more consistent with those of supposedly "normal" democracies. The new Constitution establishes peace as both a right and a duty.<sup>18</sup> Constitutional designers also created a much more extensive set of constitutional rights than those that had been found in the Constitution of 1886. For example, the new constitution included references to human dignity, such as those found in the German Basic Law, and a long list of socioeconomic rights.<sup>19</sup>

Additionally, the designers created a new, and quite powerful, Constitutional Court charged exclusively with protecting the Constitution. It maintained an existing instrument called the public action, which allowed any citizen to challenge any law in front of the Constitutional Court at any time on abstract review.<sup>20</sup> It also gave citizens the ability to rapidly and easily challenge the actions of governmental (and, in limited instances, non-governmental) actors that violated constitutional rights by filing a form of individual complaint called the *tutela*. Citizens can file *tutelas* without the assistance of a lawyer, and the designers mandated that judicial decisions had to be made within ten days of filing at each level of the judiciary.<sup>21</sup> Furthermore, the new constitution created a large number of non-judicial "checking" institutions to monitor and correct the actions of state officials. Some of these institutions, such as the *Defensoria del Pueblo* (or National Ombudsperson) and *Procuraduria General de la Nacion* (or National Inspector General) were charged specifically with the protection of human rights.<sup>22</sup>

The constitution also explicitly reframed the relationship between domestic and international law, giving international human rights law a status essentially equal to—and in some cases above—the 1991 Constitution itself. Article 93 provides that the constitution must be interpreted in light of international human rights treaties ratified by Colombia, and furthermore that "international treaties and agreements

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16 See Uprimny, *supra* note 5, at 65 tbl 3 (showing that Colombia was under a state of exception 82 percent of the time between 1970 and 1991 but only 17.5 percent of the time between 1991 and 2002)

17 See Corte Constitucional [C.C.] [Constitutional Court], octubre 12, 2002, Sentencia C-802/02 (upholding a state of internal commotion declared shortly after President Alvaro Uribe's inauguration)

18 See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 22 ("Peace is a right and a duty whose compliance is mandatory.")

19 See *id.* arts. 1 (dignity), 42–77 (socioeconomic rights), 79–82 (environmental rights)

20 See *id.* art. 241(4)

21 See *id.* art. 86

22 See *id.* art. 277, cl. 2 (National Inspector General); art. 282 (National Ombudsperson)



ratified by Congress that recognize human rights and prohibit their limitation in states of emergency shall prevail domestically.”<sup>23</sup> This latter provision again demonstrates the centrality of states of exception to the 1991 Constitution, and the overriding desire of constitutional designers to ensure that government actions during emergencies complied with core international standards.

Article 93 can be read as part of a broader global tradition within comparative constitutional law which relies upon international law to interpret domestic law.<sup>24</sup> Countries place these provisions in their constitutional orders for a variety of reasons. But, their particular salience in Colombia was tied to concerns about the problematic actions of the Colombian state during the internal armed conflict, especially during states of exception. Article 93 served as a signal to both the Colombian population and the rest of the world that Colombia would move from being seen as a troubled, violent, and repressive democracy to being a country that embraced regional and international norms.

Based largely on article 93, the Colombian Constitutional Court has created the concept of a “constitutional block.”<sup>25</sup> Under this concept as interpreted by the Court, the constitution includes not only domestic provisions, but also core provisions of international human rights law and international humanitarian law (both treaty and custom-based).<sup>26</sup> The Court has used these provisions to limit emergency decrees and legislation dealing with problems of public order during periods of normality and states of emergency. The constitutional block “in a broad sense” includes provisions of international human rights treaties ratified by Colombia, as well as certain other international law instruments and pieces of legislation. These provisions must be considered when interpreting the 1991 Constitution.<sup>27</sup> The constitutional block “in a strict sense” consists of those provisions of international human rights treaties that cannot be derogated or limited during states of exception; these provisions actually have a supra-constitutional status because they “prevail” over all other elements of the Colombian legal order.<sup>28</sup>

The interpretations of human rights treaties by authorized interpreters like the Inter-American Court of Human Rights or the commissions set up

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<sup>23</sup> See *id.* art. 93

<sup>24</sup> See generally Vicki C. Jackson, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010)

<sup>25</sup> See Carlos Bernal Pulido, *Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine*, 11 *Int'l J. Const. L.* 339, 343 (2013)

<sup>26</sup> See *id.*

<sup>27</sup> See, e.g., Monica Arango Olaya, *El Bloque de Constitucionalidad en la jurisprudencia de la Corte Constitucional Colombiana*, PRECEDENTE 2004, at 79, 85, available at <http://www.icesi.edu.co/contenido/pdfs/C1C-marango-bloque.pdf>

<sup>28</sup> See *id.* at 84

under regional or international instruments are not formally part of the constitutional block, but the Court has held that they are entitled to great weight as interpretive aids for the meaning of international law.<sup>29</sup> The Court also regularly has referred to “soft law” instruments such as guidelines or declarations, again as an interpretive aid.<sup>30</sup> Finally, the Court has routinely referred to customary international law as well as treaty-based law, particularly when drawing out the implications of international humanitarian law.<sup>31</sup> In short, the Colombian Constitutional Court has used article 93 and other constitutional provisions as the foundation for a highly internationalized constitutional jurisprudence.

Finally, the Colombian Constitution of 1991 includes a fairly generous set of rights for outsiders. Perhaps most striking among these is article 36, providing that, “the right to asylum is recognized within the limits provided by law.”<sup>32</sup> This provision is bolstered by others which give aliens access to the same civil, but not political, rights as Colombian citizens<sup>33</sup> and protects them from extradition for political reasons.<sup>34</sup> The older 1886 Constitution was not silent on the rights of aliens—it contained a provision generally entitling them to equality in civil rights<sup>35</sup>—but the new text is considerably more expansive. In part, the Assembly reflected a broader regional tradition of recognizing the rights of aliens within Latin America by passing the provision. The right and practice of asylum have a long and sometimes troubled history within Colombia<sup>36</sup> and in Latin America more generally. Commentators have noted the phenomenon is distinct from the rights of refugees, although closely related.<sup>37</sup> The Assembly’s decisions here too

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29 *See, e.g.*, Corte Constitucional [C.C.] [Constitutional Court], agosto 5, 2010, T-616/10, § II 2.2.4 (“[T]he observations and recommendations offered by the organs authorized to interpret international human rights treaties ratified by Colombia are relevant for clarifying the normative content of their dispositions and the meaning of the fundamental rights consecrated in the Constitution. Even though these documents are not automatically incorporated into the constitutional block, they do constitute a relevant hermeneutic criterion and a limit for the legislator.”)

30 A prominent relevant example is Decision T-025/04, which declared a state of unconstitutional conditions for internal forced displacement and referred extensively to the Guiding Principles on Internal Displacement produced by the United Nations Higher Commissioner for Refugees (UNHCR). Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04. This decision and its incorporation of international law are considered in more detail in Part III A *infra*.

31 *See, e.g.*, Corte Constitucional [C.C.] [Constitutional Court], abril 25, 2007, Sentencia C-291/07 (considering the constitutionality of a number of criminal law provisions bearing on the internal armed conflict).

32 CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 36

33 *See id.* art. 35

34 *See id.* art. 100

35 CONSTITUCIÓN POLÍTICA DE COLOMBIA DE 1886 art. 11

36 *See, e.g.*, Asylum Case (Colom. v. Peru), Judgment, 1950 I.C.J. Rep. 6 (holding that Peru did not have to recognize a grant of political asylum offered by the Colombian ambassador in Peru to a Peruvian politician).

37 *See, e.g.*, Discussion Document UNHCR November 2004, *The Refugee Situation in Latin America: Protection and Solutions Based on the Pragmatic Approach of the Cartagena Declaration on Refugees of 1984*, 18

seemed to respond to an increased desire to make Colombian constitutional law line up better with international legal standards. Yet the trajectory of these rights, as explained below, has been somewhat different than those aimed at internal actors. Despite the right of asylum's expansion in the 1991 Constitution, it remains to be one of the less developed rights in the 1991 Constitution.

### III. THE JUDICIAL CONSTRUCTION OF RIGHTS FOR THE VICTIMS OF INTERNAL ARMED CONFLICT

In the Constitutional Court's hands, these provisions have had a significant impact on the shape of the internal armed conflict. As noted above, for example, the Court has used the 1991 Constitution to exercise much greater control over states of exception and the exercise of executive power more generally. For our purposes, the key development is the way that the Court used the "internationalized" orientation of the 1991 Colombian constitution to build up a body of law to protect victims of the internal conflict. Before the Court began acting in this area, Colombian public policy largely lacked provisions to aid these victims, identify them, or account for their interests. Colombian politics often treated actors affected by the conflict as invisible. The Court's main achievement, in this sense, has been to inject a discourse about the rights of victims into the political sphere.

#### *A. The Rights of Internally Displaced Persons*

One of the most important lines of Constitutional Court jurisprudence was aimed at constructing a set of protections for internally displaced persons (IDPs). The UN High Commissioner for Refugees (UNHCR) found that Colombia had 6.9 million IDPs at the end of 2015 (out of a total national population of less than fifty million). This is the highest number of IDPs in the world, exceeding even extremely troubled countries like Iraq and Syria.<sup>38</sup> These IDPs have been displaced over many years by both left-wing guerrillas and right-wing paramilitaries. Many have been displaced

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INT'L J. REFUGEE L. 252, 257 n. 15 (2006). Several other countries in the region have either a right to asylum or mention the practice of asylum as a guiding principle of international relations. The constitution of Honduras creates a right to asylum, *see* CONSTITUCIÓN POLÍTICA DE 1982 art. 101 (Hond.) ("Honduras recognizes the right of asylum in the form and conditions established by law"), while the constitution of Costa Rica states that the country shall be an "asylum" for anyone persecuted for political reasons, *see* CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA, art. 31, and the Constitution of Brazil states "the concession of asylum" as a governing principle of the country's foreign relations, *see* CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] art. 4 (Braz.). Both the Honduran and Costa Rican constitutions also include a non-refoulement principle—individuals cannot be sent back to a country where their lives would be in danger.

38 UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), GLOBAL TRENDS: FORCED DISPLACEMENT IN 2015, 57 *tbl* 1 (2016), *available at* <http://www.unhcr.org/576408cd7>

from rural areas and ended up living in precarious conditions in Colombia's largest cities. The causes of internal displacement are complex and often rooted in both politics and economics, but the underlying causes usually stem from "illegal armed groups and their actions against civilians."<sup>39</sup> Colombia also has a net outflow of refugees to other countries, although the scope of this population is considerably smaller than the massive number of IDPs.<sup>40</sup> The internal displacement problem in Colombia has thus been called "one of the worst humanitarian crises in the world."<sup>41</sup>

The size of this population was already very large in the late 1990s and early 2000s, but there was at that time no coherent state policy to attend to the IDPs.<sup>42</sup> The Court began deciding a large number of *tutelas* filed by individuals or small groups of IDPs, often represented by NGOs.<sup>43</sup> In 2004, after deciding a number of these *tutelas*, the Court declared a state of unconstitutional conditions.<sup>44</sup> This declaration was based on the Court's conclusion that the population affected by displacement was very large—far too large to aid through individual orders—and that the problems affecting that population were structural in nature, stemming from deficiencies in both the budgetary resources and bureaucratic capacity of the state.<sup>45</sup> As a result of this declaration, the Court maintained jurisdiction over the case and issued sweeping structural orders demanding that the state resolve a confluence of problems involving IDPs, including their access to emergency aid, housing, healthcare, job training, and other basic social rights, as well as reparations for their losses and a possible right of return.<sup>46</sup> Subsequently, it has held regular public hearings, commissioned reports on compliance from the administration and other state and non-state actors, and issued a huge number of follow-up orders on many aspects of this massive social

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39 Ana Maria Ibañez & Carlos Eduardo Velez, *Civil Conflict and Forced Migration: The Micro Determinants and Welfare Losses of Displacement in Colombia*, 36 *WORLD DEV.* 659, 661 (2008)

40 See UNHCR, *supra* note 38, at 57 tbl 1

41 Manuel Jose Cepeda Espinosa, *The Constitutional Protection of IDPs in Colombia*, in *JUDICIAL PROTECTION OF INTERNALLY DISPLACED PERSONS: THE COLOMBIAN EXPERIENCE* 1, 5 (Rodolfo Arango Rivadeneira, ed., 2009), available at [https://www.brookings.edu/wp-content/uploads/2016/06/11\\_judicial\\_protection\\_arango.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/11_judicial_protection_arango.pdf)

42 A law was passed giving various rights to IDPs (Law 387 of 1997), but this law was not being effectively implemented. *See id.* at 7. The Court's decision emphasized the state's ultimate accountability for IDPs even if it was not the sole cause of the problem. In this sense, the opinion sounds in broader notions of state accountability even for non-state action, which as Teitel notes is a common feature of constitutionalism during transitional justice. *See* Rudi G. Teitel, *Transitional Justice and the Transformation of Constitutionalism*, in *GLOBALIZING TRANSITIONAL JUSTICE: CONTEMPORARY ESSAYS* 181, 191–96 (2016)

43 *See* Cepeda Espinosa, *supra* note 41, at 9 (noting that the Court had reviewed over 100 individual *tutelas* involving IDPs by 2004)

44 *See* Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04, § III 7

45 *See id.*

46 *See id.* § III 10 1

problem.<sup>47</sup> These orders have not overcome the existence of a large-scale structural problem with IDPs, but they have ensured a substantial and more coherent response by the state. The state now maintains a relatively functional process by which IDPs can register with the state, and those on the list receive a range of social benefits.<sup>48</sup> The Court's orders led to a much larger budget for IDP assistance and a larger, more coordinated bureaucracy.<sup>49</sup>

This case has been extensively analyzed by scholars, largely as an example of the potential of a structural remedy for widespread social rights violations.<sup>50</sup> Even if the order has not been successful in all its aspirations, scholars have viewed it as exercising a transformative impact on public policy towards IDPs.<sup>51</sup> As noted by Rodríguez Garavito, the overarching remedial approach has been robust but flexible.<sup>52</sup> That is, the Court has undertaken a labor-intensive monitoring process through reports and hearings, and has used follow-up orders to adjust the meaning of compliance through time. At the same time, the overall shape of the remedy is dialogic; the shape of public policy on IDPs has not been imposed by the Court but rather has emerged in discussions between the Court, the state bureaucracy, civil society groups, and independent state checking institutions.<sup>53</sup> In other words, the chief role of the Court has been to use mechanisms to ensure that the state was taking adequate account of different problems faced by the IDP population as a whole or of its subgroups, thus pressuring the state to provide solutions through a process of dialogue.

It is worth emphasizing the way that the Court carefully constructed and relied upon international law in its jurisprudence. The decision declaring a state of unconstitutional conditions contained an extensive discussion of international law, particularly the Guiding Principles for the treatment of

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47 See César Rodríguez Garavito & Diana Rodríguez-Franco, RADICAL DEPRIVATION ON TRIAL: THE IMPACT OF JUDICIAL ACTIVISM ON SOCIOECONOMIC RIGHTS IN THE GLOBAL SOUTH 41–42 (2015) (describing the monitoring process in detail)

48 See *id.* at 36

49 See *id.* at 53 (pointing out a large budgetary increase since T-025); Cepeda-Espinosa, *supra* note 41, at 36–37

50 See, e.g., Cesar Rodríguez Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEX L REV 1669 (2011) (suggesting that monitoring mechanisms were the key to the success of socioeconomic rights remedies); David Landau, *The Reality of Social Rights Enforcement*, 53 HARV INT'L L J 189 (2012) (arguing that the decision represents a structural strategy for social rights enforcement that is likely to be superior to other approaches at reaching the poor); KATHARINE G YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS 196–97 (2012) (exploring the T-025 as part of a “managerial” and “peremptory” conception of role)

51 See Rodríguez-Garavito & Rodríguez-Franco, *supra* note 47 (arguing that the decision had a wide range of material and symbolic effects)

52 See Rodríguez Garavito, *supra* note 50, at 16 (arguing that the Court's approach was consistent with dialogic forms of judicial review)

53 See *id.* (noting that the implementation process for T-025 “set broad goals and clear implementation paths through deadlines and progress reports, while leaving substantive decisions and detailed outcomes to government agencies”)

IDPs that were produced by the UNHCR.<sup>54</sup> These guidelines are a version of international “soft law” without directly binding effect. However, the Court used them as its key source for the establishment of international standards protecting the population. The guidelines helped establish the list of rights to which IDPs would be entitled across different areas, including protection from displacement, protection and humanitarian assistance while displaced, and reparations, return, and resettlement.<sup>55</sup> Both the Court’s initial orders and follow-up orders relied heavily on the Guidelines as a template for defining the different areas in which judicial involvement was necessary.

The monitoring process for the IDP decision has also featured substantial international involvement. The UNHCR has regularly produced reports for the Court, disseminated information about the judgment and its follow-up orders, and rendered assistance to IDPs.<sup>56</sup> Moreover, its ex-representative in Colombia has served as a member of the civil society Monitoring Commission (along with domestic civil society groups and former members of the Court) that has played a major role in developing policy proposals and monitoring compliance with the judgment. In the monitoring process, as Guzman Duque shows, the Guiding Principles have played not only a legal role as a source of authority but also a political role as a basis for organizing and presenting claims and duties: civil society groups representing IDPs have framed claims in their terms, and both the state bureaucracy implementing judicial orders and institutions charged with monitoring compliance have organized and evaluated implementation through its lens.<sup>57</sup> In effect, the Guiding Principles filled a normative vacuum. In the absence of clear domestic standards for IDPs, the Guiding Principles have allowed both the Court and a range of other actors to point towards a source of relatively detailed guidance.

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54 See UNCHR, Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2, 11 February 1998. T-025 was not the first time the Court has relied on the Guidelines. In prior *tutelas* involving IDPs, it had already stated that the Guidelines should be used as parameters for interpreting and implementing constitutional rights. See Federico Guzmán Duque, *The Guiding Principles on Internal Displacement: Judicial Incorporation and Subsequent Application in Colombia*, in JUDICIAL PROTECTION OF INTERNALLY DISPLACED PERSONS: THE COLOMBIAN EXPERIENCE 175, 177–82 (Rodolfo Arango Rivadeneira, ed., 2009), available at [https://www.brookings.edu/wp-content/uploads/2016/06/11\\_judicial\\_protection\\_arango.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/11_judicial_protection_arango.pdf). The Guidelines were also included as an appendix to the Court’s decision. See Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04, annex 3.

55 See Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04, § 5.2.

56 See, e.g., Rodríguez Garavito & Rodríguez Franco, *supra* note 47, at 114 (giving an example of the involvement of the UNHCR in the monitoring process).

57 See Guzman Duque, *supra* note 54, at 191–96; 198–201.

*B. The Rights of Victims of Internal Armed Conflict During the Peace Process*

The ongoing peace process in Colombia has also been heavily influenced by the discourse of victims as a protected class under international law. Perhaps unusually, the peace process has been undertaken within the framework of the existing 1991 Constitution through laws and amendments to its text, rather than via construction of a wholly new constitutional document.<sup>58</sup> This has given the Court the opportunity to use existing interpretations of constitutional provisions, such as article 93, to shape the process. It has also raised an important conundrum that the Court has usually managed skillfully—how to insist the rights of victims are adequately accounted for during the peace process without making the 1991 Constitution too rigid a text to play a transitional justice role.

From its early decisions, the Court made clear that it would enforce article 93 in order to ensure that legal frameworks for waging the internal armed conflict were compliant with international humanitarian law.<sup>59</sup> This has given the Court tools to shape the peace process to account for the interests of victims. The Court has emphasized the constitutional importance of peace, which was one of the driving motives behind the writing of the 1991 Constitution and is enshrined as both a right and a duty in the text.<sup>60</sup> It has explicitly endorsed a framework of transitional justice, holding that the cause of ending the conflict justifies concessions to illegal armed groups and the use of a broad flexible set of tools, beyond an exclusive focus on criminal justice.<sup>61</sup> But it has also held that peace agreements must not ignore victims' rights. For example, it has insisted that combatants who have committed certain classes of serious crimes may not escape justice entirely, and it has also emphasized the rights of victims to receive the truth about the crimes committed against them and reparations for those wrongs, paid either by the violators or the state.

In 2005, the government passed the Law of Justice and Peace, which created a demobilization process for paramilitary groups and offered them significant reductions in criminal penalties in exchange for the group's demobilization and disarmament.<sup>62</sup> Any reduction in penalties were

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58 See Rudi G. Teitel, *TRANSITIONAL JUSTICE* 197–201 (2000).

59 See, e.g., Corte Constitucional [C.C.] [Constitutional Court], mayo 18, 1995, Sentencia C-225/95 §II 12 (upholding the ratification by Colombia of Protocol II to the Geneva Convention on internal armed conflict, and emphasizing the importance of article 93 in “harmonizing” international law with principles of constitutional supremacy); Corte Constitucional [C.C.] [Constitutional Court], abril 25, 2007, Sentencia C-291/07 (striking down some provisions of domestic criminal law relevant to the internal armed conflict on the grounds that they were inconsistent with international humanitarian law).

60 See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 22.

61 See Teitel, *supra* note 58 (arguing that accounts of transitional justice should move beyond simply prioritizing individual accountability through criminal law).

62 See L. 975/05, julio 25, 2005, DIARIO OFICIAL [D.O.], available at [http://www.secretariasenado.gov.co/senado/basedoc/ley\\_0975\\_2005.html](http://www.secretariasenado.gov.co/senado/basedoc/ley_0975_2005.html)

contingent on a full confession by the paramilitary actor as to all crimes for which he was responsible, and full cooperation with the process of finding the truth of unresolved atrocities committed by these groups.<sup>63</sup> For even the most serious offenses, violators would serve only between five and eight years in prison, and some of this time—such as time spent in special demobilized zones—could be counted towards the penalty.<sup>64</sup> While many commentators saw the law as a step towards peace, others criticized it as allowing war criminals to evade justice.<sup>65</sup>

The Court upheld the basic core of the law but struck down some provisions and imposed conditions on other aspects of it.<sup>66</sup> The Court's decision barred the state from granting amnesty for certain serious crimes under international law and reiterated that any benefit given should respect the rights of victims to pursue truth, justice, and reparations.<sup>67</sup> The Court also struck down the provisions allowing time in demobilized zones to be counted as criminal punishment, and imposed conditions requiring that both the state and the paramilitaries put forth greater resources to ensure reparations for victims of the conflict.<sup>68</sup> Thus, the Court allowed the state to negotiate with illegal armed groups in service of the constitutional value of peace, but regulated the nature and extent of concessions made towards these groups, consistent with their understanding of international law.

Similar concepts have played a role in the more recent negotiation of peace with the FARC and other left-wing guerrilla groups. To facilitate peace talks that were just beginning in 2012, the government passed the Legal Framework for Peace as a set of temporary constitutional articles intended to facilitate the peace process.<sup>69</sup> The Legal Framework for Peace empowered the Congress to adopt a special law that would give concessions in the criminal punishments given to members of illegal armed groups who entered into peace agreements. The law would:

...determine selection criteria that will permit the concentration of resources of criminal investigation on the *top-level* actors responsible for all the crimes constituting crimes against humanity, genocide, or

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<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> See, e.g., *Debate: Esta fracasando la Ley de Justicia y Paz?*, SEMANA (July 28, 2007), <http://www.semana.com/nacion/articulo/esta-fracasando-ley-justicia-paz/87297-3>

<sup>66</sup> See Corte Constitucional [C C] [Constitutional Court], mayo 18, 2006, Sentencia C-370/06

<sup>67</sup> See *id.* § 4 4

<sup>68</sup> See *id.* § 6 2 3 3 (time spent in demobilized zones); § 6 2 4 (reparations)

<sup>69</sup> See L. 1/12, julio 31, 2012, DIARIO OFICIAL [D O] available at <http://wsp.presidencia.gov.co/Normativa/actos-legislativos/Documents/2012/ACTO%20LEGISLATIVO%20N%C2%B0%2001%20DEL%2031%20DE%20JULIO%20DE%202012.pdf>; Acuerdo Final para la terminación del conflicto y la construcción de una paz estable y duradera, Nov 24, 2016, available at <https://www.mesadeconversaciones.com.co/sites/default/files/24-1480106030-11-1480106030-2016nuevoacuerdofinal-1480106030.pdf>



war crimes committed in a *systematic manner*; establish the cases, requisites, and conditions in which punishments may be suspended, establish the cases in which extrajudicial sanctions, alternative punishments, or special modes of executing or complying with punishments may be applied; and authorize the conditional renunciation of criminal justice in *all* of the non-selected cases...<sup>70</sup>

The amendment also set up other instruments of transitional justice by calling for a Truth and Reconciliation Commission that would work on non-criminal forms of justice. Petitioners challenged the italicized language in the amendment, arguing that it violated fundamental precepts of international humanitarian and human rights law by allowing prosecutors to ignore crimes other than those conducted by “top-level” actors and which were not conducted in a “systematic manner.”<sup>71</sup>

The Court’s decision reviewing the Legal Framework for Peace is striking because it was conducted as a review of constitutional amendments, not ordinary legislation. The Court thus used a super-strong form of judicial review that it had previously developed to hold some constitutional amendments unconstitutional.<sup>72</sup> Under the Court’s substitution of the constitutional doctrine, proposed constitutional changes can themselves be unconstitutional if they would replace fundamental principles of the existing constitution.<sup>73</sup> This decision was recognized by both the Court and the political branches as one of extraordinary importance. For example, during the Court’s public audience reviewing the law, President Juan Manuel Santos himself came to the Court to plead for the law’s constitutionality. In his words, the moment represented “a real possibility, in my opinion the best in our history, to put an end to the internal armed conflict.”<sup>74</sup>

The Court upheld the Legal Framework for Peace, but it also imposed a set of significant conditions on its implementation. The Court’s ruling emphasized the flexible nature of international law during a regime of transitional justice. At the same time, it held that through article 93, certain

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70 L. 1/12, julio 31, 2012, art. 1, DIARIO OFICIAL [D.O.] (emphasis added)

71 See Corte Constitucional [C.C.] [Constitutional Court], agosto 28, 2013, Sentencia C-579/13

72 This doctrine is not unique to Colombia, but in fact exists in a number of countries found in regions around the world. See Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657 (2013)

73 Only a Constituent Assembly, wielding its original constituent power to replace the 1991 Constitution, is empowered to make changes of that magnitude. See Bernal Pulido, *supra* note 26, at 341–46 (describing the historical development of the doctrine); Rosalind Dixon and David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 INT’L J. CONST. L. 606, 615–18 (2015) (explaining the utility of the doctrine in stopping President Alvaro Uribe from seeking a third consecutive term in office)

74 Juan Manuel Santos, Intervención del Presidente Juan Manuel Santos en la Audiencia Pública del Marco Jurídico para la Paz, July 25, 2013, available at [http://wsp.presidencia.gov.co/Prensa/2013/Julio/Paginas/20130725\\_03-Palabras-Intervencion-Presidente-Juan-Manuel-Santos-Audiencia-Publica-Marco-Juridico-para-la-Paz.aspx](http://wsp.presidencia.gov.co/Prensa/2013/Julio/Paginas/20130725_03-Palabras-Intervencion-Presidente-Juan-Manuel-Santos-Audiencia-Publica-Marco-Juridico-para-la-Paz.aspx)

core protections of international humanitarian law and international human rights law not only were incorporated into the Constitution but also constituted fundamental principles of the constitutional order that could not be altered even by a constitutional amendment. The Court in particular derived a “fundamental pillar” of the Constitution—“the promise...to respect, protect, and guarantee the rights of society and of victims, from which is derived: the obligation to investigate, judge, and in turn sanction grave violations of human rights and international humanitarian law.”<sup>75</sup>

The Court allowed a system of prioritization on “top-level actors” committing the most serious crimes under international law, even if this meant that some lower-level actors complicit in these crimes would likely not be prosecuted.<sup>76</sup> It also endorsed the amendment’s multifaceted focus on a number of tools of transitional justice, including not only criminal law but also tools like a truth and reconciliation commission, and it gave the state broad discretion to choose the quantity and mode of any criminal punishment applied.<sup>77</sup> However, the Court required increased transparency for decisions made to prioritize certain crimes and actors and required that victims have avenues to challenge those decisions.<sup>78</sup> It also demanded that the perpetrators of crimes make a full recounting of their circumstances and the nature of their crimes, that the state provide sufficient resources to carry out thorough investigations even with respect to actors where prosecutions are not pursued, and that victims receive reparations from wrongdoers and the state.<sup>79</sup> The decision thus allowed the state to prioritize the tools of criminal justice in a rational manner, but required an emphasis on the rights of victims to truth and reparations in all cases.<sup>80</sup>

The government ultimately chose to pursue peace with the FARC using an approach that built on the Legal Framework for Peace, but also deviated from it in key respects. In June 2016, the government signed a definitive peace agreement with the FARC, and Congress passed a new set of

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75 *See* Corte Constitucional [C.C.] [Constitutional Court], agosto 28, 2013, Sentencia C-579/13, § III 5 4

76 *See id.* § III 8 3 2 iv

77 *See id.* § III 6

78 *See id.* § III 8 4 2

79 *See id.* § III 8 4 3, III 8 4 5–6

80 In a separate decision, the Court considered article 3 of the constitutional reform, which gave the Congress broad powers to delineate offenses as political and thus to avoid imposing as a penalty loss of rights of political participation, with the exception of “crimes against humanity and genocide committed in a systematic manner” where such rights could not be restored. *See* L. 1, julio 31, 2012, art. 3, DIARIO OFICIAL [D.O.] The Court upheld the constitutional amendment against a charge that it substituted the constitution by arguing that international law placed fewer restrictions on rights of political participation than on ordinary criminal justice. *See* Corte Constitucional [C.C.] [Constitutional Court], agosto 6, 2014, Sentencia C-577/14

temporary constitutional amendments facilitating the peace process.<sup>81</sup> These new amendments gave the president special decree powers on issues relating to the peace process, created a special fast-track procedure for the approval of laws and constitutional amendments related to this process, and stated that the peace agreement itself would become part of the “constitutional block” once it was signed and had gone into force.<sup>82</sup>

The drafting and approval of the final peace agreement and its associated constitutional provisions reflected the shaping done by the Constitutional Court and engaged in a kind of dialogue with international law limits noted by the Court. The initial agreement finalized in 2016 was widely seen as conscious of international law but as stretching the limits of the flexibility in a transitional justice framework.<sup>83</sup> For example, it required that members of guerrilla groups who committed the most serious crimes of international law, such as crimes against humanity and grave war crimes, be criminally punished by a Special Jurisdiction for peace; but, it contemplated alternatives to prison involving “effective restriction of freedom” for those convicted, which some argued was “amnesty by another name.”<sup>84</sup>

The initial agreement was narrowly defeated in a referendum, largely because of concerns that it deemphasized the rights of victims and let the worst members of the FARC go unpunished. The president and the FARC then renegotiated the agreement by making modest changes to the text, such as giving the Constitutional Court potential review powers over the special tribunal, broadening the responsibility of higher-ranking officers for the actions of their subordinates, and increasing the requirements on FARC guerrillas to forfeit assets for reparation funds.<sup>85</sup> This Court continues to review aspects of the peace process.<sup>86</sup> For example, in November 2017, the

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81 See L. 1/16, julio 7, 2016, DIARIO OFICIAL [D.O.] available at <http://es.presidencia.gov.co/normativa/normativa/ACTO%20LEGISLATIVO%2001%20DEL%2007%20DE%20JULIO%20DE%202016.pdf>

82 The fast track procedure would be in effect for six months and could be extended for another six months by the president. See *id.* art. 1. The amendment also provided that the agreement would constitute a “special agreement” under international humanitarian law. See *id.*

83 See, e.g., Claret Vargas, *The Peace Agreement in Colombia Matters, and it Could Set an Example for Entrenched Conflicts Elsewhere*, GLOBAL RIGHTS BLOG, Feb. 9, 2016, at <https://dejusticiablog.com/2016/02/09/the-peace-agreement-in-colombia-matters-and-it-could-set-an-example-for-entrenched-conflicts-elsewhere/>

84 See *id.*

85 See *Los puntos clave del nuevo acuerdo de paz con las Farc*, EL PAÍS (Nov. 12, 2016), <http://www.elpais.com.co/elpais/colombia/proceso-paz/noticias/puntos-clave-nuevo-acuerdo-paz-con-farc>

86 Other recent major cases have dealt with constitutional and procedural issues not directly related to the rights of victims. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], mayo 22, 2017, Sentencia C-332/17 (striking down parts of constitutional amendments allowing laws to receive fast-track consideration); Corte Constitucional [C.C.] [Constitutional Court], julio 18, 2016, Sentencia C-379/16 (considering and upholding the core of the law authorizing a referendum to approve the final peace agreement between the government and the FARC)

Court upheld most of the temporary constitutional amendments that created the special peace jurisdiction.<sup>87</sup> However, it imposed some important clarifications, again holding that ex-combatants would lose all of the criminal and political participation benefits of the special system if they did not cooperate fully in the process by, among other things, telling the full truth about their acts and contributing to their reparations after fully disclosing their assets.<sup>88</sup> The Court also struck down parts of the amendment, for example those that would have limited the review of the Court over the special jurisdiction,<sup>89</sup> and those which would have restricted the normal powers of the national Inspector General to intervene in cases in order to protect the rights of victims to situations where he or she was invited by a judge of that jurisdiction.<sup>90</sup>

In short, the Court has used standards found in international law to create a protected class of victims from the country's internal armed conflict and to give them claims not only to socioeconomic goods, but also to reparations for the wrongs done to them and a right to know the truth about those events and to pursue justice against the perpetrators. The Court's strategy in this area has combined two key elements. First, it has relied heavily on the authority of international law. Given the premium the 1991 Constitution placed on recasting Colombia as a "good" democratic state in the world order, it seems likely that these invocations have had significant normative force, and the Court's efforts would have been less successful without them.

Second, the Court's use of international law has been strategic and flexible in nature, and has included an extensive process of translation between the international and the domestic. Although the Court has relied heavily on international law as a source of authority, the process has been richer than a merely passive incorporation of international law. By wrestling with international standards in a serious way, the Court has dialogued not only with the political branches regarding public policy but also with the content of international law itself. At times the Court has given additional force to provisions that were not clearly binding under international law as a way to fill normative gaps and to ensure accountability: the UNHCR Guiding Principles for Internal Forced Displacement offer an example. During the peace process, in contrast, the Court emphasized the flexibility of international legal standards and the fact that they were consistent with a wide range of solutions to the internal armed conflict.<sup>91</sup> The Court's goal, in

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87 Corte Constitucional [C.C.] [Constitutional Court], noviembre 14, 2017, Sentencia C-674/17

88 *See id.*

89 These provisions would have required judges of the special jurisdiction to approve any review of decisions via *tutela* by the Constitutional Court. *See id.*

90 *See id.*

91 *See* Carlos Bernal Pulido, *Transitional Justice within the Framework of a Permanent Constitution: The Case Study for the Legal Framework for Peace in Colombia*, 3 CAMBRIDGE J. COMP. & INT'L L. 1136 (2014)

other words, seems to be to make the political process cognizant of the rights of victims of the conflict, rather than forcing the state to adhere to a particular substantive approach.

#### IV. THE PROMISE AND LIMITS OF THE COURT'S APPROACH

This article argues that the Court used the international law provisions of the Colombian Constitution of 1991 to construct a discourse that protected the victims of internal armed conflict. In so doing, it adopted a stance that was consistent with the overall orientation of the Constitution, which was designed to harness international law as a way to ameliorate a domestic crisis of legitimacy.

It is worth analyzing the Court's rich jurisprudence from three distinct comparative perspectives. The first is the general frame of judicialization of sensitive, politicized issues: judicial interventions in a peace process raises obvious risks. I argue that the Court has usually managed to limit these risks through jurisprudence that is flexible, essentially emphasizing the importance of the rights of victims without putting political actors in a straightjacket. The second frame emphasizes the impact of intervention on the vulnerable group. While aggressive judicial enforcement of the rights of groups could and at times has accentuated a logic of "otherness," for the most part the Court has successfully drawn on a logic of solidarity that has greatly deepened engagement with victim's rights within the political system. However, this very success suggests a limit on the replicability of the Court's approach in situations involving true outsiders such as refugees. The logic of solidarity that justifies the Court's activism may not exist vis-à-vis outsider populations. Indeed, as I show below, the Court's limited and more deferential jurisprudence on outsider groups such as asylum-seekers stands in some contrast to its aggressive protections for the victims of internal armed conflict.

##### *A. Avoiding the Downside of Judicialization*

An obvious potential problem of allowing judicial intervention in something as delicate and highly politicized as the peace process is that it may pose risks to both the institution of the Constitutional Court and the peace process itself. Precisely because the Court has constructed so many tools of intervention in legislation and even constitutional amendments related to the peace process, it poses an unusual threat to the legal stability of that process. Unsurprisingly, then, the scope of intervention in the peace

process played a central role in this year's elections of new magistrates to the Court.<sup>92</sup>

The Court has usually been cognizant of these risks. Its interventions in the Law of Justice and Peace and the Legal Framework for Peace stressed the rights of victims without overruling the basic approach taken by political actors. Its emphasis on flexibility, while maintaining a sense of limits, is an attempt to guide political discourse without placing it in a straightjacket. Bernal notes, for example, that in the Legal Framework for Peace case, the Court made an important change in its jurisprudence on the unconstitutional constitutional amendment doctrine by allowing balancing.<sup>93</sup> It recognized that even major changes to constitutional principles, which might otherwise be struck down, can be permissible if in service of other fundamental constitutional principles such as peace. Moreover, in carrying out this balancing, the Court considered not only the domestic constitution but also the goals of international law in a regime of transitional justice via article 93.<sup>94</sup> In the Law of Peace and Justice case, the Court also explicitly balanced between the rights of victims and the constitutional value of peace.<sup>95</sup>

The Court has also read international law itself as a relatively—although not completely—flexible system.<sup>96</sup> The majority of the Court in the Legal Framework for Peace case, for example, allowed constitutional changes that prioritized criminal justice being wielded against the highest-level actors committing the most serious crimes such as crimes against humanity, war crimes, and genocide, against the dissent's view that would have required such crimes to be prosecuted regardless of an actor's place in the hierarchy or level of responsibility.<sup>97</sup> The majority justified its view in light of the inherently flexible nature of transitional justice, as well as the nature of the conflict in Colombia and resource constraints on enforcement.<sup>98</sup>

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92 See, e.g., *El 10 de mayo el Senado elegirá a dos magistrados de la Corte Constitucional*, EL ESPECTADOR (Apr 18, 2017) at <http://www.elspectador.com/noticias/judicial/senado-le-pone-fecha-eleccion-de-dos-magistrados-de-la-corte-constitucional-articulo-689907>

93 See Pulido, *supra* note 91, at 1153

94 See *id.* at 1152–53

95 See Corte Constitucional [C.C.] [Constitutional Court], mayo 18, 2006 Sentencia C-370/06 § 5

96 In this sense, the majority's approach is consistent with leading theories of transitional justice, which emphasize the need for accountability but maintain a number of different ways for a constitutional and legal orders to achieve these goals, and which emphasize that criminal justice should be understood differently during transitional moments. See Teitel, *supra* note 58

97 See Corte Constitucional [C.C.] [Constitutional Court], agosto 28, 2013 Sentencia C-579/13, Gonzalez Cuervo, J., dissenting (arguing that the provisions violated the “minimum obligation” of states under international law to investigate and punish certain grave violation of human rights and international humanitarian law committed “under any rank”)

98 See Corte Constitucional [C.C.] [Constitutional Court], agosto 28, 2017, Sentencia C-579/13 § 8 3 2 (justifying the amendment as a response to a context where it was impossible to proceed case-by-case as in ordinary criminal justice and where it was important to clarify the underlying “macro-criminal” structure of the crimes)

The Colombian experience thus suggests that judicialization of a peace process may improve outcomes without threatening stability, so long as it is undertaken in a certain way. The key is not the extent of judicialization, but instead the timing and nature of the Court's interventions. One could, of course, question whether the Court has been too flexible, allowing the state to underplay the rights of victims too much. But in this context, the political risks of decisions can be severe.

Take, for example, the Court's 2017 decision striking down parts of temporary constitutional amendments that created a congressional "fast track" procedure to ease passage of new laws and constitutional amendments related to the peace process.<sup>99</sup> It held that parts of this amendment that required provisions to be voted on as a block,<sup>100</sup> without the opportunity for further revision in the absence of executive approval,<sup>101</sup> were unconstitutional because they clashed with core constitutional values related to democratic deliberation. The decision only gave legislative members the ability to make changes to the executive's proposals during congressional deliberations without executive consent, while leaving other aspects of the fast-track procedure intact.<sup>102</sup> For example, fast-track proposals related to the peace process must still receive priority on the congressional floor<sup>103</sup> and can still be approved with reduced procedural requirements.<sup>104</sup>

Nonetheless, the FARC stated that the decision had "put the peace process in the most difficult situation it has lived since its start."<sup>105</sup> Members of the government also denounced the decision and sought its nullification, arguing that it made it more difficult for the government to use a key procedural tool for the implementation of peace. Any piece of legislation or amendment related to the peace process now faced the possibility of unraveling on the congressional floor. The decision thus illustrates the extremely delicate nature of judicial interventions related to peace.

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99 See Corte Constitucional [C.C.] [Constitutional Court], mayo 22, 2017, Sentencia C-332/17

100 See L. 1/16, art. 1(j), julio 7, 2016, DIARIO OFICIAL [D.O.] available at <http://es.presidencia.gov.co/normativa/normativa/ACTO%20LEGISLATIVO%2001%20DEL%2007%20DE%20JULIO%20DE%202016.pdf>

101 See *id.* art. 1(h)

102 In fact, these aspects of the procedure had been upheld in an earlier decision. See Corte Constitucional [C.C.] [Constitutional Court], diciembre 13, 2016, Sentencia C-699/16

103 See *supra* note 100, art. 1(b)

104 For both legislation and constitutional amendments related to the peace process, committee debates can be undertaken in joint session between the House and Senate, while floor debates must be conducted separately. Furthermore, constitutional amendments can be approved in one legislative session rather than the normal two. See *id.* art. 1(d), (f)

105 *Fallo de la Corte sobre acuerdo pone a prueba a mayorías del Congreso*, EL TIEMPO (May 19, 2017), at <http://www.eltiempo.com/politica/congreso/sentencia-de-la-corte-pone-a-las-farc-a-repensar-tiempos-de-la-paz-89872>

B. *Building Solidarity vs. Accentuating “Otherness”*

Another theoretical danger of the Court’s approach is that it could heighten a sense of privileged “otherness” for the particular social groups affected by displacement or otherwise victimized by the conflict. The Court has provided a number of protections, especially economic protections, to these groups. As noted above, the Court has held that IDPs are entitled to emergency economic assistance, as well as a range of other benefits, such as assistance with housing and job placement.<sup>106</sup> It has also held that the broader class of victims of internal armed conflict is entitled to reparations from armed groups or from the state for the harm they faced. Some political actors have hinted at a critique that these actors are receiving unfair advantages over other citizens, frequently with the help of fraud. State actors have at times resisted compliance by claiming that individuals are falsely registering as IDPs or falsely seeking reparations, and the Court has had to monitor these processes to ensure that undue obstacles are not placed on them.<sup>107</sup> In the context of broad scarcity and widespread poverty, there might be some danger that these critiques could stick and lead to backlash against victimized populations.

Over time, however, a more optimistic story based on solidarity has won out. Political actors have increasingly tended to recognize the rights of these groups, effectively incorporating discourses about IDPs and victims into politics. The Court’s main discursive weapon in these disputes, which is seen most clearly in the main IDP decision from 2004, is to identify IDPs and victims as deserving citizens who deserve recognition and support from the state but who have not received it as a result of lack of political will and bureaucratic incompetence. The Court’s decisions in these areas have thus worked in part by rendering invisible (and shameful) failures by the Colombian state more visible. Rodríguez-Garavito and Rodríguez-Franco, for example, argue that the IDP decision led to a significant increase in the quality of press coverage of displacement.<sup>108</sup> Moreover, decisions championing the rights of vulnerable and seemingly deserving groups put the state in a difficult rhetorical position. The state may seek to drag its feet on compliance, of course, but the Court has faced little direct pushback on its goals. Some scholars have argued that the IDP decision itself should be understood as a strategic response to a difficult political context where judicial interventions on more conflictual issues would have threatened the Court as an

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<sup>106</sup> See *supra* Part III A

<sup>107</sup> See, e.g., Corte Constitucional [C.C.] [Constitutional Court], abril 25, 2013, Sentencia SU-254/13 (holding that the state must pay the amount of reparations set in the law to registered IDPs and could not use common excuses to pay the reparations, such as that the registered IDPs may not actually be victims or that reparations should be set off against other payments to IDPs such as emergency economic aid or housing assistance)

<sup>108</sup> See Rodríguez-Garavito & Rodríguez-Franco, *supra* note 47, at 130–35



institution.<sup>109</sup> The Court instead was able to make progress on areas where it could draw on a broad consensus and essentially force the executive's hand.<sup>110</sup>

A key moment of political incorporation of the Court's agenda was the Law of Victims and the Restitution of Land, passed in 2011.<sup>111</sup> The law adopted the Court's framing of those displaced or otherwise affected by the conflict as victims of internal armed conflict who are entitled to extensive protections under international law. Article 3 of the law defines victims as "those persons who individually or collectively have suffered harm for facts occurring after January 1, 1985, as a consequence of violations of international humanitarian law or grave and manifest violations of international human rights, occurring as a result of the internal armed conflict."<sup>112</sup> Many of the provisions of the law tracked the Court's jurisprudence and pulled from international law to inform which benefits should be extended to IDPs. Others have given greater definition to rights that the Court has had difficulty enforcing on its own. For example, the law contemplated special legal processes to adjudicate the return of land that was improperly taken from IDPs, and it set amounts and other procedures to give them reparations from the state for the wrongs that were committed against them during the conflict.<sup>113</sup> The law thus symbolically embraced the Court's framing, although subsequent jurisprudence and struggles have taken place over the scope and implementation of the law.<sup>114</sup>

The upshot, then, is that the Court has been fairly successful at constructing a political discourse of solidarity in which IDPs and other victims have been unfairly deprived of justice by the state. Rather than feeding a sense of otherness, its work has more commonly helped to create a sense of inclusion vis-à-vis these groups.

### C. *A Replicable Strategy? Insiders vs. Outsiders*

The very logic of the Court's success suggests that it may have less success in constructing an agenda focused on groups socially identified as

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<sup>109</sup> See Jorge González-Jácome, *In Defense of Judicial Populism: Lessons from Colombia*, INT'L J. CONST. L., May 3, 2017, at: <http://www.iconnectblog.com/2017/05/in-defense-of-judicial-populism-lessons-from-colombia/>

<sup>110</sup> See *id.*

<sup>111</sup> See L. 1448/11, junio 10, 2011, DIARIO OFICIAL [D.O.] at [http://www.secretariasenado.gov.co/senado/basedoc/ley\\_1448\\_2011.html](http://www.secretariasenado.gov.co/senado/basedoc/ley_1448_2011.html)

<sup>112</sup> *Id.* art. 3

<sup>113</sup> See *id.* arts. 9, 25

<sup>114</sup> See, e.g., Corte Constitucional [C.C.] [Constitutional Court], marzo 28, 2012, Sentencia C-250/12 (upholding the temporal scope of the law as applying only to incidents after 1985 as a permissible exercise in legislative judgment); Corte Constitucional [C.C.] [Constitutional Court], octubre 10, 2012, Sentencia C-781/12 (upholding a provision limiting the law only to victims of "internal armed conflict," but holding that that phrase must be understood in a "broad sense"); Corte Constitucional [C.C.] [Constitutional Court], abril 24, 2013, Sentencia SU-254/13 (clarifying various aspects of the right to reparations created by the law)

“outsiders” rather than “insiders,” such as foreign refugees. The success of the Colombian story stems in part from a solidarity rhetoric: it was difficult for the state to oppose granting rights to Colombian victims of armed conflict. This kind of solidarity with domestic IDPs may be more difficult to achieve with respect to foreign refugees. Using international and domestic constitutional law to call attention to the plight of these groups may thus spark higher levels of active political resistance.

There is some evidence for this distinction within Colombian constitutional law and politics. The Court’s extensive jurisprudence on the rights of victims inside Colombia stands in contrast to its scarcer and more permissive jurisprudence on refugees and others found outside of the country. The constitutional right to asylum, for example, is one of the less developed rights in the Colombian constitution. In those relatively few cases where it has been cited, the Court has given considerable deference to the political branches, although it has held that the right may be protected by *tutela* because it is fundamental in nature.<sup>115</sup>

The Court’s broader jurisprudence on the rights of foreigners in Colombia is also fairly deferential. In Decision C-834 of 2007, for example, the Court considered a challenge to a provision of law that defined the system of social protection as being “the group of public policies oriented to diminishing the vulnerability and improving the quality of life of *Colombians*.”<sup>116</sup> The challengers argued that the italicized phrase should be struck out or rewritten because the welfare system should be read to include foreigners resident in the country in light of article 100 of the Constitution, which gave resident foreigners the same civil rights as Colombians. The Court rejected the challenge. It noted that all people resident in the

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115 See Corte Constitucional [C.C.] [Constitutional Court], agosto 14, 2003, Sentencia T-704/03. The case involved an Iranian who had been caught with a false passport trying to board a flight to Miami, and who claimed political persecution. He was sentenced to an 18-month sentence for using false documents, and to be expelled from the country following that sentence. Towards the end of that criminal sentence (and thus several years after entering the country), the petitioner applied for asylum and was denied, with the authorities both casting doubt on his story and finding that he had applied in an improper manner by waiting several years to make the application. The Court upheld most of the decision taken against the petitioner. It vacated the administrative judgment on the narrow ground that the administrative actors had not made clear to the petitioner that he would have thirty days after that decision to legalize his immigration status (if possible), and that in no case could he be returned to the country—Iran—where he has stated that his life would be in danger (the administrative actors had already stated that they would not return him to Iran in any case). The fairly limited case law on the rights of foreigners to seek asylum or refugee status is broadly consistent with T-704: the Court has adopted a position of substantial but not complete deference. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], abril 4, 2005, Sentencia T-32/05 (rejecting the claim of a Cuban applicant for asylum that he was being denied a right to a vital minimum level of subsistence, instead finding that he should be deported and that there were other countries willing to take him in); Corte Constitucional [C.C.] [Constitutional Court], abril 26, 2017, Sentencia T-250/17 (upholding a decision by Colombian authorities to deny refugee status to a Venezuelan family, although reversing denial of work visa for denial of due process because it lacked adequate reasoning).

116 See Corte Constitucional [C.C.] [Constitutional Court], octubre 10, 2007, Sentencia C-834/07 (emphasis added).

country—whether Colombian or foreign—had a right to receive a “vital minimum” level of subsistence.<sup>117</sup> However, beyond the vital minimum, the Court held that the legislature had a large “margin of configuration” as to how foreigners would be included in existing social safety nets.<sup>118</sup> The Court has likewise been insistent in holding that provisions entitling foreigners to equal enjoyment of civil rights did not prohibit inequalities of treatment, so long as these were the result of “reasonable justification.”<sup>119</sup>

Of course, Colombia historically has been an originating, rather than destination, country for foreign refugees. But the Venezuelan economic and political crisis has changed that dynamic, leading to an influx of more than half a million Venezuelans by the end of 2017, some coming for political reasons, and many more to flee economic catastrophe.<sup>120</sup> The Colombian president has noted that the movement may be “the most serious problem” currently facing the country.<sup>121</sup> The Constitutional Court has begun to decide a large number of cases involving Venezuelan plaintiffs: the recent volume has been sufficient for the president of the Constitutional Court to express “concern” in a public interview.<sup>122</sup> The Court has maintained its line denying foreigners access to many health benefits while requiring that they receive at least a minimum level of services, and perhaps has begun slowly and cautiously building up a more expansive set of rights.

For example, in Decision T-314 of 2016, the Court reiterated that foreigners irregularly present in the country had no right to accede to the national healthcare system.<sup>123</sup> It thus denied a request by a Venezuelan to receive medicine and treatment for diabetes and held that his rights had not been violated because he had received emergency treatment in a hospital. It has also found that requiring Venezuelan children to possess documents

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117 The “vital minimum” refers to the fundamental right to a level of subsistence necessary to live a dignified existence, which has been the centerpiece of the Court’s extensive jurisprudence on socioeconomic rights. For a discussion of the significance of the concept, see DAVID LANDAU, *THE PROMISE OF A MINIMUM CORE APPROACH: THE COLOMBIAN MODEL FOR JUDICIAL REVIEW OF AUSTERITY MEASURES*, IN *ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS* (Aoife Nolan, ed., Cambridge University Press, 2014).

118 See Sentencia C-834/07.

119 See, e.g., Corte Constitucional [C.C.] [Constitutional Court], octubre 9, 2003, Sentencia C-913/03; Corte Constitucional [C.C.] [Constitutional Court], julio 4, 2017, Sentencia C-421/17 (emphasis added).

120 See *Venezuelans Flock to Colombia in Last Half of 2017: Government*, REUTERS, Jan. 19, 2018, at <https://www.reuters.com/article/us-venezuela-colombia-immigration/venezuelans-flock-to-colombia-in-last-half-of-2017-government-idUSKBN1F81Z0>.

121 See Santos: *Éxodo de venezolanos es el problema más serio de Colombia*, EL NACIONAL, Feb. 19, 2018, at [http://www.el-nacional.com/noticias/mundo/santos-exodo-venezolanos-problema-mas-serio-colombia\\_223626](http://www.el-nacional.com/noticias/mundo/santos-exodo-venezolanos-problema-mas-serio-colombia_223626).

122 See *Con tutelas, venezolanos reclaman derecho a la salud*, EL TIEMPO, Feb. 19, 2018, at <http://www.eltiempo.com/justicia/cortes/tutelas-de-venezolanos-para-pedir-proteccion-de-derecho-a-la-salud-184294>.

123 See Corte Constitucional [C.C.] [Constitutional Court], junio 26, 2016, Sentencia T-314/16. See also Corte Constitucional [C.C.] [Constitutional Court], diciembre 16, 2016, Sentencia T-728/16 (denying *tutela* for foreign petitioner seeking to be placed on organ transplant waiting list).

attesting to legal status in order to attend school did not violate the constitution.<sup>124</sup>

However, the Court also recently held that the healthcare system had to both provide prenatal care for an expectant Venezuelan mother and register her child in the system.<sup>125</sup> Furthermore, the Court has protected petitioners in situations where the government put unnecessary barriers in immigration processes,<sup>126</sup> and it has ordered the state to ensure that Venezuelans performing sex work in Colombia should not be deported en masse without adequate consideration of their individual circumstances.<sup>127</sup> The latter decision, which ordered a place of prostitution to be reopened, occasioned harsh critiques that the Court had opened the door to massive migration of Venezuelan sex workers and migrants more generally.<sup>128</sup> Public statements by the Court's president on the Venezuelan crisis have emphasized the need to balance protection of rights with limited resources and the rights of Colombians to receive healthcare and other services.<sup>129</sup>

The point here of course is not to argue that the influx of migrants from Venezuela poses the same problems, or imposes the same constitutional obligations, as Colombian IDPs or victims of the internal armed conflict. It is simply to suggest that the logic of solidarity that the Court has drawn upon in protecting internal victims may be more difficult to construct for the benefit of outsiders.

## V. CONCLUSION

This article has explored the Colombian Constitutional Court's use of the internationalized orientation of the Constitution of 1991 to construct a robust but flexible set of rights for the victims of that country's internal armed conflict. This achievement suggests several questions for comparative research. The first is about constitutional design. A key feature of the Constitution of 1991 is that it turned towards international law—including provisions explicitly pointed towards outsiders, like the right to asylum—chiefly as a vehicle for resolving a crisis of order and legitimacy,

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124 See Corte Constitucional [C.C.] [Constitutional Court], abril 26, 2017, Sentencia T-250/17

125 See Corte Constitucional [C.C.] [Constitutional Court], noviembre 15, 2017, Sentencia SU-677/17

126 See Corte Constitucional [C.C.] [Constitutional Court], julio 4, 2017, Sentencia T-421/17 (holding that the state was forcing a Venezuelan born of a Colombian father to go through "excessive ritual" to verify his status)

127 See Corte Constitucional [C.C.] [Constitutional Court], febrero 6, 2017, Sentencia T-073/17

128 See, e.g., *¿Abrió puerta a migración masiva venezolana fallo de Corte sobre prostitutas de ese país?* EL PULZO, Apr 18, 2017, at <http://www.pulzo.com/nacion/fallo-permite-prostitutas-venezolanas-quedarse-colombia-PP251158> (collecting critiques of the decision from politicians and journalists)

129 See *Con tutelas, venezolanos reclaman derecho a la salud*, El Tiempo, Feb 19, 2018, at <http://www.eltiempo.com/justicia/cortes/tutelas-de-venezolanos-para-pedir-proteccion-de-derecho-a-la-salud-184294>

and an international image crisis, linked to an internal armed conflict. In other words, it turned outwards as a way to resolve an internal problem. Such an orientation does not seem to be unusual, especially in the global south. In South Africa, for example, constitutional drafters turned towards international law as a way to signal a changed state and to help ensure that the abuses of apartheid would not recur;<sup>130</sup> in Mexico, reformers recently created a similar link in part to overcome a domestic human rights crisis linked to worsening violence.<sup>131</sup> Designers may thus turn toward international law and the external aspects of constitutionalism chiefly for domestic reasons, and in these contexts international law may gain an enhanced power as a source of authority.

A second comparative question is about the ways in which the different strategies of courts can improve the political and social response towards vulnerable populations like IDPs and refugees. The Court's approach has been to draw on the authority of international law in a flexible way that forces the state to take account of the victims of internal armed conflict, but which also provides the state with a wide range of options for resolving that conflict. Whether such a strategy would work elsewhere, and whether the result would change if the beneficiaries are more clearly cast as outsiders rather than insiders, is a complex question. It may be possible for courts to use a similar logic for the benefit of foreign migrants even in poor countries, but the conditions under which such a strategy could work may be more stringent. The Colombian case suggests that analysts should look not only at the extent to which a constitution is turned towards the external, providing rights for asylum seekers and other actors, but also the reasons why such a turn has occurred. Moreover, judicial success may depend on legal, political, and social discourses that allow for the construction of solidarity with groups of "outsiders."<sup>132</sup> Further comparative analysis is thus needed to illuminate the extent to which elements of the Colombian constitutional strategy for victims of internal armed conflict are viable in distinct contexts, such as in refugee crises that cross international borders.

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130 See Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U PENN J CONST L 205, 207–08 (1998)

131 See PEDRO SALAZAR UGARTE ET AL., *LA REFORMA CONSTITUCIONAL SOBRE DERECHOS HUMANOS: UNA GUIA CONCEPTUAL* (2014) (explaining the meaning and impact of a constitutional reform that incorporated international human rights law into domestic constitutional law), available at <http://corteidh.or.cr/tablas/r33063.pdf>

132 In South Africa, for example, the Court issued an order extending welfare benefits to permanent residents residing in the country, and drew off of a solidarity logic. It emphasized that permanent resident aliens are "part of the South African community" and pay taxes that fund the welfare programs they were subsequently being denied. See *Khosa and Others v Minister of Social Development and Others*, 2004 (6) SA 505 (CC) at para 74