
Article

Ideals and Realities of Restitution: the Colombian Land Restitution Programme

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Abstract

Colombian Law 1448 of 2011, known as the Victims' Law, addresses the issue of internal displacement and land dispossession caused by the armed conflict. The law aims to help internally displaced people (IDPs) to a better life by restoring their rights to the dispossessed land, to formalize property rights, and to facilitate return. To achieve these aims, the Colombian government has put in place a nationwide programme of land restitution, which involves a comprehensive set of regulations, mechanisms and procedures bringing together a multiplicity of actors. Taking as the point of departure how the Victims' Law envisages the process, we contrast design with preliminary findings on current implementation. We find institutional overload, new conflicts on the ground, and unexpected prospects of return.

Keywords: Colombia; internal displacement; land restitution; return; transitional justice; victims' rights

1. Introduction

Since the late 2000s scholars of transitional justice—broadly defined as the ways by which societies in transition seek accountability for human rights violations of the past—have shown increased interest in distributive justice and socioeconomic rights (De Greiff and Duthie 2009; Waldorf 2012; Fircchow and MacGinty 2013; García-Godos 2013), key areas for the political stability and sustainable peace of countries emerging from armed conflict. Some have argued for the need to address the structural causes of conflict in transitional justice in general (Laplante 2008; Mani 2008), while others focus on the transformative potential of victim reparations (Uprimny and Saffon 2009). Victim reparations require the identification of a subject whose rights have been violated (victims), and the design of

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appropriate state measures to restore these rights. This involves an institutional and political effort that not all states are willing or able to initiate and carry through, thus leading us to acknowledge the political character of victim reparations programmes (García-Godos 2008). Being a form of reparation, land and property restitution go straight to the heart of the distribution of power and economic resources of post-conflict societies.

According to the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (UN Commission on Human Rights 2005) '[S]tates shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice' (Principle 2.2). In situations of armed conflict producing massive internal displacement, such as in Colombia, the deployment of restitution as a preferred remedy for internally displaced people (IDPs) involves a most comprehensive task with huge humanitarian and political implications. At the same time, the international practice of land and property restitution has demonstrated that giving primacy to a particular remedy (such as restitution) over others can be not only arbitrary, but even counterproductive (Pantuliano 2009; Williams 2012). Either way, planning socioeconomic development in post-conflict societies with massive internal displacement ought to include consideration of the visions and realities of land and property restitution.

In this article, we identify strengths and limitations in the ongoing process of land restitution in Colombia in order to assess its potential contribution to a post-conflict future. The Final Peace Agreement (Acuerdo final para la terminación del conflicto y la construcción de una paz estable y duradera) between the Colombian government and the Revolutionary Armed Forces of Colombia–People's Army (FARC–EP) signed on 24 November 2016 puts the Colombian experience with land and property restitution into a new light. Along with peace come great expectations across Colombian society, particularly among victims of the armed conflict and IDPs. Can the process of land and property restitution contribute to meeting these expectations? To address this, we contrast the design of the restitution programme with preliminary findings on current implementation. Our approach is empirical, exploring and charting the complex network of institutional actors, rules and procedures involved in the process. The article is based on an extensive review of legal and official documents produced by Colombian state agencies, and fieldwork material collected in four field visits between 2013 and 2015.¹ We also use data from a household survey conducted for the overall research project in 2014.² Based on the Colombian land restitution experience, the article contributes to identifying challenges and opportunities of return and restitution in a post-conflict setting along three issues: institutional overload, conflicts on the ground, and the option of return. We find that considering the restitution programme's achievements solely in terms of numbers (of claims, hectares of land or court rulings) is insufficient and inaccurate. Our analysis indicates rather that the transformative potential of restitution applies to both individual claimants and institutions alike. The main implication

1 Fieldwork involved interviews with public officials, experts and IDP families involved in the restitution programme, as well as field observation in Bogotá and Barranquilla. In the first visit (December 2013) 16 officials, five experts and five IDP families were interviewed. We conducted 10–15 interviews in each of the following visits.

2 This research was part of the Colombia Land and Gender project led by Henrik Wiig at the Norwegian Institute of Urban and Regional Research (NIBR). The project included a Respondent Driven Sample (RDS) survey of 499 IDP households currently living in the Bogotá and Barranquilla areas (Gutiérrez et al. 2014; Wiig 2015).

for practice is that the primacy of restitution in relation to internal displacement and IDPs needs to be contrasted with the needs and preferences of victims in the design of appropriate policies.

2. Background: conflict, internal displacement and the land system in Colombia

The armed conflict between the FARC–EP and the Colombian state dates back to 1964 with the creation of the guerrilla group, following the nationwide civil war known as *La Violencia* (1948–1957) and the subsequent period known as *Frente Nacional* (1958–1974). Paramilitary groups emerged around the same time, originally providing private security to large landowners in areas with limited state law enforcement. These groups enjoyed considerable support from the national army, rural elites, and drug-lords. In the 1990s the balance of power shifted from the rural elites to paramilitary commanders, who not only took over areas controlled by drug-lords and guerrillas, but also co-opted and expelled cartels and rural elites (Duncan 2006). The expansion of the paramilitaries implied also their incursion into politics, controlling local constituencies under the umbrella organization United Self-Defence of Colombia (AUC) (Richani 2001). In December 2002 the AUC declared a unilateral ceasefire, and peace negotiations in 2003 led to their demobilization in 2005–2006 (OACP 2006). Paramilitary groups account for a considerable part of the atrocities and internal displacement during the armed conflict.

Internal displacement has taken place throughout the Colombian armed conflict, often without entering the policy agenda. While the basic needs of IDPs caught the attention of humanitarians and public services in the late 1990s, the issue of land restitution remained a central yet unfulfilled claim among IDPs until the 2000s. The official figure of IDPs in the late 2000s was 3.3 million, while the Consultancy for Human Rights and Displacement (Consultoría para los Derechos Humanos y el Desplazamiento, CODHES) estimated 5.9 million for the period 1985–2013 (CODHES n.d.). According to the National Victim Register, by 1 November 2016, 7,011,027 people were registered as victims of internal displacement (RNI 2016). Obviously, any attempt to secure the rights of victims in Colombia must take into account the rights of IDPs. Forced displacement took place by different strategies: violence and usurpation, legal and illegal tactics to take over property, forging documents, registering false titles, and simulating proper sales (that is, forcing owners to sell at extremely low prices under threat of their lives) (CNRR 2010). Local authorities and public officials often turned a blind eye or sanctioned illegal practices of usurpation (Lid and García-Godos 2010).

The attention of the Colombian state to the IDP situation can formally be traced back to 1997 (Acción Social 2010), but the issue became central in 2004, when the Colombian Constitutional Court declared it was ‘an unconstitutional state of affairs’ (Ruling T-025). The Court ordered the government to take adequate measures to protect the rights of IDPs. Since then, various mechanisms have been implemented by the state and monitored by civil society (Acción Social 2010). These, however, did not include the possibility of return and restitution.

Restitution of land and property finally entered the policy agenda through the implementation of Law 975 of 2005 (Law of Justice and Peace). The law did not mention forced displacement specifically, yet it aimed to fulfil the right to restitution of IDPs, establishing regional units, pilot projects and judicial processes (García-Godos and Lid 2010). The 2008

administrative reparations programme was the first to explicitly identify forced displacement as a violation, providing monetary compensation to IDP families registered. A proposal for a law focusing on victims' rights and land restitution was presented and dismissed by the national Congress in 2008 (Sánchez 2009).

Soon after assuming power in 2009, President Juan Manuel Santos presented a bill to Congress to address 'the pending debt' the country had to the victims of the armed conflict. Shortly after, the bill was merged with a separate proposal on land restitution, thereby placing the issue of internal displacement and land restitution at the centre of a national agenda on victims' rights. Law 1448, known as the Victims' Law, was signed on 10 June 2011 and welcomed by broad sectors of Colombian society and the international community for the transformative potential that victim reparations and land restitution had for millions of victims and IDPs (Semana 2011).

Law 1448 established a national system for the fulfilment of victims' right to reparation, creating an institutional framework to develop and implement a comprehensive national reparations programme including restitution. New institutions were created,³ others underwent reorganization or received new functions to address restitution.⁴ Concerning restitution, the law aims both to assist poor IDPs to a better life by restoring their rights, and to reinstall respect for private property rights. With millions of IDPs, the task of restitution in Colombia is obviously enormous and the humanitarian and political implications of such a project equally vast.

The Colombian restitution programme takes place in a situation where the land system of property rights is still under construction. The 2010 nationwide survey on IDPs found that only 18 per cent of displaced farmers had formal property rights to their agricultural land (Comisión de Seguimiento 2010). Formal property rights are more the exception than the rule, and ascertaining who owns what is a challenging task. In this context, the restitution process could also be seen as a formalization or titling effort, as it aims to resolve the ownership of specific properties. Briefly, there is a distinction between formal ownership or property rights proper for those holding a land title registered in the public registry (owner, *propietario*); possession when there is a title, but not in the name of the person working/living on the land (holder, *poseedor*); and occupancy when no formal title deed has ever been issued on a given piece of land worked by a farmer (occupant, *ocupante*). According to Colombian legislation, occupants can claim formal rights to the land through a process of land adjudication. Three conditions must be fulfilled: (i) The occupant must demonstrate that they have used the land 'in good faith', for more than one year if on state land, or ten years on the property of individuals, and not against the express will of the owners (if 'in bad faith', the requirement is five and 20 years); (ii) the household needs the land to achieve a reasonable livelihood; (iii) the household does not possess or make use of more than one

3 The Specialized Unit for Land Restitution (Unidad de Restitución de Tierras—URT) and the National Registry for Usurped and Abandoned Lands (Registro de Tierras Despojadas y Abandonadas Forzosamente—RTDAF) are the most relevant for this article. Other institutions include the Specialized Unit for Victims (Unidad de Víctimas), the National Victims' Registry (Registro Único de Víctimas) and the National Centre for Historical Memory.

4 Among these are the Ministry of National Defence, the National Registry, the National Cadastre, the Superintendency of Notaries and Registration, and the Colombian Institute for Rural Development (INCODER). With the exception of the first, these institutions constitute the formal system of land registration in Colombia.

Agricultural Family Unit (UAF)⁵ of land in total including the parcel in question. Adjudication does not in itself confer any ownership/property rights. Occupants must register the adjudication at the National Registry, otherwise they remain simply occupants, not owners, which has serious implications with regard to restitution. A last category is tenancy (*tenencia*), and the rights holder is known as tenant (*tenedor*). Large landowners often lent out parcels of land in exchange for casual free labour when needed. The farmer or his ancestors might have farmed the same parcel of land, yet without any formal right to the land. The Victims' Law does not consider tenants as having any rightful claims to the land and they are excluded from the restitution process.

3. Implementing land restitution in Colombia

According to the Victims' Law, all victims of violations of international humanitarian law and international human rights law committed by illegal armed groups (paramilitaries, guerrillas) or by state actors (police, military) after 1 January 1985 are entitled to reparations from the state. Land and property restitution, however, can only be claimed for acts committed after 1 January 1991.⁶

The restitution programme is guided by the principles of differential treatment,⁷ progressiveness, gradual implementation, and the rights to truth, justice and integral reparation (Law 1448 of 2011, Articles 13–25), specifically mentioning victims' 'right to return to their place of origin or relocate of their own free will, in conditions of security and dignity' (Article 28). Accordingly, formal owners, holders in possession of the land, or occupants who have been dispossessed or forced to abandon the land due to the armed conflict after 1991 are entitled to the restitution of land and property (Article 75). Both abandonment and dispossession give grounds for restitution, identified by the law as the preferred form of reparation for victims.⁸ Restitution encompasses the return of the property lost as well as the formalization of property rights (Article 72). The law envisages also the possibility of monetary compensation or relocation to land or property of similar characteristics only as a secondary measure and in cases where the material/physical restitution of the actual property is not feasible (Articles 72, 97 and 98). Subsequent decrees and directives have been passed to implement this law, making restitution a complex endeavour involving multiple actors, phases and procedures.⁹

Given the need for a concerted effort, the agency responsible for moving the process forward is the new Specialized Unit for Land Restitution, known as URT, which has 22

5 A UAF is the amount of land needed to support a family in a given agricultural area. The area of a UAF is established by the land adjudication authorities and varies across regions.

6 The definition of victim includes also closest relatives, but excludes members of armed groups (except for children and youth demobilized while still minors).

7 The Victims' Law also has a gender focus to protect women's access to land and enhance gender equality. It establishes preferential treatment and the prioritization of cases when the applicant is a woman, as well as the mainstreaming of gender perspectives in the administrative and judicial process of land restitution (Articles 114–118).

8 This is similar to the Bosnian restitution model, which gave primacy to restitution over alternative remedies for IDPs and refugees, such as compensation (Williams 2012: 91).

9 See <https://www.restituciondettierras.gov.co/normatividad> for an updated list of decrees regulating Law 1448.

regional offices and its headquarters in Bogotá.¹⁰ The URT's mandate is to design, administer and preserve the Register of Forcibly Usurped and Abandoned Lands (RTDAF); to gather information and evidence of dispossession or abandonment for land and property registered by claimants; to process restitution claims and formalization procedures for abandoned lands, as well as to represent claimants before the judicial restitution authorities; and to administer compensation payments for claimants in cases where restitution is not possible.¹¹

4. The restitution process, step by step

At the national and regional levels, the process starts with the identification of areas where restitution can actually take place. This strategic part of the process occurs at two levels, known as macro- and micro-focalization. Macro-focalization refers to the identification of regions of the national territory where the conditions of public and personal security indicate that it is possible to implement land restitution in a safe and dignified manner. The assessment is conducted by the National Security Council, on the basis of inputs from the Ministry of Defence and with the participation of the URT; the criteria applied are not publicly known. Micro-focalization refers to the identification of specific operational zones within larger macro-focalized areas where the restitution process is to start, on the basis of historical density of dispossession, the security situation and local conditions for return (Law 1448 of 2011, Article 76; Decree 599 of 2012). In theory, the formal processing of individual applications cannot be initiated until an area has been micro-focalized. By January 2016 a total of 87,119 applications had been received by the URT from 58,779 claimed holders of land rights to 71,796 parcels of land, about half of them within the micro-focalized zones.¹²

At the individual level, the process starts when claimants (displaced victims entitled to do so or their legal representatives) present their applications to the local URT office formally requesting that a specific property 'be included in the RTDAF' (Solicitud de inscripción en el RTDAF); its inclusion in the register implies the admission of a restitution claim.

Owners, holders and occupants can have different motivations and interests regarding restitution. Displaced farmers with formal property rights in violence-free areas would not need the restitution process to return to their land, as their rights are already formalized. However, participating in the restitution process can bring additional benefits for the three qualified categories of land users. For example, restitution judges can order public agencies to provide additional support to facilitate return (such as, communal infrastructure, productive projects, health and educational programmes, rehabilitation treatment). Court rulings can also include provisions for police or military protection upon the claimant's return. The possibilities of using the property oneself or being able to sell it later (after at least two years) (Law 1448, Article 101) can also be strong incentives for registering a

10 Law 1448 of 2011, Articles 103–113. The formal name of the unit is Unidad Administrativa Especial de Gestión de Restitución de Tierras Despojadas.

11 For this purpose, the URT administers a fund from which compensation and other forms of benefits are provided. The Fund is regulated by Decree 4829 of 2011 and is funded through state budget allocations, donations, public transfers, and the transfer of property from restitution applicants receiving alternative locations.

12 As the number of applications exceeds the number of parcels claimed, it is likely that some parcels are claimed by several individuals.

restitution claim.¹³ IDPs within the categories of possession and occupancy have an extra incentive for registering a claim at the URT: they achieve faster processing compared to the ordinary procedure for property formalization/titling.

All claims undergo an administrative stage by the corresponding regional URT office, involving several steps. The URT has to gather the information needed to ascertain whether a specific property has in fact been owned/possessed/occupied by the claimant, and that the claimant was forced to abandon the property. First, a preliminary analysis is conducted to determine the eligibility of the application, based on the cut-off date requirement (1991); if the claimant is a victim of the internal armed conflict; and if the applicant is owner, holder or occupant. Secondly, if the claimant is found eligible, the URT initiates an investigation of the specific case by gathering information (Acto de acometimiento formal del estudio de caso) and assessing it (Estudio de caso) before reaching a decision. This is possibly the most intensive part of the process in terms of data collection, staff involved and institutional co-ordination. Information is collected through formal institutional requests, field visits to the properties in question, revising contextual information, contacting local authorities and neighbours, and more. The URT also informs any persons currently living in or using the property that there is a restitution claim on the property. Current users may then provide information and documents to contest the claim, adding to the documentary case file. By law, the URT has 60 days to gather information and reach a decision on whether the property claimed is to enter the RTDAF (Acto administrativo de inscripción en el RTDAF), as the administrative stage's final step. The formal registration of a property in the RTDAF is a prerequisite for initiating the judicial stage of the restitution process. Rejected claims are considered settled and do not pass to the judicial stage.¹⁴

Once the property is in the RTDAF, the claimant (or the URT on their behalf) can present the case to a Restitution Judge (Juez del Circuito de Restitución). Restitution judges are members of the ordinary judiciary with experience in civil law. They have the authority to evaluate and pass judgment without an open trial process and to determine whether a property will be returned or not to a claimant, and how. The judicial stage starts by assessing the admissibility of the case (Auto de admisión de la solicitud de restitución), setting in motion administrative procedures to protect the property from commercial transactions while judicial review is ongoing; this is publicly announced to all parties concerned. Next, there is a period of 15 days to allow counter-claims to be presented. If none, the Restitution Judge proceeds to evaluate the evidence and reach a ruling (*sentencia*).¹⁵ The judge has 30

13 Law 1448 restricts the sale of any restituted land for a period of two years. Other restrictions may apply on other properties, depending on the year and law applicable to them.

14 The distinction between investigative-preparatory functions and adjudicative functions is common in restitution programmes. In South Africa, the Restitution of Land Rights Act 22 of 1994 originally established a Land Court to adjudicate claims and a Commission on the Restitution of Land Rights to receive, process, investigate and prioritize claims prior to an adjudication phase by the Land Courts (Hall 2004: 657). The residential property restitution programme in Kosovo also operated in a similar manner, with the investigative-preparatory phase conducted by the Housing and Property Directorate and the adjudication power given to the Housing and Property Claims Commission.

15 If counter-claims appear, the Restitution Judge only prepares the case until its pre-ruling stage, remitting it then to a Restitution Magistrate (Magistrado de Restitución del Tribunal de Distrito Judicial) to issue the court ruling in an open trial.

days to review all evidence provided (*período probatorio*) and may, if necessary, request additional information from the URT and other public agencies. Finally, the judge must reach a decision on the case within four months after its admission.

The court ruling constitutes the definitive resolution of the legal status of a property and its rightful owners/holders/occupants. It also provides compensation remedies to second occupants who acted in good faith when acquiring/occupying the property. Further, it includes all necessary provisions leading to the formalization of the property. The property title will include not only the name of the claimant, but also that of his/her spouse/partner at the moment of dispossession, regardless of whether they still live together or not. Rulings also provide additional decisions instructing various public institutions to ensure the effective implementation and protection of rights for each specific case. Administrative units tasked with the implementation of rulings may request clarifications from the judges. Rulings handed down by restitution judges or magistrates cannot be appealed in other courts, but may be subject to revision by the Supreme Court in exceptional cases.

Court rulings are relatively extensive and complex documents.¹⁶ A single ruling usually encompasses several land claims made by several claimants and can thus include multiple decisions involving various claimants, measures to be taken and institutional actors involved in the implementation of such measures. For example, in addition to deciding whom the various plots of land belong to and the proper registration of property rights by relevant institutions, a court ruling can also instruct the Victims' Unit to include claimants as beneficiaries of different reparations programmes, and state programmes to provide housing support or technical support for productive projects. It can also instruct ministries to provide the basic public infrastructure and services to secure a dignified return, and the local police and security forces to guarantee the safety of the return. By deciding or instructing state agencies to take part in the fulfilment of the right to return and restitution in their rulings, restitution judges demonstrate their endorsement of the idea of the transformative potential of victim reparations and restitution, following the spirit of the Victims' Law. The effective realization of that potential is, however, an empirical question.

Once a court ruling has been issued, the claimant must accept it in full (Law 1448, Article 91). A judge might, for example, divide the property to fulfil the principle of joint titling and ownership between the claimant and spouse/partner at the time of dispossession, or order the Superintendency of Notaries and Registration (*Superintendencia de Notariado y Registro*, SNR) to replace old title deeds with a new one stating joint owners instead.¹⁷ This contrasts greatly with the experience in Kosovo, where the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC), created by the UN Mission in Kosovo in 1999, decided only concerning the restoration of property

16 Rulings are 60–80 pages on average. They follow an overall format, but the presentation of factual information varies among judges and courts. By February 2017 a total of 2,352 court rulings had been issued by restitution courts, concerning 4,877 claims. Although rulings constitute a valuable source of information for legal and social analysis, a systematic analysis of these is outside the scope of this article.

17 When claimants apply for restitution they are generally unaware that they have to share the formal property rights with (even former) partners. The court might actually decide on behalf of a former spouse, for example, and the registered owner cannot decide whether or not to enter (or withdraw from) the restitution process at his/her own will. (Interview with officials at Superintendency of Notaries and Registration, December 2013).

rights, and proper registration and repossession of the actual properties. Upon a positive decision, a claimant could choose between three options as a way to implement the decision: accept repossession, place the property under temporary administration by the HPD, or close the claim (applicable for example to those claimants who had sold their property and no longer needed the assistance of the HPD) (Cordial and Rosandhaug 2009: 88–9).

The physical/material restitution of a given property is to take place within three days after the ruling is announced (Law 1448, Article 100). The act of restitution can be carried out by the local judicial authorities, with support from the police, if deemed appropriate. If the property is being used by other people, they will be evicted. While the judicial stage concludes with the announcement of a ruling, restitution judges have extended competence over the cases they decide upon, in order to guarantee effective implementation of the court orders and protection of the rights of those being restituted (Law 1448, Article 102). The URT and the Superintendency of Notaries and Registration are mandated by law to carry out and oversee the satisfactory implementation of court rulings.

5. Realities of restitution

How is the Colombian restitution programme doing in terms of implementation? By 2016, the URT had received 87,119 applications for the restitution of land parcels, of which 42,676 are within micro-focalized zones (URT 2016b: 24). Of these, 30,593 entered the administrative stage but only half (14,931) have been admitted/registered into the RTDAF. As many as 11,374 claims have now entered the judicial process. The latest figures indicate that 1,585 court rulings have been reached, settling a total of 3,283 claims. If we consider the number of claims rejected by the URT as resolved, the total number of claims settled is 18,945 (URT 2016a).

The claims settled through court rulings correspond to 2,606 properties, amounting to 180,789 hectares of land. By December 2015, restitution judges had ordered 202 compensations by equivalent value (URT 2016b: 42); in other words, six per cent of the 3,283 claims settled by court ruling chose compensation as an alternative to restitution. Various other measures were included in the rulings, such as economic support for production-related activities among returning IDPs (mainly agriculture-related measures). A total of 1,799 productive projects with a value of approximately 19.5 million US dollars and housing construction support from the Colombian Rural Bank to 3,232 claimants have been provided (URT 2016b: 50). We now proceed to assess implementation along three issues: institutional overload, conflicts on the ground, and the option of return.

Institutional overload

While the number of restitution cases reaching a court ruling has affected the lives of many IDPs, there is more to be done. It is tempting to contrast these numbers with the total number of over seven million IDPs and the estimated 7–8 million hectares of abandoned lands in Colombia due to the armed conflict and conclude that the results achieved by the programme are extremely modest. But there are at least two important qualifications to be made; first, not all IDPs are claimants in the restitution process (for example, only one parent, not the children), and second, not all IDP families were dispossessed or forced to abandon their property, in which case restitution is not applicable. Furthermore, the National Development Plan 2014–2018 expects that the URT will only process 50,000 claims by 2018 (DNP 2015) which is only a minor fraction of the original estimate of 360,000

expected claims established in 2011 (DNP 2011: 30). Compared to the 30,593 claims mentioned above, which include both rejected claims and those accepted into the RTDAF, the difference between achievements and objectives looks different: achieving the target is under way.

Estimates by Gutiérrez (2013) show that the goal of restitution might be impossible to achieve. In an optimistic scenario, with considerable and rapid expansion of institutional capacity in the URT and the judiciary, it would take a hundred years to redress all IDPs who have lost land. Under more realistic assumptions, the process would never be completed. Since the Victims' Law limits the restitution process to ten years, it could be argued that the process is unlikely to reach the majority of potential beneficiaries. Is the process really moving at a slower pace than it could? How to explain the relatively modest achievements so far?

The restitution programme has proven to be extremely demanding in terms of institutional capacities and coordination, leading to an institutional overload. The URT treats each restitution claim as a separate case. Even with highly motivated and skilled professional staff, the URT and its partner institutions cannot match the challenges of implementing restitution in a patchwork of formal property rights and informal forms of tenure.¹⁸ Each case offers nuances, usually involving multiple claimants and stakeholders. Opposition to restitution claims by second occupants further complicates the matter.

The aim of transparency in the process involves continuous reviews and assessment of the same information at different stages, placing a burden both on the institutions providing the information as well as on those requesting it. Furthermore, the Victims' Law and regulations established coordination committees at macro- and micro-levels with the participation of relevant stakeholders and institutions. Yet coordination is also a challenge at the local level. Municipal coordination committees mandated to convene and distribute tasks require IDP representation, yet recruiting IDP representatives has proven problematic due to issues of constituency and organization. Their absence, however, can delay the initiation of activities and decision-making processes (interview with officials from Gobernación del Atlántico, December 2013, Barranquilla).

In the implementation of Law 1448, moreover, elements have arisen which contradict existing procedures and national legislation. Participant institutions and the judicial system faced therefore the challenge of interpreting and adjusting legal and institutional instruments along the way through ad hoc processes of institutional consensus-making. Most of the institutions involved meet several times a year in Bogotá for training sessions and to discuss problems arising in implementation and to agree on common solutions. The challenge of inter-agency coordination and inherent contradictions is thus met by a flexible and

18 As noted by Buyse (2009: 259), an important factor in the success of the property restitution programme in Bosnia in processing 200,000 claims in a ten-year period was that 'there was little uncertainty about which property had belonged to whom before the war: most cadastral information had survived the hostilities unscathed'. This is very different in the Colombian case, where formal property registration and cadastral information are still in the making. Post-conflict Guatemala faced a similar situation in the late 1990s, yet the CONTIERRA programme applied an alternative conflict resolution mechanism to solve land conflicts involving IDPs without a formal judicial sanction. Decisions were arrived at through investigation and conciliation between parties in dispute (Bailliet 2000).

collaborative approach to implementation, which can be considered as a best practice in institutional development.

There is much at stake in the restitution process, both politically and on the ground. Informants at public institutions involved in restitution are careful and often reluctant to criticize apparent wrongdoing and unfortunate effects in public, fearing that such critiques could be used to undermine or derail the restitution process. Policymakers and public officials are well aware of the responsibility that rests upon them (interviews with public officials, December 2013, Bogotá).

The URT has attempted to alleviate the institutional overload by processing individual claims over land that historically was part of the same property. A similar strategy was applied in Kosovo in the early 2000s. The relevant institutions there designed procedures to facilitate rapid decision-making and implementation, including techniques for mass claims processing, shifting evidentiary obligations to the HPD and expanding their mandate to facilitate access to information from other institutions, and the issuance of ‘cover decisions’ to provide collective notification of court rulings (Cordial and Rosandhaug 2009). In South Africa, the restitution process went from being a two-phase process (as in Colombia) to a mainly administrative one, with land courts only intervening in cases with counter-claims. Together with the possibility of compensation for claims in urban areas, this change led to a significant improvement in the number of claims settled by the programme (Hall 2004: 657–8). The likelihood of a similar strategy in Colombia is limited due to the clear and long-standing need for mechanisms of conflict resolution over land rights.

In 2015 the URT developed a strategy (Estrategia 2015) aiming to conclude the administrative process of registered claims in eight selected regions of the country with high levels of land dispossession and with the security and institutional conditions necessary to advance restitution (URT 2016b: 56). This strategic choice has important implications for the future of the restitution programme.

Programme-meets-rights-holders: challenges on the ground, literally

On the ground, the restitution process faces several challenges. One of them concerns the heterogeneity of IDPs, a category including both small-scale farmers as well as large hacienda owners forced to leave their lands to save their lives. Owners and holders are entitled to the restitution of their lost property independently of size and value. Occupants, on the other hand, are constrained by the limit of one agricultural family unit (UAF) set by law in 1994. Many IDP families who are occupants find, to their surprise, that their claims exceed the maximum land area that can be granted per household on state land (one UAF). In these cases the URT can only proceed for the restitution of the maximum allowed. However, acting as if the remaining claim does not exist may serve to delegitimize the process in the eyes of the claimants; ancestors might have cleared the land before such limitations were enforced. URT officials can find themselves caught in the dilemma of acting as neutral fact-finding public officers or advocates for poor and disadvantaged IDPs. In such a situation it can be tempting to circumvent the official UAF limit, for instance, by splitting the parcel in two, registering half in the name of the woman and the other half to the man—‘in order to make it possible for them to make a decent living’ (interview with URT officers 11 December 2013). This circumvention of the law by the administrative system itself illustrates how the UAF can be perceived as unjust or illegitimate by both claimants and administrators.

When the land to be returned is in use by others, known as ‘second occupants’ (*segundos ocupantes*), new challenges arise. IDPs left their land for a variety of reasons. Some were violently expelled by the warring sides; others left due to a perceived threat to their lives; and yet others due to the increased difficulty of making a living from farming in the midst of a violent conflict. The formal criteria of peace in micro-focalized areas has in practical terms meant that restitution proceeds in areas with idle land. As large parts of these areas are covered by jungle or dense undergrowth, the restitution process has not yet encountered major open conflicts of interest.¹⁹ There are however, regional variations. In Montes de María, a survey of 205 claimants who had applied and completed the process with a court ruling of restitution in their favour showed that in 43 per cent of cases there was an opponent to their restitution claim (García and Pardo 2016). Thus a significant part of the land to be restituted in the future may currently be used by others, with the potential for future land disputes and violence.

Second occupants who may not bear direct responsibility for the IDPs fleeing in the first place are considered to have acted ‘in good faith’ (*buena fé*). Often IDPs themselves, they may have settled on unused land to make a living; or they may have bought the land from IDPs who voluntarily sold it for what was perceived as a fair price under the circumstances; or they may have been brought there by a warring faction to populate the area. Once settled, many have often invested time, energy and financial means to improve the land and farm infrastructure, and consider the land to be theirs.

The restitution courts by default assume that IDPs are the rightful owners. The burden of proof for showing otherwise is put on the current users. The position of second occupants is weak, even if they paid for the land, as the Victims’ Law requires free unpressured consent as well as correct prices. In many instances the IDPs were put under pressure by local power-holders to sell for a pittance. The offer of ‘I can buy the land from you today, or I can buy it from your widow tomorrow’ is common in IDPs’ accounts of displacement. It was difficult for the public registry to fulfil its role in verifying that transactions were free of improper pressure; the public registrar might have been corrupt and/or under pressure himself, or the transaction remained informal. The courts have also tended to assume that transactions occurred mainly between asymmetric parties: that the rich either pressured or took advantage of the small-scale farmer’s misery. In a landmark case on the Caribbean coast the Restitution Judge ordered the restitution of many smallholders as the price paid for their land was considered unfairly low, and evidence now shows that transactions between small-scale farmers—symmetric parties—have in fact been common (García and Wiig 2017). Low prices could reflect the ongoing conflict rather than undue pressure: few took the risk of buying land, the IDPs needed money to establish themselves in new sites of residence, and agriculture had low profitability due to dysfunctional markets in times of conflict. In the eyes of current in-good-faith users, the potential restitution of IDPs can be seen as a form of hostile land eviction by the state. The eviction of poor small-scale farmers from restitution parcels has been recognized as a problem and the Ombudsman has been given the task to assist good-faith second occupants affected by the process.

It is also the case that some displaced families felt insecure and intimidated into selling even if the buyer had no intention of using force. Cases have been reported in which state institutions reclaimed debts from displaced victims, unintentionally provoking sudden

19 This does not mean that the leaders of local victim organizations claiming restitution are not harassed or threatened, apparently by groups opposing restitution.

processes of sale. There are also examples where public agencies sold the debt of small-holders to private debt-collecting companies, who then forced IDPs to sell their land (interview with IDP families, Barranquilla and member of National Commission of Historical Memory, Bogotá, December 2013).

The use of land may have also changed throughout the years. The creation of the infamous plantations by aggregating the land of many displaced small-scale farmers makes it hard to restore the land as it once was. According to the Victims' Law, if the recreation of the original property is difficult, displaced victims should be compensated financially rather than having their land restored to them.

While the presence of good-faith second occupants is real, there can be no doubt that local power-holders and the paramilitary used force to pressure small-scale farmers. They may still control large areas, either openly or through a series of substitute owners. These actors may still hold a physical and psychological grip on local populations reluctant to claim their rights for fear of their lives. There have been several incidents of threats and killings of restitution activists in recent years.²⁰ Intimidation by groups such as 'No to land restitution' hinder IDP families in claiming restitution, thus undermining the process as a whole. For the restitution process and the possibility of return to be viable and credible, the central government will probably have to confront these power-lords head-on.

The option of return

While the restitution programme was designed to make return possible, the actual return of IDPs is influenced by several factors, security being a vital issue. The purpose of macro- and micro-focalization is to implement restitution in areas where claimants are not at risk of experiencing dispossession once again. However, public officials report that the IDPs themselves do not necessarily trust these macro- and micro-focalized areas to be safe, and that incidents of insecurity and violence have been reported. The peace agreement between the government and FARC-EP has, formally speaking, brought peace to Colombia, but many areas are still considered unsafe. Criminal bands (BACRIM), the successors of paramilitaries, as well as demobilized guerrillas make their presence felt and constitute a threat to local communities. Local institutions and organizations may still be controlled by local power-holders who may use violence to impose their territorial control.

IDPs may have personal and psychological reasons not to return. Most of them experienced dramatic and traumatic events involving direct intimidation or specific acts of violence during the conflict and in displacement. In connection to the household survey, we observed that these fears and feelings of insecurity remain vivid in the minds of IDPs, overriding the urge to return, especially among women. The men seemed more willing to take the risk of return, possibly due to their attachment to the land as a source of income and identity. The 2014 household survey in Bogotá and Barranquilla indicates that few IDPs actually wish to return; 29.2 percent of respondents would like to return if given the possibility (Gutiérrez et al. 2014; Wiig 2015). In terms of subgroup interests, the survey shows that women are considerably less willing to return than men, 16 per cent for female single headed households compared to 37 per cent for male single headed households. There is a similar gender pattern among respondents in households with a couple (man and woman):

20 There have been continuous reports over the past years concerning threats and harassment towards community leaders seeking restitution, from institutions such as Oficina Internacional de los Derechos Humanos Acción Colombia (OIDHACO), MAPP-OEA and Human Rights Watch.

24 per cent where the woman answers the survey and 33 per cent where the man is the one answering. Another important aspect is that only 58 percent of the sample expresses interest in claiming land restitution—that is, more than 40 per cent fear, or do not find it worthwhile, to reclaim their lost land. Among those who would present a claim, the majority would sell the land as soon as possible. Only 20 per cent of the sample intends to claim restitution and farm the land themselves (Wiig 2015). A recent study based on a household survey applied to more than 43,000 displaced households between 1997 and 2004 shows similar results: those who have experience of direct violence indicate a lower desire to return, and only 11 per cent of households wanted to return (Arias et al. 2014). Earlier quantitative surveys point in the same direction. The 2008 survey by the Follow-up Commission on Internal Displacement found that only 3.1 per cent of the respondents actually wanted to return (Comisión de Seguimiento 2008). A further plausible explanation could be that IDPs who farmed on marginal land on the agricultural frontier had not developed deep family roots in the colonizing areas that were most affected by the conflict (Saffon 2010: 160). These IDP families would most likely be inclined to accept compensation or replacement land somewhere else.

In terms of context, infrastructure facilities and social networks also play a role. Returnees will not be coming back to their land and communities as they once were. Reclearing idle land requires considerable investment before it can be farmed again. Public infrastructure like schools, roads and productive assets left abandoned have usually been destroyed or have deteriorated. The social configuration of the community might be different: not everyone will return, time has passed and a new power balance most likely evolved; the community of the past has ceased to exist. For some IDPs, there can be more insecurity attached to returning than staying where they are. In neighbouring Peru, it was not unusual that peasant families returning to the countryside after the armed conflict in the 1990s maintained an open link to the areas of refuge. Del Pino (2001) refers to these IDP families as ‘the floating people’ or ‘people with two feet’—one in the urban area of refuge, the other in the countryside. Given the conditions of abandonment in the countryside, peasant families saw little benefit in returning and staying there: a general demand was for financial and technical support for income-generating activities in order to make living in the countryside a viable option (*ibid.*).

The intergenerational issue is also important. The cut-off date for restitution is 1991. More than a generation may have passed before return is made possible. Older IDPs might not be in a condition to resume farming. The younger generation may not share the commitment to the communities their parents came from. If younger people inherit the land, they may consider alternatives to direct farming, such as renting out, seasonal labour migration, or simply selling the land to the highest bidder. Most IDPs moved into urban areas with better infrastructure and public services and more varied employment opportunities than in the countryside; this is generally appreciated by the old and younger generations alike. Again, there is evidence that economic opportunities at the sites of refuge decrease the desire to return (Arias et al. 2014). The URT has in some cases reconstructed the physical infrastructure in local communities before organizing mass returns, although with varying degrees of success.²¹ Many IDPs consider return to be an option, not a must.

21 In one case about 80 families returned jointly to their reconstructed village in a municipality in Magdalena. Disappointment with the size of the houses led all of them to leave and go back to Barranquilla over the next two days. (Interview with IDPs, December 2013, Barranquilla.)

6. Conclusions

While return and restitution as forms of reparation are cherished principles in transitional justice, the challenges on the ground of land and property restitution in Colombia lead us to question policy choices and methods and to consider alternatives.

One basic precondition for the effective implementation of restitution is the existence of established registers of property rights, as this facilitates the identification of rightful owners. Even in cases with formal, well established systems of property rights, where displacement lasted a relatively short time (such as in Bosnia—Buyse 2009) and/or where the number of displaced victims is relatively limited, restitution processes are challenging endeavours (Leckie 2009). In countries like Colombia, where a formal system of property rights co-exists with informal tenure, with millions of IDPs, in a long-lasting armed conflict, the challenge confronting national authorities and restitution practitioners is simply overwhelming.

The Colombian land restitution process is moving forward at a relatively slow pace. What was expected to be an effective procedure of transitional justice has turned into a highly resource-intensive case-by-case process leading to an institutional overload. It is therefore encouraging that amid challenges of institutional overload and inter-agency coordination, new arenas and practices are being constructed by the institutional actors involved to find practical as well as substantial solutions for implementation. This benefits restitution practice, but more importantly, strengthens institution-building.

Internal displacement in Colombia has occurred throughout the armed conflict, producing several waves of IDPs. Abandoned land has been taken by other families, in good and bad faith. If in good faith, the prospect of eviction of second occupants is likely to produce new displaced people—a most unexpected outcome from a restitution programme. If in bad faith, eviction for restitution can strengthen the rule of law locally. A post-conflict scenario implies the expansion of micro-focalized areas, opening the path for more restitution claims that need to be processed and settled. The return of IDPs to their place of origin in such a scenario requires an effective state presence in areas where restitution is being implemented, both in terms of security and welfare, to guarantee rights protection and make the goal of a dignified return a reality. In this sense, the institutional coordination capabilities developed to meet the challenge of institutional overload provide a good example for institutional coordination at the local level.

The need to incorporate the actual needs *and* preferences of displaced victims in restitution programmes cannot be overestimated. For a long time IDPs, victims' groups and human rights organizations have placed the issue of return and restitution as a major demand in their agendas. Today, with a restitution programme in place, there is evidence that few displaced victims want to return, even if they have the chance to do so. The time factor makes return less viable as potential beneficiaries grow older and their offspring move elsewhere. Colombia is not an exception and other countries that experienced internal displacement faced the same situation, for example, Peru. Based on the Colombian experience, we question the preferred status of restitution in relation to internal displacement and IDPs. On normative grounds, land restitution is and will most likely continue to be the preferred option in the transitional justice repertoire, but it does not need to be the only option. The Victims' Law allows the use of alternative forms of redress for displaced victims, such as compensation and housing support. Yet these are relatively seldom applied and only as an outcome of the judicial process, not as an option at the outset. Many IDPs would rather

have social housing in urban areas than the option of return (Sliwa and Wiig 2016). Far from arguing against restitution, what we argue for is the possibility of choice in restitution programmes. If displaced families do not want to return, for whatever reasons they may have, then we need to design policies and programmes that provide support and redress in their new home. The demands, desires and preferences of displaced victims concerning their present and future ought to guide policy choices.

Can the restitution process contribute to meet the expectations created by the 2016 peace agreement? The restitution programme and its legal framework precede the peace agreement. Considering its achievements solely in terms of numbers of claims, hectares of land and court rulings issued is, in our view, insufficient and inaccurate. Bringing in the transformative potential of victim reparations and restitution that inspired the Victims' Law, we need to recognize the significance and scope of the restitution programme. The implications for individual claimants receiving restitution and other forms of reparation are visible and tangible, although their impact in time is yet to be seen. The implications for the institutions and people involved in making restitution possible are less visible, but equally real and no less important, as they involve the realm of institution-building and rule of law. The transformative potential of restitution applies therefore to both individual claimants and institutions. Just as in Bosnia, where housing restitution contributed to rebuilding the rule of law (Buyse 2009: 26), the Colombian land restitution programme is, step by step, trying to put order into chaos, reorganizing the rural countryside by way of formalizing and securing the property rights of Colombian IDPs. In a sense, by facilitating return and restitution, the land restitution programme can be considered as a prelude of a post-conflict scenario in Colombia.

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