

Jemima García-Godos  
Henrik Wiig

# The Colombian Land Restitution Programme

**Process, results and challenges, with special  
emphasis on women**



**NIBR**

Norwegian Institute for Urban and Regional Research

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Abstract: The majority of the more than 5 million IDPs in  
Colombia have lost their land due the conflict.  
This report describes the ongoing process of land  
restitution. The process is slow, and few want to  
return to the countryside. Women are given  
special attention, and are registered as equal  
owners to men. The land restitution process also  
discloses several challenges to rural development  
that is relevant also for a possible redistributive  
land reform in the future.

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# Preface

The majority of the more than five million internally displaced people (IDPs) in Colombia had to flee their homes, agricultural lands, and livelihoods through the five decade long conflict between the guerrillas, paramilitary forces and military.

This report describes the land restitution program initiated by the Colombian government as part of the implementation of Law 1448 of 2011, known as the Victims' Law. The program aims to make the return of IDPs possible, securing their future rights through land property registration and formalization. This publication is part of the [www.colombialandgender.org](http://www.colombialandgender.org) study financed by the Norwegian Ministry of Foreign Affairs. The authors, associate professor Jemima García-Godos at the University of Oslo and researcher Henrik Wiig at NIBR, express their gratitude to research partners at the Colombian Land Observatory, particularly professor Francisco Gutiérrez Sanín and associate professor Paola García Reyes for interesting discussions and valuable insights, and to informants at various land-related Colombian institutions who so generously shared their knowledge and insights with us to make this report a comprehensive description and analysis of the Colombian land restitution process.

Oslo, October 2014

Geir Heierstad

Director of the Department of International Studies

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# Summary

*Jemima García-Godos and Henrik Wiig*

## **The Colombian Land Restitution Programme -**

Process, results and challenges, with special emphasis on women

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Since 2011, Colombia is embarked in an ambitious program of land and property restitution for the more than 5 million internally displaced people who fled their homes and lands due to the internal armed conflict. The restitution process involves the return of IDPs as well as the formalization of property rights. In spite of great initial optimism, by mid-2014 only 20.000 HA of land have been restituted. This report gives a detailed description of the process itself, discussing the many challenges that have risen, including the consideration to innocent third parties farming the land today and the hesitancy among IDPs to return to their land. Furthermore, the report discusses some alternatives that might ease the restitution process and the implications of restitution in a prospective scenario of land reform, given the ongoing peace negotiations between the government and the guerrilla.

# Sammendrag

*Jemima García-Godos and Henrik Wigg*

**Det colombianske programmet for tilbakeføring av jord –**

Prosess, resultater og utfordringer, med spesiell vekt på kvinner

NIBR-rapport 2014:14

I 2011 initierte Colombia et program for tilbakeføring av jord til mer enn 5 millioner internt fordrevne som har måttet flykte i forbindelse med den bevæpnede intern konflikten. Programmet innebærer tilbakevending av de internt fordrevne så vel som formalisering av eiendomsrettigheter. Til tross for stor optimisme, frem til mid-2014 har bare 20.000 HA blitt tilbakeført. Denne rapporten gir en detaljert beskrivelse av selve prosessen, og diskuterer de mange utfordringene som oppstått, bl.a. hensynet til uskyldig tredjepart som i dag bruker jorden og usikkerheten blant intern fordrevne som ikke ønsker å flytte tilbake. Videre diskuteres alternativer som kan lette prosessen og mulige implikasjoner av tilbakeføringsprosessen i lys av eventuelt landreform, gitt pågående fredsforhandlingene mellom regjeringen og opprørsgeriljaen.

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# 1 Introduction

## 1.1 Aim of this report

Colombian Law 1448 of 2011, known as the Victims' Law, addresses the issue of internal displacement and land dispossession caused by the armed conflict in the country. The intention is to facilitate the return of people who fled their homes and lands due to the conflict, by restituting land that was lost. The overall objective of the law is twofold: to help poor internally-displaced persons (IDPs) to a better life by restoring their rights; and to re-install respect for private property rights.

The process of land restitution involves a comprehensive set of regulations, legal mechanisms and procedures, bringing together a multiplicity of public agencies and social actors, individuals and collectives. The process is led by new institutions that coordinate actions across the various sectors. This report assesses the process of land restitution in Colombia by taking as the point of departure how it is envisaged by the Victims' Law, and contrasting the original design with preliminary findings on current implementation. The information gathered for this report builds on an extensive review of legal documents, official reports and materials produced by Colombian state agencies, as well as interviews with officials from national institutions directly involved in the restitution programme. The interviews were conducted during three field visits to Colombia, September –December 2013.

The report starts with brief background information on the Colombian armed conflict, focusing on internal displacement and public response in Section 1. Sections 2, 3 and 4 discuss in detail the basic principles of the Colombian restitution programme, its legal and institutional innovations, and the mechanisms and actors involved in the stages of the process. Section 5 assesses the effects of the restitution process upon women, while Section 6 provides a more general assessment of various challenges and opportunities observed through the implementation process. Section 7 considers the restitution programme in view of the ongoing peace negotiations between the Colombian state and the FARC guerrillas. The report ends with Conclusions and Recommendations in section 8.

The formalization of property rights over land is an integral part of the restitution process. While Colombia's Victims' Law does not alter the current formalization procedures, it creates new mechanisms that demand from existing institutions such as INCODER, SNR and IGAC to prioritize the IDPs before other claimants and applicants. The new restitution process is thus given priority over other institutional mandates. In all, 834 parcels of land have been ordered restituted, of which 10,000–15,000 hectares have been put to some type of use (URT, 2014b). Thus, as yet the

process has had limited impact, given the more than 5 million IDPs who have lost an estimated 7– 8 million hectares of land.

Land restitution is related to the prospects of durable peace in Colombia. Success in land restitution might introduce the rule of law in the countryside, disempowering some local elites and leading to real democratic institutions that can secure the rights of all citizens. Conversely, failure would further entrench the local elites, possibly leading to violent uprisings by the rural poor in the future. The ongoing land restitution process may thus be seen as forerunner to a potential land reform. If smallholder agriculture proves successful and economically viable, the state may consider land acquisitions for redistribution among the rural poor.

## 1.2 The Colombian armed conflict

Armed conflict has been a feature of Colombia's history since independence in 1810, although the intensity, the locations, and the actors involved have changed over time.<sup>1</sup> The current conflict can be traced back to 1964 with the creation of the Revolutionary Armed Forces of Colombia (FARC-EP). Soon the National Liberation Army (ELN), the Popular Liberation Army (EPL), M-19 and other smaller groups followed suit, adhering to various socialist ideologies (Offstein 2003, Peñaranda et al. 1999). Most guerrilla groups were demobilized in the peace process of 1989–1990, but FARC and ELN have continued their armed struggle until today.

The formation of paramilitary groups coincided with the first communist guerrillas, and can be linked to Decree 3398 of 1965 which sanctioned the mobilization of the civilian population in the context of national defence and civil defence (Decree 3398 of 1965). This legal framework remained in place until 1989, when it was eliminated during peace negotiations with various guerrilla groups (Decree 1194 of 1989). When the FARC and ELN regained ground in the early 1990s, a new legal framework opened for the organization of defence groups known as *Convivir* in 1994-1995, aimed at providing private security to landlords in combat areas where the presence of state forces was limited (Decree 356 of 1994). While *Convivir* groups were dismantled by law in 1997, they are seen as the immediate predecessor to today's paramilitary groups. Paramilitary groups later organized under the banner United Self-defence of Colombia (AUC) (Richani 2001), which by 2005 had about 30,000 members (Salinas et al. 2008),

Over time, the paramilitaries consolidated territorial control and started to displace the guerrillas. The numerous local and regional self-defence groups enjoyed considerable support from the national army and their founders in local government, as well as from the drug and rural elites. In the 1990s the balance of power within these fragmented groups shifted from the original leadership asserted by rural elites, to paramilitary commanders. These paramilitaries not only took over areas controlled by drug-lords and guerrillas, but also co-opted and expelled cartels and rural elites, eventually controlling a large share of the drug trade (Duncan 2006). The military expansion of the paramilitary forces ran parallel with their incursion into politics by

<sup>1</sup> For reasons of space we omit some important historical processes, like the nationwide civil war known as *La Violencia* (1948–1957), and the subsequent period known as *Frente Nacional*, which lasted for 16 years.

means of controlling local constituencies. In 2002 they claimed to control 35% of the Colombian national Congress, and one third of the country's municipalities (El Tiempo 2002).<sup>2</sup>

In December 2002 the AUC declared a unilateral ceasefire – a government precondition for talks with any of the armed groups. Negotiations were formalized on 15 July 2003 with the Pact of Santa Fé de Ralito, whereby AUC leaders agreed to demobilize fully by the end of 2005.<sup>3</sup> Demobilization started in 2003 – even before the negotiations had concluded; and by 2006 some 37 AUC groups had demobilized (ACP 2006).<sup>4</sup>

The human cost of this conflict has been considerable. As of this writing, the National Victims Register indicates that almost 43,000 people have been forcefully disappeared, 32,000 kidnapped and 253,000 have been killed as a result of the armed conflict.<sup>5</sup>

### 1.3 Internal displacement in Colombia

The death tolls are high, but even more striking is the massive internal displacement, hardly comparable to any other internal conflict in the world. Figures vary, but the number of IDPs is nevertheless in the millions. Official figures from the former presidential agency *Acción Social* indicate 3.3 million IDPs, while the non-governmental organization and coordinator of the Follow-up Commission on Internal Displacement CODHES has indicated that 5.1 million people were displaced in Colombia in the period 1985–2010 – roughly 11% of the entire population (CODHES 2010:8). Any attempt to secure the rights of victims in Colombia must take into account the rights of the largest group of victims in the country: victims of internal displacement.

The attention of the Colombian state to the victims of internal displacement can formally be traced back to 1997 (Law 387 of 1997). Among the measures envisaged by this law was the creation of a special registry for abandoned land and property, the Unified Registry of Parcels (*Registro Único de Predios*, RUP) (Acción Social 2010:14). However, protection of the rights of IDPs did not improve, and in 2004 the Constitutional Court announced ‘an unconstitutional state of affairs’ (ECI – *Estado de cosas inconstitucional*) with regard to Colombian IDPs (Ruling T-025). A civil society initiative, the ‘Follow-up Commission on Public Policy regarding Internal Displacement’, established in November 2005, has played an active role in developing indicators and recommendations on internal displacement. Since 2007, the Follow-up Commission has undertaken several studies and reports at the request of the Constitutional Court to monitor the situation of IDPs and progress as regards

<sup>2</sup> This was subsequently substantiated by Colombian researchers and information provided by former paramilitary leaders during the Justice and Peace hearings. These events are known today as ‘the *parapolítica* scandal’. See Romero (2007).

<sup>3</sup> *Acuerdo de Santa Fé de Ralito para Contribuir a la Paz en Colombia* (2003).

<sup>4</sup> Explaining why the paramilitaries demobilized in 2003 is subject to much controversy. A common explanation is the threat of extradition to USA on drug-related charges for the main paramilitary leaders. Protection from extradition is one of the core principles of the demobilization package.

<sup>5</sup> Registro Único de Víctimas’ website, <http://rni.unidadvictimas.gov.co/?q=node/107>, accessed 14 August 2014.

their rights. Various state mechanisms have been implemented, mostly coordinated by former *Acción Social*<sup>6</sup> through the National System for Integral Support to the Displaced Population (*Sistema Nacional de Atención Integral de Población Desplazada – SNAIPD*). Parallel to this process, was the establishment of the Project on Protection of Land and Patrimony of Internally Displaced Population (hereafter ‘the PLP Project’), run by *Acción Social*, which developed and incorporated new methodologies and practices for the registration and legal protection of abandoned land and property. It was within the scope of that project that the Unified Registry of Abandoned Land and Territories (RUPTA) was created. The registry enabled displaced families to register property left behind and gain access to some legal protection by blocking potential third-party legal transactions (Acción Social 2010). In time, the Project became the administrative basis for today’s land restitution unit.

#### 1.4 Land restitution prior to Law 1448

Despite a growing focus on protecting the rights of IDPs in the early 2000s, protection measures fell short of promoting or providing actual restitution. Restitution of land and property entered the policy agenda through the implementation of Law 975 of 2005, known as the Law of Justice and Peace. Although Law 975 does not mention forced displacement specifically, it did create several paths for fulfilling the right to restitution for IDPs. On the administrative side, an institutional mechanism for restitution of land and property was created: the Regional Commissions for the Restitution of Property, to be coordinated by and form part of the National Commission for Reparations and Reconciliation (CNRR) (Art. 52). In cooperation with the PLP Project and others, the CNRR prepared a ‘First Draft Programme for the Restitution of Property’ (Acción Social 2010:34). Twelve pilot projects of restitution were initiated by the PLP Project in 2009 (Acción Social 2010:34) and several others by the CNRR to test various modalities for restitution (Lid & García-Godos 2010). These pilots provided experience in selecting cases, developing standardized methodologies, and designing specific interventions.

Beyond the administrative aspect, Law 975 also opened the possibility of restitution through judicial process, as part of the kinds of reparations to which victims of the armed conflict and IDPs are entitled and awarded by judges at the end of the proceedings. Within the Justice and Peace framework, then, restitution was provided as a form of reparation. This could be conducted in two ways: through individual cases (with a court ruling establishing that the perpetrator/usurper must return property to the victims); or through the confiscation of assets from perpetrators to become part of the Reparations Fund, from which land can be redistributed to victims as a form of reparation (García-Godos & Lid 2010). However, the limited number of assets dealt with and court orders issued by the Justice and Peace process has rendered this path to restitution ineffective.<sup>7</sup>

<sup>6</sup> *Acción Social* was reorganized and renamed in 2011 as per Law 1448.

<sup>7</sup> As of June 2014, only 9 cases with judicial sentences were in the process of making effective the payment of reparations to the respective victims. The number of victims awarded reparations in each case varies from 164 to 1440 victims. Concerning property, 371 rural properties and 170 urban properties have been delivered to the fund; only 42 rural properties have been restituted so far. See

Forced displacement was explicitly identified as a crime under the individual administrative reparations programme developed by the Justice and Peace framework. Benefits for IDPs under that programme provided families already registered under the SNAIPD with automatic access to the administrative reparations programme, although double benefits were not allowed. However, while housing support schemes alleviated some of the immediate and short-term needs of displaced families, it was aspirations of return and restitution that were mentioned the most among victims' organizations (García-Godos 2013).

## 1.5 The process towards Law 1448

The design and implementation of a comprehensive programme for victim reparations beyond monetary compensation was left pending by the CNRR. The first proposal to focus on victims' rights and explicitly address land restitution was presented to Congress in 2008. The proposal, known as 'Estatuto de Víctimas', was dismissed the following year (Sánchez León 2009). According to Saffon (2010), this proposal created an apparent consensus among various sectors of society around a restitution agenda on the basis of differing, even opposing, interests: the government aiming at economic efficiency and avoiding comprehensive land reform, while victims' organizations and human rights groups were seeking far-reaching redistribution. Consensus between those two opposite interests was found in the middle ground, based on principles of restorative justice,

To understand this unexpected consensus, Saffon distinguishes between three different approaches to the issue of land Colombia in general, and to the issue of restitution in particular. From an economic justice perspective, land concentration is justified because it improves agricultural productivity. More jobs and redistribution of resources through taxation have the potential to improve the standard of living for everyone. Along this line, IDPs could be given monetary compensation for the loss of their land, enabling them to invest on new land or in other productive activities better adjusted to their current situation. From a distributive justice perspective, the value of restitution is based upon its contribution to achieving a more just and less uneven distribution of land ownership in Colombia. From this perspective, the uneven pattern of land distribution in the country is the expression of deep structural inequalities that cause the armed conflict in the first place. Finally, from the perspective of restorative justice, restitution is considered as a form of reparation to which victims are entitled to on the basis of their dispossession. This entitlement or right is to be prioritized independently of the victim's current level of welfare or the future use they intend to give to the restituted land (Saffon 2010:146). Restorative justice puts no emphasis on either efficiency or equality.

On this basis, Saffon identifies land restitution as a second-best option for both the government and victims' organizations and human rights groups, with two possible scenarios for any future attempts to promote land restitution: a 'planned-to-fail' scenario where restitution is introduced and implemented as a window-dressing attempt at good will that failed due to the complexity of the issue; and a 'unexpected

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URT 2014. Available at:

[http://www.unidadvictimas.gov.co/images/docs/frv/informebienenes/INFORME\\_EJECUTIVO\\_CO RTE\\_30\\_06\\_2014.pdf](http://www.unidadvictimas.gov.co/images/docs/frv/informebienenes/INFORME_EJECUTIVO_CO RTE_30_06_2014.pdf), accessed 15 August 2014.

success' scenario, where societal actors embrace the restitution agenda to promote their own interests, but in the process, end up changing their motivation towards the restorative justice goals of land restitution (Saffon 2010:178).

Just six weeks after assuming power in August 2010, President Juan Manuel Santos presented a new bill to the National Congress promising to address 'the pending debt' the country owed the victims of the armed conflict. This bill was soon to be known as the 'Victims' Law'. Shortly after, a separate legislative proposal on land restitution was presented to Congress, where it was merged with the first proposal, thereby placing the issue of internal displacement and land restitution at the centre of a national programme for reparations to victims. Outreach activities by the CNRR and civil society organizations, congressional debates and wide media coverage promoted public discussion of the proposal, which was approved by Congress on 1 June and signed into law on 10 June 2011 as Law 1448 of 2011. The Victims' Law has been welcomed by broad sectors of Colombian society for seeking to address victims' rights in general – and, most importantly, restitution of land and property (Semana 2011).



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## 2 Land restitution in Colombia: The legal framework

### 2.1 Law 1448 – Main features

The Victims' Law covers victims of illegal armed groups such as paramilitaries and guerrillas, as well as members of the Colombian police and armed forces. Reparations can be claimed for harm since 1 January 1985, while land and property restitution applies for acts committed after 1 January 1991. The law does not affect the judicial processes implemented under the Law of Justice and Peace. Compared to the Justice and Peace process, the threshold of proof is significantly reduced in favour of the victim.

The definition of 'victim' is established by Art. 3, which takes as its point of departure violations of international humanitarian law and international human rights law committed after 1 January 1985. Victims include those who suffered violations, as well as their closest relatives, independent of status or identification of the perpetrator. Members of armed groups are not considered victims, the sole exception being children or youngsters who demobilized while still minors. Relatives of illegal armed groups can be considered victims only if their individual rights have been violated.

Persons whose rights were violated in the context of armed conflict prior to 1985 are entitled to the right to truth, symbolic reparations and guarantees of non-repetition, but only as part of collective measures directed at society at large. Articles 13 to 27 establish principles to guide implementation of this law, the most relevant in this context being the principles of differential treatment (Art. 13), progressiveness (Art. 17), gradual implementation (Art. 18), and the rights to truth, justice and integral reparation (Articles 23–25). Art. 28 explicitly addresses what is to be considered as victims' rights in the framework of Law 1448, highlighting twelve specific rights, including 'the right to truth, justice and reparation' and 'the right to return to one's place of origin or relocate out of free will, in conditions of security and dignity'.

The scope and mechanisms for land and property restitution are established in great detail in Articles 71–123. Formal owners (*propietarios*), persons in possession of the land (*poseionarios*), or those using state lands (*ocupantes*) who have been disposed or forced to abandon the land due to the armed conflict after the cut-off date are entitled to the right of restitution of land and property (Art. 75). The law also establishes the categories of abandonment and dispossession as bases for restitution, identifying restitution as the preferred form of reparation for victims. Restitution encompasses the return of the property lost, as well as the formalization of legal entitlements (formal property rights) (Art. 72). The law envisages the possibility of

monetary compensation or relocation to land/property of similar characteristics to that which was lost only as a secondary measure and in cases where material restitution is not feasible (Art. 97).

Law 1448 has been regulated by various subsequent decrees and directives explicitly addressing specific aspects of the law.<sup>8</sup> For instance, there are special regulations for each ethnic group in accordance to the principle of differential treatment, special regulations concerning the Registry of Usurped and Abandoned Lands and the National Victims Registry, and various administrative directives concerning specific parts of registration processes. All in all, the restitution process is a complex endeavour involving a large number of institutional actors at various stages of the process.

## 2.2 Where are ‘women’ in Law 1448?

To protect women’s access to land and enhance gender equality, Law 1448 establishes preferential treatment for women in the process of land restitution (Articles 114-118). Such preferential treatment encompasses prioritization of cases when the applicant is a woman, and the general mainstreaming of gender perspectives in the administrative and judicial process. Women whose land is restituted are also entitled to various additional benefits according to Law 731 of 2002. Furthermore, in restitution cases involving the formalization of a property title, the new title will be issued in the name of both the man and his partner or spouse at the moment of dispossession or abandonment, as a way of ensuring women’s access to property and land (Art. 18).

The emphasis on differential treatment in general and preferential treatment towards women has been followed up by the various institutions created by the law in terms of special procedures and internal guidelines. A state policy on the protection of women victims of the armed conflict, where the issue of land restitution and access to land forms part of a priority area, was approved recently. A direct follow-up has been the signing of a cooperation agreement between the Specialized Unit for Land Restitution (URT) and the Presidential Commissioner for the Equality of Women in June 2014, aiming, *inter alia*, to mainstream gender indicators in the restitution process, provide capacity-building on gender differentiation among judicial and administrative staff working at various stages of the restitution process, and strengthening female victims of armed conflict.<sup>9</sup>

## 2.3 Administrative units and functions

To secure implementation, Law 1448 established the creation of a whole new set of institutions, some completely anew, others based on the reorganization of existing institutions. In addition, Law 1448 changed or expanded the mandates and functions of other institution. Among the new institutions created are:

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<sup>8</sup> An updated list of decrees regulating Law 1448 can be found at <http://www.unidadvictimas.gov.co/index.php/en/normativa>, accessed 23 June 2014.

<sup>9</sup> ‘Nuevas alianzas fortalecen los derechos de la mujer en la restitución de tierras’, <http://restituciondetierras.gov.co/?action=article&id=1215>, accessed 23 June 2014.

1. National Victims' Registry (Registro Único de Víctimas),
2. National Information Network for Victim Reparations (Red Nacional de Información para la Atención y Reparación a las víctimas)
3. National System for Integral Victims' Reparations (Sistema Nacional de Atención y Reparación Integral a las Víctimas)
4. Specialized Administrative Unit for Victims (Unidad de Víctimas)
5. Specialized Unit for Land Restitution (Unidad de Restitución de Tierras – URT)
6. National Registry for Usurped and Abandoned Lands (Registro de Tierras Despojadas y Abandonadas Forzosamente – RTDAF)
7. National Centre for Historical Memory.

While the first four units listed above deal with a great number of violations committed during the armed conflict, aiming to provide integral reparations to victims, the RTDAF and the URT focus on internal displacement and restitution of land and property. The National Centre for Historical Memory developed from a sub-unit at the CNRR, aimed at clarifying and protecting the historical legacy of the armed conflict. In various ways, all these new institutions aim to develop and implement a comprehensive national reparations programme that includes compensation, restitution, rehabilitation and guarantees of non-repetition for victims of Colombia's armed conflict. Other changes include the transformation of *Acción Social* into an administrative department (the Department for Social Prosperity) to anchor some of the new units. As regards staff, the URT benefited from the experience and expertise acquired at the PLP Project (see Section 1.4), which was operational and part of *Acción Social* from 2003 until 2012. Similarly, the Victims' Unit incorporated staff previously engaged at the National Commission for Reparations and Reconciliation (CNRR, 2005–2011) as well as from *Acción Social*.

The financial costs associated with implementation of the Victims' Law are obviously high. In December 2011, the Funding Plan for the Sustainability of Law 1448 was approved (CONPES 2011), establishing the funding framework for the period 2011–2021, the expected 10 years of operations. The costs of implementing Law 1448 have been estimated at approx. COP 54.9 billion (or USD 30 million) (CONPES 2010:50). These costs are planned to be covered by state funds. The incorporation of these financial costs into the mid-term planning of the national budget is indicative of the commitment of the Colombian government to implementation of Law 1448.

## 2.4 Inter-institutional coordination

Given the complexity of internal displacement and land restitution in Colombia, the implementation of Law 1448 requires a concerted effort from a great many state institutions. As noted, the law envisages new mandates and additional tasks for state institutions. Inter-institutional coordination and access to information are explicitly addressed in Art. 31 of Decree 4829 of 2011, which regulates Law 1448. The following state institutions play a pivotal role in providing the necessary information and in implementing measures at different stages throughout the restitution process:

- Ministry of National Defence
- National Registry (*Registraduría*)
- Geographical Institute Agustín Codazzi (*Instituto Geográfico Agustín Codazzi* – IGAC) (national cadaster)
- Superintendency of Notaries and Registration (*Superintendencia de Notariado y Registro* - SNR)
- Colombian Institute for Rural Development (*Instituto Colombiano de Desarrollo Rural* - INCODER).

In addition, the URT is mandated to request information from other public and private institutions, as deemed necessary for fulfilling its functions.

These institutions (except the Ministry of Defence) constitute the formal system of land registration in Colombia. The restitution programme brings them together for the specific purpose of land restitution. The next section offers a brief description of the land registration system, as the overall institutional framework within which restitution is implemented.

## 2.5 Land registration in Colombia

The 2010 nationwide survey on IDPs found that only 18% of displaced farmers had formal property rights to their agricultural land (Comisión de Monitoreo 2010).<sup>10</sup> Formal property rights are more the exception than the rule in the Colombian system of land tenure. Even in the absence of a restitution programme, ascertaining who owns what is a challenging task. Given this reality, the restitution process can in part be seen as a formalization or titling process, as it aims to resolve the ownership of specific properties.

In Colombia, agricultural land have gradually been acquired and worked by farmers since colonial times. As a general rule, farmers obtain rights to the land by cutting forests and cultivating the soil on unused state lands (*baldíos*). To formalize rights over a specific parcel of land there, a farmer must apply to the Colombian Institute of Rural Development (INCODER), which measures the land, sets borders, and checks whether the formal requirements are fulfilled, before issuing a statement of adjudication (*adjudicación*). Since 1960 INCODER and its predecessor Incora have issued rights to 19 million hectares of land to smallholders (INCODER 2013).<sup>11</sup> However, the INCODER statement of adjudication is only the first step in the formalization process. The farmer must subsequently submit a claim to property rights at the Superintendence for Notaries and Registries (SNR), presenting the statement of adjudication and other documents certifying his/her relationship to the

<sup>10</sup> In 2019, the Centre of Development Investigation (CIDE) at the National University (UNAL) interviewed 10,433 households in the III National Census on the verification of rights to the displaced population, commissioned by a network of national NGOs and financed by SNV, the Netherlands Development Organisation.

<sup>11</sup> Further, it has issued rights to 36 million ha of indigenous territories, but these lands are not necessarily suitable for agriculture. According to INCODER, Colombia has about 118 million hectares that are suitable for farming (Interview with INCODER official, December 2013).

land. Once the SNR has verified the claim, it will first issued a document known as '*Folio de la Matricula Inmobiliaria*', thereby including the property in the National Registry (*Registro de Instrumentos Públicos*). The SNR will then issue a Title Deed (*Certificado de Libertad*) which includes a summary of the ownership records for the property. Finally, the SNR will send the information to the Geographic Institute Agustín Codazzi (IGAC), the national institution responsible for land surveying in Colombia, where the property will be included in the National Land Cadastre and mapped.

However, the process is not necessarily followed strictly by individuals or institutions, and land registration faces many challenges (Gutiérrez Sanin 2010). In many cases farmers have neglected to register statements of adjudication at the SNR, while new owners fail to register property transactions. Statements of adjudication, receipts and contracts are often presented by farmers as 'property titles' – which they are not. At the institutional level, the Public Registry run by the SNR and the Land Cadastre administered by IGAC are not necessarily updated or in concordance with each other. A given parcel of land might appear in only one of them; or the exact geographical references for the parcel might be missing, or be solely referential. It is often difficult to identify the same parcel in both registries. This is important, as both the URT and the SNR may request information from other institutions, including IGAC, in order to process restitution claims.

There are also serious problems with both registers. The geographical references are not necessarily exact, or only a general description is given. Furthermore, both are vulnerable to fraud and imprecision. Local notary offices are supposed to verify whether a transaction is freely undertaken, by identified individuals, and at a 'correct price'. However, these may be corrupt or under pressure by local powerholders to falsify and produce transactions that never took place (CNRR 2010). Furthermore, officials in both systems have delete existing titles from the registries, leaving the rightful owners at best with a physical title deed to prove their rights. The Land Cadastre is not yet fully centralized or computerized, with many files recorded only in register books, which makes it challenging to locate material evidence. INCODER also files all its adjudications into a separate registry system, with similar deficiencies. At present, the three institutions exchange information through various collaboration agreements, not necessarily in a coordinated manner.

## 2.6 Categories of land rights in Colombia

The Colombian land system operates with four categories of land rights. Only title deeds (*Certificado de Libertad*) with recorded history (*Folio de Matrícula Inmobiliaria*) registered in the National Registry under a person's or corporate name are considered to establish *Ownership* or *Property Rights* proper. The holder of a title deed is called the owner (*propietario*). In many cases, titles deeds were issued long ago, and subsequent transfers have seldom been updated in the public registry. This means there is a properly registered parcel of land, but under the name of a previous owner. When a person is in possession of title in another person's name, and is also able to document the transfer through transactions, the status is regarded as one of rightful *Possession* (*posesión*) and the holder of possession rights is known as possessors (*poseedor*). If no formal title deed has ever been issued on a given piece of land worked

by a farmer, the situation is defined as one of *Occupancy* and the holder of occupancy rights is known as occupant (*ocupante*). According to Colombian legislation, owneroccupants can claim formal rights to the land through a process of land adjudication. Three conditions must be fulfilled: (i) The solicitor must show history of use for more than one year on state land or 10 years on the property of individuals ‘in good faith’, e.g. not against the expressed will of the these, or similarly 5 and 20 years ‘in bad faith’; (ii) the household needs the land to achieve a reasonable livelihood; (iii) the household does not possess or make use of more than one Agricultural Family Unit (UAF)<sup>12</sup> of land in total – the amount of land needed so support a family in the given agricultural area - including the parcel in question and other properties. INCODER receives applications and verifies whether these conditions are met, before granting formal adjudication of land. As mentioned, the adjudication does not confer any ownership/property rights per se. The landholder must register the adjudication at the National Registry; until that is done the landholder remains an occupant, not an owner.

The last category is tenancy (*tenencia*), and the rights-holder is known as tenant (*tenedor*). Large landowners often lend out parcels of land in exchange for casual free labour when needed. Money rarely changes hands in this barter agreement. The farmer or even his ancestors might have farmed the same parcel of land, without having any formal rights to the land. Such agreements were often oral, which makes it difficult to distinguish a tenant from an occupant, whether in good or bad faith. As the Victims’ Law does not consider tenants as having any rightful claims to the land, they are excluded from the land restitution process.<sup>13</sup>

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<sup>12</sup>The Agricultural Family Unit refers to the basic farming unit required by a family for sustainable agrarian production. A UAFs extension is established by INCODER and may vary across geographical regions in Colombia.

<sup>13</sup> However, the vocabulary in the Victims’ Law differs slightly from that in the Civil Code and is a source of confusion. The latter operates with three criteria – title (*título*), occupancy (*tenencia*) and the perception of being the owner (*ánimo de señor y dueño*) – and defines the land to be ‘in possession’ if the later two are fulfilled (without distinguishing between private and state land). However, the Victims’ Law concept of ‘occupant’ (*explotadores de baldíos cuya propiedad se pretenda adquirir por adjudicación*) applies to state lands only. This implies that an ‘occupant’ under the Victims’ Law would be defined as ‘in possession’ under the Civil Code.

### 3 The Land Restitution Unit (URT)

The agency responsible for implementation of land restitution is the Specialized Administrative Unit for Land Restitution (*Unidad Administrativa Especial de Gestión de Restitución de Tierras Despojadas* – UAEGRTD; here URT). Its mandate, functions and composition are established in Articles 103–113 of Law 1448. In brief, these are:

- To design, administer and preserve the Register of Forcibly Usurped and Abandoned Lands (*Registro de Tierras Despojadas y Abandonadas Forzosamente*; here referred to as RTDAF).
- To gather all information and evidence of dispossession and abandonment for land and property registered by restitution claimants.
- To process restitution claims and formalization procedures for abandoned lands, as well as to represent claimants before the judicial restitution authorities.
- To administer compensation payments for claimants in cases where restitution is not possible.

The URT is administratively affiliated to the Ministry of Agriculture. It has 22 regional offices across the country, and headquarters in Bogotá.<sup>14</sup>

The RTDAF is administered by the URT and regulated by Decree 4829 of 2011, which details the procedures to be applied. The registration or incorporation of land and property into the RTDAF constitutes the administrative stage of the restitution process, and will be discussed below. Decree 4829 also regulates the alternative of compensation (monetary and material) for those cases when restitution is not feasible (Articles 36–45). For this, the URT administers a fund (known as the URT Fond) from which compensation and other forms of benefits linked to restitution will be provided. The Fund's resources come from state budget allocations, donations, transfers from state institutions, and transfer of property from restitution applicants who have received alternative locations.

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<sup>14</sup> <http://restituciondetierras.gov.co/?action=article&id=9>, accessed 23 June 2014. Some of these regional offices have been established recently; eight or nine of them are based on the previous Regional Offices for Property Restitution, which formed part of the National Commission for Reparation and Reconciliation, created in the context of the Justice and Peace process

## 4 The implementation of the land restitution

### 4.1 Macro- and micro-focalization

For the individual claimant, the process of land restitution starts with the registration of his or her claim. At the national and regional levels, the process starts with the identification of those areas where restitution can actually take place. This initial or strategic part of the process has two phases/levels, termed Macro- and Micro-focalization.

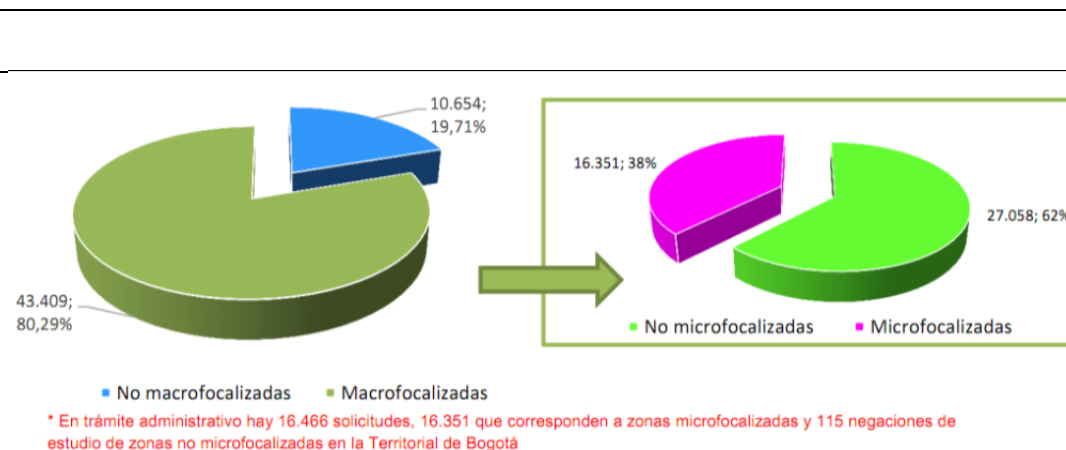
Macro-focalization refers to the identification of large areas/regions of territory where conditions of public and personal security and a risk assessment indicate that it is possible to implement land restitution in a safe and dignified manner. The assessment is conducted by the National Security Council, on the basis of inputs from the Ministry of Defence and with the participation of the URT (Articles 4 and 6, Decree 4829). The criteria applied by the Ministry of Defence and the NSC in conducting these assessments are not publicly known.

Micro-focalization refers to a second level of area identification, and occurs only within those areas that have been approved for macro-focalization. The URT and its regional offices determine, on the basis of certain criteria, specific areas/districts/communities where the processing of restitution claims will be initiated. The criteria applied in determining micro-focalization include historical density of dispossession, security situation and conditions for return (Art. 76 of Law 1448; Decree 599 of 2012).

According to the URT Annual Report 2013, a total of 54,063 applications had been received by the URT by the end of 2013. Some 80% of these applications corresponded to macro-focalized areas. From the applications in macro-areas, 38% (16,352 applications) corresponded to areas that also have been micro-focalized; these are the ones the URT can proceed with. In practice, the URT is now moving forward with the initial registration of *all* applications. This is so because it receives applications from across the national territory, whether or not the area has been macro- or micro-focalized. However, the formal processing of individual applications cannot be initiated until the area to which the application pertains has been micro-focalized.



Figure 4.1 Applications in process in micro-focalized areas



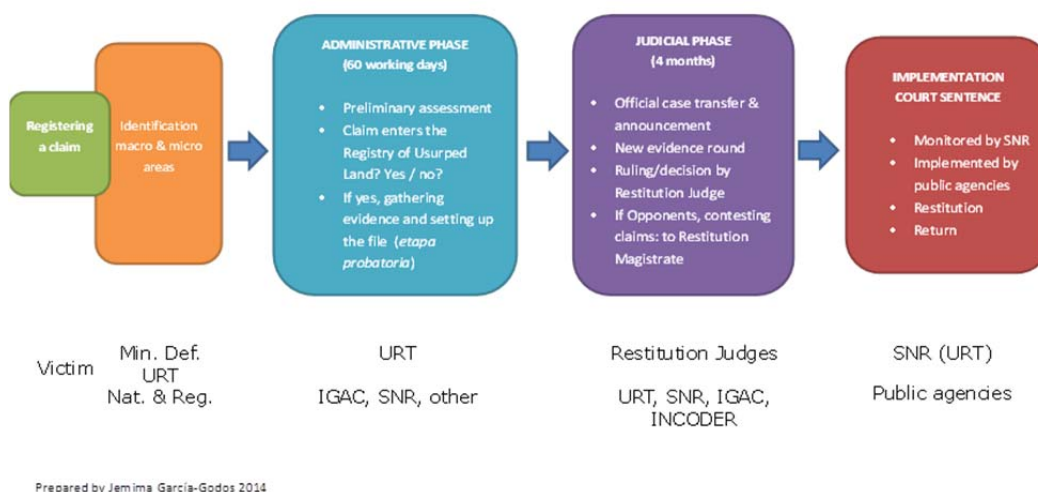
Source: URT-Oficina de Tecnologías de la Información. *Informe Anual de Gestión Plan de Acción 2013*, URT, Bogotá, January 2014, p. 12.

## 4.2 Stages in the restitution process

### 4.2.1 Summary

We begin with a brief summary of the restitution process as it unfolds from the moment an individual application is presented until when a court ruling in favour of restitution is announced and implemented.

Figure 4.2 *The Colombian Restitution Process*



### 4.2.2 Presenting claims

The process starts when claimants present their applications to the local URT office requesting that a specific property be included in the RTDAF (*Solicitud de inscripción en el RTDAF*). Applications may be presented by those legally entitled to do so (known as *titulares de derecho*): formal owners, possessors or occupants. Also family members with legitimate credentials can present applications, as well as the legal representatives of the applicant.

What motivates individual IDPs to present a claim and embark on the restitution process? Although the answer might seem obvious ('to regain something that is rightfully yours' and/or 'be able to return to your home or place of origin'), it is important to recognize that all victims of internal displacement do not necessarily share the same motivations or interest in the restitution process. Owners, *possessors* and occupants may have differing interests in entering the process. Under normal circumstances, displaced farmers with formal property rights in violence-free areas would not need the restitution process in order to return to their land, as their rights are already formalized. However, a restitution ruling handed down by a restitution judge can order state agencies to provide additional support to facilitate return – communal infrastructure like roads, schools, medical posts, productive projects, health and educational programmes, rehabilitation treatment, etc. Court orders can also include provision 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, according to the law, Art. 101) can also be strong incentives for registering a restitution claim<sup>15</sup>. Since judges can make changes to property titles following the clauses on joint titling for the spouse/companion at the time of displacement (thus dividing the property in half), it would seem that the motivation for registering a claim outweighs the risk of having to share the property right with one's (often former) spouse/partner.

Farmers within the two other categories of *Possession* and *Occupancy* have an extra incentive in registering a claim at the URT, as they achieve faster processing compared to the alternative channel of submitting the claim the traditional way through the formalization institutions.

### 4.2.3 Administrative stage

The URT can formally start processing applications only in those areas that are micro-focalized. Assuming that this is the case, the application is processed by the regional URT office in what is known as the 'administrative stage'. Here the URT will gather the information necessary to ascertain whether the specific property has in fact been owned/possessed/occupied by the applicant, and that the applicant was forced to abandon his/her property. This stage entails several steps:

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<sup>15</sup> Law 1448 restricts the sale of any restituted land for a period of two years. However, restrictions for sale for up to 10 and 15 years may still apply on other properties, depending on the year and law applicable to them. There might also be restrictions on how to sell the land. For example, INCODER reserves the right of first refusal, that is, that land can be sold to private individuals first after INCODER has declined a sale offer..

- First, a preliminary analysis is conducted to determine the eligibility of the application. This is based on the requirement regarding the time limit (1991); if the applicant is a victim of the internal armed conflict; and if the applicant is owner, possessor or occupant.
- Secondly, if the application is found eligible, the URT initiates an investigation of the specific case by gathering information (*‘Acto de acometimiento formal del estudio del caso’*) and then assessing that information (*‘Estudio de caso’*) before reaching a decision. This is possibly the most intensive part of the process, in terms of research, staff involved and institutional coordination, because it is here that all necessary information will be gathered by the URT itself – requests to other institutions, field visits to the properties in question, collecting contextual information, contacting local authorities and neighbours, etc. It is also in this phase that the URT will inform any persons currently living or using the property that there is a restitution request on that property. Current users may then provide information and documents to contest the claim. This information will be added and included in the specific case file. By law, the URT has 60 days from the moment the case is initiated through the *Acto de acometimiento* to reach a decision on whether the property claimed in the application is to enter the RTDAF.
- The final step in this stage is the decision on whether to include the specific property claimed by the applicant in the RTDAF. This proceeds through the emission of an administrative act, *‘Acto administrativo de inscripción en el RTDAF’*. This accounts for the formal registration of property in the RTDAF, and is a prerequisite for initiating the judicial stage of the restitution process.

#### 4.2.4 Judicial stage

Once a property claimed for restitution has been entered in the RTDAF, the claimant (or the URT on behalf of the claimant) can present the case to a specially assigned Restitution Judge (*Juez del Circuito de Restitución*), thereby entering the judicial phase. Restitution Judges have the authority to evaluate and pass judgement without an open trial process, determining whether the property will be restituted or not, and how. In the case of opposition to claims presented during the process, the Restitution Judge deals with the case only until the pre-ruling stage, evaluating the case and providing justification. In such situations, the Judge will remit the case to the Restitution Magistrate (*Magistrado de Restitución del Tribunal de Distrito Judicial*), who will issue the court ruling. Also this stage follows several steps:

- First, a formal request is presented to the Restitution Judge.
- Second, there is a period of 15 days after the formal request is given, to allow for any counter-claims to the specific case. If no counter-claims are presented, the Restitution Judges proceeds to evaluate the evidence and reach a ruling.
- Third, the Judge will have to assess first whether the case is admissible. This is done through an Admission Act (*‘Auto de admisión de la solicitud de restitución’*), which sets in motion several administrative procedures aimed at protecting the property from transactions while judicial review is underway. If the case is deemed admissible, the opening of the judicial process is announced to the parties concerned.

- Fourth, the judge has 30 days to review all evidence provided for the case (*‘período probatorio’*), and may, if necessary, request additional information from the URT or other public agencies.
- Finally, the judge must reach a decision on the case within four months after the Admission Act. The court ruling constitutes a definitive resolution of the legal status of property and its rightful owners/possessors/occupants. It also provides for compensation remedies for third parties who acted in good faith when acquiring/occupying the property. Further, it includes all necessary provisions leading to the formalization of the property. According to the law, the property title will include not only the name of the applicant, but also that of his/her spouse/partner at the moment of dispossession, regardless of whether they are still together or not.
- Administrative units tasked with implementing the court ruling may request clarifications from the judges (*‘consultas’*). Rulings handed down by restitution judges or magistrates cannot be appealed in other courts, but they may be subject to revision by the Supreme Court in exceptional cases.

#### 4.2.5 Implementation of court rulings

Court rulings issued by restitution judges are explicitly addressed by Law 1448, in Art. 91, where a variety of situations and solutions are considered. Such rulings establish not only the final decision regarding ownership, but also a set of orders or instructions to be implemented by various public institutions to ensure effective implementation and protection of rights in each case.

Once a court ruling is issued, the claimant must accept it in full. A judge might, for example, divide the property to fulfil the principle of joint titling/joint ownership between the claimant and spouse/partner at the time of dispossession. The judge can order the SNR to replace the old title deed with another that states there are two joint owners rather than the previously recorded one.<sup>16</sup>

According to the law (Art. 100), the physical/material restitution of a given property is to take place within three days after the ruling has been announced. The act of restitution can be carried out by the local judicial authorities, and 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 the court ruling, restitution judges have extended competence over the cases they decide upon, in order to guarantee effective implementation of the court order and protection of the rights of the people whose land is to be restituted (Art. 102 Law 1448).

The following sections examine some challenges arising from actual implementation of the restitution process.

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<sup>16</sup> Claimants are generally unaware that they have to share the formal property rights with (often former) partner when they apply for restitution. Furthermore, the court might actually apply on behalf of other, for example the (former) spouse, implying that the registered owner cannot decide whether or not to enter (or withdraw from) the restitution process at his/her own will.

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## 5 The impact on women

### 5.1 Female preference in process

As discussed in section 2, women – in particular, single mothers who head a household – are to receive differential and preferential treatment in accordance to the Victims' Law at all stages of the process: in the application and administrative phase (Art. 114), at the judicial phase (Art. 115), and during the liberation and transfer of property (Art. 116). They are also to be the first to receive other types of additional support like credit, productive projects, education and other individual goods of limited supply. The requirement of joint property rights between the couple who originally abandoned the property is apparently gender-neutral. However, agriculture is mainly a male activity and land is normally perceived to be the property of men: most inherited land is passed on to sons rather than daughters. The Victims' Law implicitly defines its provisions on joint property as being a gender-equalizing policy by including Article 118 under the section heading 'Norms for women in the restitution process'.

Public discussion concerning joint titling in the Victims' Law and contradictions with the Civil Code has been almost absent in Colombia. Few are aware that joint titling overruns the individual right of spouses who have brought property into the marriage or inherited as defined in the civil law. Gender activists consider joint titling as a means to counter structural gender discrimination (SismaMujer 2013). While the law states that both sons and daughters should inherit equally, men continue to inherit land more often than women do. In practice, what joint titling does is to balance a daughter's unlawful loss (not having inherited) with the transfer of property rights to her brother's wife. While this logic may make sense at the structural level, the rights of the individual woman may not necessarily be protected. In this perspective, women are considered more as a group rather than as individuals.

Differential and preferential treatment to women in the restitution process is guided by two policy documents. First, the 'Programme for special access for women, girls and youngster in the administrative stage of the restitution of disposed land process' was approved by a resolution in late 2013 (URT 2013). While mainstreaming female preference is treated in very general terms, the resolution refers to a 'technical document' to be produced by the URT, and explicitly opening for the possibility to access non-governmental funding sources to finance the 'programme'. The second policy document is a recent government White Paper providing perspectives on the protection of female victims of the armed conflict and their rights (DNP 2013).

## 5.2 Results

According to interviews we carried out by the project team, it has been difficult to implement preferential treatment for women in the restitution process as intended.

The first challenge is to make women claim land. Through special information campaigns and collaboration with gender-focused NGOs, the URT is attempting to get women, especially heads of household, to come forward to claim land that belonged to the household. This has proven difficult because both men and women in the countryside normally consider agriculture to be a male activity, and see land as being the property of men. For instance, a widow might not even know the exact locality of the parcel or the position of its boundaries. Weaker connection to the land also makes it harder for women to overcome the psychological barriers involved in returning to areas where they may have experienced horrendous atrocities. However, the few available figures on the content of the land restitution rulings indicate reasonable success in reaching out to women (see below).

The three selection criteria for micro-focalization security, concentration of cases and economic viability of return are not directly related to gender. The concentration of potential female applicants could have been an additional selection criteria for micro-focalization, e.g. the number of widows, for example proxy by the number of recorded male deaths, would *de facto* put women first in line to be included in the process if such is the aim of the policy

It is also difficult to prioritize women in the administrative phase due to the practical implementation of tasks in the micro-focalized areas. The URT finds it more time efficient to include all claimants in one identified area before they moving to the next. Selecting women first, and then men, would imply more travelling for the institutions involved and hence a loss of valuable work-time.

However, informants indicate that the URT and other institutions involved in formalization do make greater efforts to help women compared to men in similar situations, as well as seeking to help the most vulnerable – who tend to be women. Actually, the degree of gender awareness has increased in most of the Colombian state administration in general. For example, INCODER previously often adjudicated land only to male applicants; today they would immediately ask about any female partner to be included on the title deed with joint ownership.

The URT normally represents women, as well as male applicants, at the judicial phase. Our informants expressed that the URT had high gender awareness and willingness to use resources to help women. Furthermore, that restitution judges and restitution magistrates are trained to take into consideration the special circumstances that affect women, both as claimants and partners to be jointly titled with male claimants. The top-down signal from URT and SNARIV to prioritize women seems to have trickled down to people working on the ground. However, the need for the local URT offices to meet annual targets as to number of land parcels might lead them to prioritize male claimants, as these tend to be better informed about the property being claimed.

One paradox found during implementation, is that even in those cases where a parcel is owned by a couple, the law presumes to be only *one* claimant; which is usually a

man. Various actors perceive this as an unreasonable practice that reduces gender equality, and have proposed innovative, practical ways to bypass this situation. Local URT offices may formally register a given parcel as two separate claims, one for the husband, the other for the wife. In processing the claims, these two are administratively treated as one property. While this creative solution makes women more visible, it also increases the number of claimants to the same property.

Women are also supposed to receive preferential treatment and more attention in the post-ruling/follow-up stage. Land restitution is only part of the comprehensive package of measures involving court rulings. The claimants and their families can be entitled to individual help, such as education, psychological assistance, or productive projects, or collective benefits like the provision of infrastructure. There is no information available on the gender perspective in such assistance. However, respondents stress that measure to make returning a viable enterprise, for example productive projects, would assist more profitable agricultural activity which is culturally dominated by men.

Whether the URT has been successful in identifying potential female claimants and convincing them to register is difficult to assess, as we do not know the distribution of potential claimants. However, as many as 40% of the 54,063 claims for land restitution registered by 31 December 2013 were made by women (URT, 2014). However, the URT annual report does not indicate how many female claims were accepted in the RTDAF or later actually given a title.

Joint titling between applicant and the spouse at the time when they abandoned the land is another important gender equalizing policy. It seems reasonable to assume that most of the 40 percent female claimants are widows and hence without a male spouse with whom to share the land title. On the other hand, most of the 60 percent male claimants do probably have a spouse. SismaMujer (2014) refers to URT statistics which indicate that for all claims involving the claimant's spouse, 72 percent are made by men and 28 percent by women (unfortunately, the number of total claims is not known). The URT is reported to put considerable effort into identifying female companions, whether they are still in the household or have formed a separate household, in order to issue joint property rights. A partial review of early court cases indicates that half of the parcels are given a joint title, a quarter individual titling and a fifth is restituted to an undefined group of inheritors of the deceased original rights-holder.<sup>17</sup> A woman is normally the main beneficiary, but the restitution judges implicitly grant rights to children, parents and other family members.<sup>18</sup> The explicit distribution is to be decided later.

Gender outcomes are difficult to identify in statistics based on settled land restitution cases published by URT. According to URT informants, about 3500 individuals have so far benefitted from restitution, 49 percent of these being women and 51 percent men. While judges order joint titling in 90 percent of the court decisions, this figure might encompass different types of households and include several family members. The extent of imposed joint titling and co-ownership between husband and wife at the moment of displacement is still unknown.

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<sup>17</sup> The residual are smaller categories.

<sup>18</sup> The cases of orphaned children are normally put in this category.

One possible explanation for the rather high share of land titling to women mentioned above is that the URT chose to start with land reform farms that were handed over to poor peasants in the 1960–70s after land occupations. INCORA, and later INCODER, often issued joint ownership in these cases and both spouses hence recognise their dual ownership rights today. It can be expected that there will be less acceptance of joint property rights as the restitution programme proceeds with more cases where land was inherited and brought into the family by one spouse alone.

The Victims' Law establishes preferential treatment for women. URT informants express concern about the lack of explicit regulations applicable to the paragraphs addressing this during the restitution process as well as concerning joint titling. Accordingly, the law's general approach in this matter leaves preferential treatment up to the interpretation of local URT offices and individual judges. Judges tend to be conservative when it comes to establishing the rights of women, often requesting explicit, material proof of a marital relation to the man. Since many couples were never officially married, a formal marital connection is hard to establish. Men and women may have changed partners after displacement, and may even lack formal identity papers. The URT puts great effort to demonstrate the contribution of the woman in farming, taking care of the family or her participation in other economic activities to contributing to the family livelihood. When such contribution is acknowledged at the court, the judges tend to approve property rights to the woman either through joint titling or by splitting the land into two properties with both the man and the woman as owners if they no longer constitute a single household. The preferential treatment seems to be more a question of differences in knowledge and ability, both on the part of restitution authorities as well as women claimants, rather than gender per se. One example is the tendency for women not to be able to give the exact position and demarcation of the parcel. The URT hence often rely on the social mapping exercise to prove land right for women whose men died or disappeared during the conflict, e.g. in practise the neighbours indications are taken at face value.

Idiosyncratic interpretations, however, seem to play a major role in final court decisions. URT informants inform that some male occupant restitution claimants are titled individually in spite of the clear rule of joint titling when state land is adjudicated to households. On the other hand, many judges establish joint titling for individually owned land (*bien propio*), brought into marriage or inherited, in contradiction to the partial common property rights (*gananciales*) clause of the Civil Code. There have been cases where the judge grants monetary compensation to the woman for "improvements to the land while living together" when outright property rights are not admitted.



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## 6 Challenges in the process of restitution

### 6.1 Cooperation between land titling institutions

The objectives of the Victims' Law are twofold: to help poor internally-displaced persons (IDPs) to a better life by restoring their rights; and to re-install respect for private property rights. The URT is given the faculty to call upon assistance from the land formalization institutions. The URT treats each restitution claim as a separate case, and is not mandated to formalize the property rights to other land holders within the micro-focalized zones. The result is hence a patchwork of titled and untitled land within the area, some will appear in the cadastre, others not. The formalization institutions will hence later have to return to the area to make a complete cadastre.

The land formalization institutions prefer to process all parcels within a given area at the time and perceive the patchy URT approach as a labour and cost inefficient approach to land titling. They claim too much of their human resources are tied up to satisfy the requests by the URT, and furthermore claim they would have been able to title far more land than URT if given their financial resources to employ more people. Rather than URT as a mainly a judicial unit call upon them for technical assistance, they could call upon the judicial system to settle unclear cases involving IDPs they encounter in their formalization work. This reverse process would give more 'value for money': more formalized properties per Colombian peso granted by the government. Alternatively, a preference for helping IDPs could be introduced through the selection of geographical areas.<sup>19</sup>

In fact, the mission of the URT and the restitution judges extends beyond the formalizing of property rights. They are also expected to consider necessary measures that can make return a viable option for IDPs. The judge has the right to order other institutions to undertake complementary actions, such as building schools, infrastructure, and providing income-generating programmes, mental health care, and security. The Victims' Law and its regulations establish coordination committees at macro- and micro-level where all institutions relevant to the restitution process are expected to take part.

Furthermore, land formalization institutions warn that misconceptions on the part of inexperienced restitution judges threaten to create chaos in the land registry system. These institutions are obliged to inscribe parcels in the land registry and land cadastre exactly as the judge demands, even if there are inaccuracies according to maps,

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<sup>19</sup> We have not evaluated the validity of these claims by calculating a cost-benefit analysis of alternative forms of organization; this would require considerable information from within the institutions that they are probably not willing to share.

registry system, or the like. For example, a judge may order the SNR to give a parcel a registration number that is already being applied to a different property. The institutions have only the right to ask for clarification in case the order issued by the restitution judge is unclear with several possible interpretations.

## 6.2 Chancing practice through implementation

The Victims' Law was, like most laws in Latin America, made early in the period of a newly elected president. The idea is to activate a policy, in this case helping the IDPs and restoring the respect for private property rights, by creating institutions and expectations among the population by concrete actions as soon as possible, to make it difficult for the next government to undo or alter the policy. The more time a government spends in preparing the law, the less time there is left for implementation. Thus new laws run the risk of including contradicting elements and may even conflict with existing legislation. The bureaucracy, interest organizations and the judicial system must then define the content and redefine concepts in the law as the policy is being implemented, in an intricate process of institutional consensus-making normally not open to the public.

The process of restitution revolves around the evaluation of cases and issuing of rulings by new restitution judges on cases prepared by the URT. Most of the involved institutions meet several times a year in Bogota as part of these training sessions, to discuss new challenges and problems that have risen and then instruct the restitution judges on how to solve them. Informants at these institutions are wary and often reluctant to criticize apparent wrongdoings and unfortunate effects in public, fearing that such critiques could be used to undermine or derail the restitution process. The issue of good-faith third parties has emerged as a major problem. If not solved, the process of land restitution might come to a halt or may even ignite reactions in rural areas. However, the Victims' Law clearly gives priority to the rights of IDPs but opens for compensation to innocent third parties. A practical solution could thus be to compensate the IDPs who do not have the intention to return, rather than evicting and compensating the innocent third parties.<sup>20</sup> Forceful displacement and eviction might cause resentment and possible violent resistance. The effort might even be futile, as the short experience of restitution shows that few IDPs actually return to the restituted land. However, offering compensation rather than restitution would entail a shift of direction from the original intentions of the law, which is basically based on principles of restorative justice.

The compensation of innocent third parties as planned could make possible, at least in theory, the purchase of restituted land from former IDPs. Experience from similar situations in other countries show that this is difficult when there is only one possible buyer and one possible seller.<sup>21</sup> Joint titling between spouses is another pertinent aspect in the restitution process. Land-related agencies tended to see such redistribution within the household as *de facto* confiscation of property from one

<sup>20</sup> Most accessed the idle land for free. The matter becomes more complicated if they paid for it either directly to the IDP or some intermediary, e.g. perpetrator.

<sup>21</sup> The construction of new ethnic zones in Bosnia made return nearly impossible for many IDPs, but voluntary sales were hard to effectuate in practice, due to "thin" local markets. So the IDPs got no monetary compensation and the current user no formal property rights: a lose-lose solution.

individual in order to give to another, usually from husband to wife. The civil law explicitly states that values brought into the marriage or inherited are to remain individual property, and whatever is acquired while married is the joint property of the couple. Institutions and agencies more concerned with the societal outcome tended to see joint titling as necessary intra-household redistribution in order to achieve gender equality.

As discussed in section 1.5, Saffon (2010) argues that different actors have supported land restitution as a second-best option, as they both lack the political leverage to ensure preferred principles of justice. While the current elite may prefer economic justice, former President Uribe discredited the approach by allowing corrupt practices and personal networks to benefit, leaving the IDPs without compensation. On the other hand, NGOs and the FARC guerrillas see inequality and rural poverty as the root cause of the armed conflict, thus seeking distributive justice; yet they know that the landed elites have the power to prevent land reform. In such a context, both sides have lukewarmly embraced restorative justice through land restitution as a middle ground, given the power equilibrium. They can be expected to advocate their preferred policy if they gain greater political power. It is possible to argue that both sectors were aware, right from the start, that the interests of the ‘innocent third party’ could derail the restitution process. The motivation for supporting restitution lays in the hope that by then, they will be strong enough to pull restitution towards their preferred solution of either compensation (for economic efficiency) or comprehensive land reform (for distributive justice).

### 6.3 Conflicting laws

The land restitution law may clash with other parts of the law. One example could be the possible conflict with civil code on joint property rights between husband and wife (as discussed in section 5).

### 6.4 Bottlenecks difficult to overcome

An example of bottlenecks encountered concerns the municipal coordination committees where the involved institutions discuss and distribute tasks that also presuppose IDP representation in order to have a quorum. Recruiting IDPs has proven problematic, and their non-representation prevents other institutions from making formal decisions. For example, the Transitional Justice Committee in Barranquilla was not able to start work.

### 6.5 Lack of control in focalized areas

The idea behind defining macro- and micro-focalized zones is to start the land restitution in areas where the beneficiaries do not risk their lives or being disposed of their land again. However, the Ministry of Defence, which ultimately defines such areas, cannot necessarily guarantee security in the long run. There is an incentive for the regional military units to exaggerate their territorial control, and the release of areas to focalization is an indicator of their success and efficiency. These informants report that the IDPs themselves do not necessarily trust these areas to be safe, and

several incidents of violence and insecurity have been reported from focalized areas. Even activist individuals under protection programmes have been killed in recent years.

Moreover, pacified areas today might re-emerge as battlegrounds tomorrow. Criminal bands (BACRIM), the successors of the paramilitary groups, as well as the FARC guerrilla, can move rapidly over large distances and suddenly constitute a threat to the locals.

And finally, the institutions and people may still be controlled by local power-holders, some even as elected political representatives, who may resume their violent activities if they perceive a threat to their territorial control.

## 6.6 Possession of more than a family unit of land

IDPs are a heterogeneous group. Small-scale farmers as well as large hacienda owners have been forced to leave their lands, fleeing for their lives. As owners and possessors they are entitled to the restitution of the entire property that was lost, independent of size and value. Occupants on the other hand, are constrained by the UAF limit set by the land reform law of 1994.<sup>22</sup> Many IDP who are occupants find, to their surprise, that their claims exceed the maximum land that can be granted to one household on state land. The URT is then supposed to forward only the maximum claim. However, acting as if the reminding claim does not exist serves to delegitimize the process in the eyes of the claimants, whose family might have cleared the area previously, when such limitations did not exist. URT officials may find themselves caught in the dilemma of both being neutral fact-finding public officers and advocates for weak and poor IDPs. In such a situation, it can be tempting to circumvent the official UAF limit. One possible solution is to split 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’. 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.

## 6.7 Conflict with current users

### 6.7.1 ‘In good faith’ resistance

The IDPs left their land for various reasons. Some were actively evicted by the warring sides; other left due to a perceived threat to their lives, and some because the increasing difficulty of making a living from farming in the midst of a violent conflict. The formal criteria of peace in the micro-focalization process have until now implied restitution of land that is not in use. The explanation given is that the warring factions depopulated the areas to prevent interference in the transport of drugs, weapons and troops along certain corridors. The restitution process has hence not encountered major conflicts of interest as large part of the chosen microfocalized areas are covered by jungle or dense undergrowth. However, most land to be restituted in the future is actually being cultivated by others today. These persons

<sup>22</sup> The UAF concept first appeared as a legal term in 1961, but it is still not clear exactly where.

often bear no direct responsibility for the IDPs fleeing in the first place. They may have settled on unused land, often as IDPs themselves, 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 in by the warring faction to populate the area. Once settled, they have often invested time, energy and financial means to improve the land and farm infrastructure, and now consider the land to be theirs.

The land courts by default assume that IDPs are the rightful owners. The burden of proof for showing otherwise is put on the current users. Their position is weak, even if they paid for the land, as the Victims' Law require free unpressured consent as well as correct prices. In many instances the IDPs were put under pressure by the power-lords to sell for a pittance ('I either buy the land from you, or I buy it from your widow'). It was difficult for the public registry to fulfil its role in verifying that the transaction was free of improper pressure because the seller did not complain; the public registrar might have been corrupt and/or under pressure, or the transaction remained informal. The land courts have tended to assume that transactions between asymmetric parties are improper: that the rich either pressure or take advantage of the small-scale farmer's misery. History now shows that transactions between small-scale farmers – symmetric parties – have in fact been common. 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 their new sites of residence, and agriculture had low profitability due to dysfunctional markets in times of conflict. Thus, the current peace dividend leading to higher prices on the land markets might lead IDPs to claim land restitution at the expense of buyers.

The Victims' Law does set any final date for possible loss of land. There is less violence in the countryside after the paramilitary formally demobilised in the period 2003-2006. Many transactions have taken place afterwards, including large-scale initiatives where IDPs were asked, through their network, to come to a certain place at a certain time where they were offered standardized contracts. The IDPs might have felt insecure and intimidated to sell even if the buyer had no intention of using force. In several cases, state institutions like INCODER reclaimed debts from the IDP that indirectly ignited the sales process, or the institution simply reclaimed the land due to unpaid debts and sold it to others even though the IDPs should have been exempted from their financial obligations. There are examples where INCODER sold the debt of small scale farmers to debt collecting companies, which in the end forced IDPs to sell their land. In a landmark case on the Caribbean coast the restitution judge ordered restitution to many smallholders as the price paid was considered unfairly low.

Current in-good-faith users have invested time and resources, leading to a sentimental attachment to the land. They see potential restitution to IDPs as a form of hostile land eviction effectuated by the state. There have been few reported incidents of violent conflicts between IDPs and current users because most land in the selected micro-focalized zones is idle – precisely because the government wanted to prevent violence in the initial phase of the process. The twin considerations in the Victims' Law of introducing respect for private property and helping poor victims are in some cases conflicting. For instance, the IDPs may be wealthy families whose haciendas were split among several small-scale farmers who took over the area.

Furthermore, the use of land may have changed. The creation of the infamous plantations, often with African palms, by aggregating the land of many small-scale farmers makes it hard to recuperate the land as it once was. According to the Victims' Law, IDPs should be compensated financially rather than having their land restored to them if the recreation of the original property is difficult.

The ejection of poor small-scale farmers from restitution parcels is now becoming recognized as a problem and the government is searching for ways to protect their rights. The Ombudsman (*Defensoria del pueblo*) is intended to become their legal representative in the same way as the URT represents the IDPs who claim land restitution in the judicial process.

### 6.7.2 'In bad faith' resistance

There can be no doubt that local power-lords and the paramilitary used force to pressure small-scale farmers. They still control large areas, either openly or through a series of substitute owners. The Justice and Peace process requires that perpetrators are to compensate their victims by returning stolen property; in practice, this has rarely occurred. Most land is still in the hands of the perpetrators, or has been sold off through intermediaries, making it difficult to recuperate. These actors may still have both a physical and physiological grip on the population, who are reluctant to claim their rights for fear of their lives. There have been several incidents of threats and killings of restitution activists in the latter years. Rumours of organizations like 'No to land restitution' can undermine the restitution process by intimidating and hindering IDPs to claim restitution.

For the restitution process and the possibility of return to be credible, the central government will probably have to confront these power-lords head-on. The military have maintained a rather tight grip on some areas with high symbolic value, like Carmen de Bolívar on the Atlantic coast, and have demonstrated a willingness to protect the rights of the IDPs.

### 6.7.3 Neutrality difficult

The poor rural population was often forced to align with one of the warring factions, as people who declare neutrality are seen as possible traitors. In remote areas with illicit crops the warring faction in control forced 'their' farmers to grow coca leaf in what can best be described as out-grower schemes.<sup>23</sup> If one side was defeated by the other, the farmers had to leave and the new power invited their farmers in. One informant described such a process in Norte de Santander, where slum residents in Cucuta and farmers in Catatumbo literally exchanged positions when the paramilitary and the guerrilla alternated in controlling this jungle area. The small-scale farmers in each of these waves can be defined both as IDPs and beneficiaries of violent acts.

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<sup>23</sup> Farmers are contracted to sell their produce at pre-set prices to the warring faction in control, who in return often provide loans, inputs and services that make it easier for cash-strapped farmers to start production.

## 6.8 Return difficult

### 6.8.1 Fear and psychological effects

The return of IDPs to their original homes is held as the ultimate aim of the land restitution process. The rural population have lived very difficult lives during the conflict. Direct intimidation or a specific act of violence made people pack all their belonging and flee, often overnight, driven by fear. These fears, or feelings of insecurity, remain vivid in their minds, overriding the urge to return – especially for women. The men, as the principal agriculturalists in Colombian households, are more connected to the land itself and may often be more willing to take risks.

Some quantitative surveys indicate that few IDPs actually want to return. CCPPDF (2008) found that only 3.1% of the respondents actually wanted to return. Part of the explanation is probably 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 (Saffon 2010). They would gladly accept compensation or replacement land somewhere else.

### 6.8.2 Infrastructure missing

Whole communities were often forced to leave, so returnees will not be coming back to the society that they left. If the land has been left idle ever since, for example because the warring faction did not want observers to their activities, trees and bush will have returned, necessitating considerable investment in land clearing before the land can be farmed again. Public infrastructure like schools, roads and productive assets has often been destroyed, or has deteriorated due to lack of use. Furthermore, the social fabric might be different from what it used to be: not everyone will return, time has passed and a new power equilibrium might evolve. All in all, the society of the past does simply not exist any longer, so for IDPs there can be more insecurity attached to returning than staying where they are.

### 6.8.3 Sceptical young generation

IDPs who left their lands after 1 January 1991 are entitled to land restitution. That means that more than a generation may have passed before return is made possible. Some of these IDPs are now too old to start farming again, and the next generation does not necessarily share the same commitment to the village where their parents come from. If young people inherit the land, they compare the outcome of return, exploiting the land without moving, e.g. renting out or periodic migration, to simply selling the land to the highest bidder. Most IDPs have moved into more densely populated areas with better infrastructure, public services and varied employment opportunities than in the rural areas, something which is normally appreciated by the old and the new generation alike. The URT has in some cases reconstructed the

physical infrastructure before organizing mass returns – with varying degrees of success, according to anecdotal evidence.<sup>24</sup>

#### 6.8.4 Agriculture less profitable

Before displacement, the main source of income for IDPs was agriculture, and this sector will also be the main source of employment when they return. However, the profitability of small-scale farming is questionable, because food prices in Colombia fall when the barriers to cheap imports are lifted through free trade agreements and the government further reduces production incentives like fertilizer subsidies. There is still a preference for large-scale units in the government's agricultural policy. One initiative is to support palm oil production by encouraging the companies to move from the Atlantic coast and Chocó to the supposedly more suitable 'Upper Llanos' flatlands close to the Andean range in Meta Department.

Colombian GDP has been growing by about 5% annually over the last five years (World Bank, 2014). As in the rest of Latin America, this economic growth has been fuelled by the natural resource price boom. More and better job offers in urban areas weaken the pull-effect of increased labour demand through restitution of land in the countryside.

### 6.9 Slow process

Colombian laws and initiatives often meet insurmountable problems in the practical implementation. There was a real fear that land restitution would suffer a similar fate. An analysis of 388 court rulings shows a falling trend from the peak of 50–60 a month in mid-2013, to hardly double-digit figures by spring 2014.<sup>25</sup> Even with average of 30 court rulings in late 2013, it seems hardly possible to achieve an acceptable number of cases.

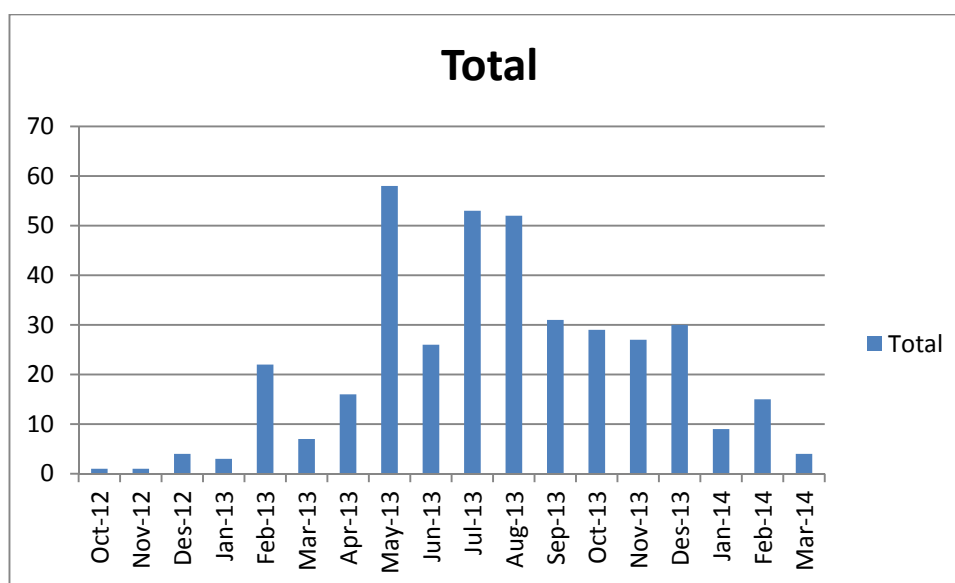
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<sup>24</sup> In one case about 80 families returned jointly to their village in a municipality in Magdalena. Disappointment with the size of the houses led all of them to leave and return to Barranquilla within two days.

<sup>25</sup> Personal communication with Francisco Gutierrez of the Land Restitution Observatory



Figure 6.1 *Number of rulings, by month, settled in land courts in Colombia. Each ruling may include several individual claims. Source: URT, organized by the Land Restitution Observatory*



In their quarterly report of 31 March 2014, the URT notes having received 59,741 applications for land parcel restitutions, 21,518 of which within micro-focalized zones (URT, 2014b). Of these, 5918 have been included in the RTDAF, with 4158 having entered the judicial process. A total of 431 court rulings by either restitution judges or restitution magistrates have ordered the restitution of 834 parcels. Each parcel might constitute several plots with different claimants as they have very similar characteristics, e.g. land occupation of large farms were appropriated by the state and of then split into equal shares and handed over to the small scale farmers. The total claims of these settled cases originally amounted to 20,877 hectares. The URT quarterly report further indicates that claimants have now put 563 of these 834 parcels to use in some way or another.<sup>26</sup> In other words, we see that the restitution process has led to the use of about 15,000 hectares of land – a mere drop in the ocean, given that more than 5 million IDPs have abandoned an estimated 7–8 million hectares of land. The URT assesses that 90 percent of the cases benefit more individuals than the claimants, hence benefiting a total of approximately 3500 people.

Various measures were included in these settled restitution cases, among them economic support for initiatives to increase productivity for returning IDPs (mainly agriculture-related measures), contributed USD 5.4 million to the total of 466 productive projects last year. There has also been some support for the construction of houses. The URT has recommended such subsidies for 1035 claimants, and the Colombian Rural Bank assigned subsidies to 822 of these.

The considerable number of restitution cases taken to the courts has affected the lives of many IDPs – but this is almost nothing, seen against the total number of

<sup>26</sup> The threshold to be included in the concept is rather low since *some use* (usufructuan de alguna forma) that is neither residing or farming while residing somewhere else is included.

some 5.5 million IDPs in the country. As noted above, the number of 54,000 applications is expected to rise if IDPs experience benefits. Gutierrez Sanin (2013) has estimated the time it would take to cover all IDPs under various scenarios of increasing the institutional capacity to restitute land. Under the most positive scenario with a considerable and rapid expansion of capacity of the URT and judiciary, it would take 100 years to include all IDPs who have lost their lands. Under more realistic assumptions, the process will never come to an end. The Victims' Law has limited the restitution process to a mere 10 years; it seems unrealistic to terminate it so rapidly.

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## 7 Challenges related to the peace process

### 7.1 Land restitution proxy for land reform

The land restitution process can also be interpreted as a *de facto* land reform. Colombian history shows that property rights cannot be separated from the owner's physical control and power to prevent contesters from grabbing the land. A semi-feudal system implies that smallholders exist because the large landowners accept and need them as part-time labour supply. Wüig (2009) has argued that the introduction of the state as a guarantor through titling, police and judicial protection would mean that smallholders would at last become independent. The local power-lords on their side would lose 'territorial control' and could try to resist such *de facto* land reform.

There have been various attempts to redistribute land in Colombia. Unfortunately, all of them must be characterized as unsuccessful. One possible explanation is the limited extent of previous initiatives. Most land reforms in which considerable amounts of land are passed on from large owners to peasants have entailed forceful dismantlement of traditional rural elites. In Peru, General Velasco expropriated all land for a pittance in the 1960/1970s, indirectly forcing the rural elite to move to the towns. Ethiopia expropriated land, denying the local elites any positions of responsibility in their area. In China, the Maoists expelled or executed many large-scale landowners. The dismantlement of the rural elite was deemed necessary to prevent sabotage of the land reform as well as their potential comeback as a political actor.

In Colombia, only some large farmers got their land expropriated after land occupations by the poor rural population in the 1960-80s. Most were unaffected by this redistributive land reform, but they feared they would be the next in line. This served as incentive for large land owners to build an alliance against smallholders as well as the guerrilla. The failure of the 'willing seller – willing buyer'<sup>27</sup> attempt in the 1990s can be interpreted the same way. If a group of small-scale farmers could prove themselves capable of running former large estates, even increasing production, political pressure for forcible redistribution could be the result. That meant that large landowners had an incentive at least not to help, or even prevent, such smallholder takeovers from becoming a success. The lack of political interest in making the willing seller–willing buyer programmes in, for example Guatemala or South Africa, actually work can actually be a way of protecting the current position of the rural elites.

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<sup>27</sup> Landowners sell voluntarily at market prices, and the state subsidizes (groups of) peasants who want to buy the land

The new Land Fund (*Fondo de Tierras*) proposed in Havana runs the same risk of failure as previous land reform programmes in Colombia. The fierce resistance on the part of the rural elite in Colombia today – who constitute part of the ‘dark forces’ alongside narco-mafias and paramilitaries – could be based on well-founded fears of state expropriation of what they perceive to be their rightful property. One example is land cleared on the agricultural frontier after 1961. The limit was set to one Agricultural Family Unit (UAF), i.e. as much as one family could farm alone. However, many continued clearing large estates without meeting any objection from the state. The law, like many other Colombian laws, was never enacted in practice. Reclaiming such land now as state property, more than five decades later, is hence seen as expropriation and an attack on large-scale farmers. It seems even more unjust if the land was cleared, but never titled, before 1961. The Colombian land agency INCODER enacted a land confiscation on the Atlantic coast in 2011, reclaiming and confiscating 10 out of 11 parcels of lands that constituted an estate.<sup>28</sup>

According to Colombian legislation, the state can reclaim much of the land held by large land owners. The INCODER has become infamous for illegal practices in the adjudication of land and the institution is now requested by the Procuraduría to review the historic process leading to the creation of large estates and possibly nullified adjudications if (i) several adjudicated UAF-size properties were wrongly united into one farm, and if (ii) illegal practices were applied in past adjudication and titling processes, e.g. corruption, coercion, mismanagement of all types. The nullifying process (*revocaciones*) now initiated by INCODER has put an embargo on a large number of properties, as much as 170 large estates only in the Oriental Llanos flatlands. However, the legal processes have not come to an end, and the current owners argue that prior to 1994 UAF as a concept referred to the minimum of land that should be adjudicated to a family, not a maximum. Such an understanding would put no restrictions to the unification of several UAFs through markets operations if the other conditions for such are met. Most parties do agree that estate/land unifications after 1994 were illegal. In fact, in many parts of the country, adjudication and titling processes were not finalized in many parts of the country<sup>29</sup>. The ongoing processes of review and nullification opens for a redistributive land reform and has created a high level of fear among rural elites. The outcome is still open. The resistance of rural elites to such confiscations will in the end depend on their political leverage and the strength of state institutions to implement its policies and actually take possession of land and properties in remote areas of the country.

One way to address this issue is to convince the rural elites that formalization and the presence of a strong state would improve profitability and facilitate agricultural production. The lack of state presence and general lawlessness in rural areas prevent the general transition from rather low-productive cattle ranching to high-productive commercial estate farming. ‘Divide and conquer’ could be a possible strategy – for

<sup>28</sup> [http://www.INCODER.gov.co/Bolivar/pavas\\_predios.aspx](http://www.INCODER.gov.co/Bolivar/pavas_predios.aspx)

<sup>29</sup> Each region might have a different pre-history due to different degrees of state presence. Cattle ranchers in the Oriental Llanos flatlands normally made a private agreement on borders between their properties to be recorded and publicly available through the local notary. These “land possession titles” were perceived as good as any title deed even though the state never took part in the agreement. There are no legal hindrances for the state to reclaim this land.

example, by building alliances with the agro-industrial complex, inducing some large-scale farmers to put pressure on the most conservative amongst themselves to accept the cost through some redistribution, to achieve the gains from formalization. The idea is to introduce the rule of law once and for all. Informants in producer organisations and agricultural businesses now claim they are open to land rental schemes as they understand their existing property rights are legally questionable. They also believe that renting state land would prevent land speculation, thus avoiding overprizing land. In their view, the state should stop the adjudications or sale of land to both small and large scale farmers alike.

The most extreme solution would be to copy the post-Soviet solution in Russia – simply formalizing the current landowners even though they may be known criminals that stole land. Then, through formalization, state presence and the rule of law, they could convert themselves into a modern law-abiding agro-capitalist class, accepting a smallholder class that is given land in willing seller–willing buyer approaches.<sup>30</sup> This alternative, however, would have a high political cost. Such solution is not politically acceptable in the same manner as a revolutionary land reform disempowering the rural elite once and for all is unthinkable.

## 7.2 Insecurity of property rights obstacle for investments in agriculture

Physical control is a prerequisite for land tenure security in Colombia. Introducing the state through land titling and rule of law could in principle increase tenure security and hence the farmers' willingness to invest in the land. The upside potential is large, since Colombian farmers underperform compared the good natural conditions for high-end agriculture in large parts of the country. Needed investments in machinery, knowhow and infrastructure and inputs will not take place if the farmer is not sure of reaping the benefit in form of production increases if they lose the land in the future.

One of the basic ideas of the land restitution and titling process is to create such land tenure security, and as such lead to more investments. However, the overall effect might be negative for a long time to come. The restitution process is slow, and any current landholders risk losing their land if an IDP is proven to be 'the rightful' owner by the court, so they will be reluctant to invest in the farm. This applies to anyone who has acquired land after 1991, as even legal purchases of titled land might be contested due to low price as unfair.

The restitution process is intended to last for 10 years. What will happen with land not claimed, or not processed within this period, is still unclear.

Informants in the agro-business sector claim the nullifying process by INCODER has created a high level of insecurity which has detrimental impact on investments.

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<sup>30</sup> The Kennedy clan in the USA is another example. The father built a fortune with illegal liquor smuggling, made a transition into a law-abiding businessman, and then financed the political campaigns to make his sons John and Robert the most respected president and presidential candidate in modern times.

Potential foreign investors may not wish to initiate business, and banks may not want to lend or roll-over loans to the current owners.

### 7.3 Dwindling profitability of small-scale farmers with free trade agreements

The peace dividend in the agricultural sectors is supposed to be large as the current utilization of land is probably unproductive. Much highly fertile land is actually used for grazing cattle in extensive low labour and capital intensive schemes. High insecurity in the countryside prevents investments in more intensive food and cash crops cultivation, and the general abandonment of the state of the countryside imply that the infrastructure like roads are not close to the standards needed to induce high productive capital and labour intensive agricultural growth. As peace and investments by the state in the countryside hopefully return, the agricultural sector should progress. However, it is not clear how the structure of the Colombian agricultural sector will be in the future.

Economic theory assumes that large farms are less productive than small farms. The so-called inverse relationship between farm size and productivity is based on moral hazard in employment of workers (Wiig and Øien, 2012) An individual will have more incentive to work hard on the land if he/she benefits directly by the outcome than if employed by someone who is not able to control effort properly, being wage earners or share-croppers. However, the moral hazard argument applies to all types of production. It is hence an empirical question whether family units are more productive than large company structures employing labour. This differs by product, region and labour culture in general and not at least the intended market segments. The requirements as to standardization, packaging, sanitation and control differ hugely between a local village market, urban consumers and exports. Market access for small-scale farmers without capital for investments, volume or knowledge for advanced production is reduced, as more consumers now prefer to buy at the supermarket rather than barter with vendors in the traditional market places (Reardon and Berdegue 2002).

Another element is the heavy leaning towards cattle ranching in the current agricultural structure in Colombia. The owners probably do not risk investing in horticulture and more capital-intense production due to the general insecurity in the countryside. If the rule of law can be established, large producer units might move into the segment of small-scale producers today, with volume increases depressing price and finally forcing small-scale farmers out of business. Concentration into larger units in agriculture is a fact of life in most parts of the world. The experience with export-oriented farming in Latin America – especially Peru with a considerable share of world trade in grapes, asparagus and other high end-value products – is dominated by large units with large numbers of employees. Contract farming, whereby intermediaries supply each farmer with input and knowhow as well as buying his produce at an agreed price, does not seem to be a viable alternative, since few such schemes exist.

Farmers' protests against the forthcoming free trade agreements which would reduce tariff barriers on imports of agricultural products and the general increase in input

prices due to fewer subsidies for agriculture took Colombia by surprise last year. Both phenomena force Colombian farmers to become more productive in the future, and the smaller units are less able to cope with increased competition.

Both the introduction of the rule of law in rural areas and the opening up to world trade will benefit the larger commercial units, at the expense of smaller family farms. Any IDP who foresees the dwindling profitability of small-scale agriculture will be more reluctant to return. The initiatives taken by the restitution judges in the restitution process to support production with infrastructure, capital and inputs might not be sufficient to tempt former farmers back, if the future of the sector is bleak.

## 8 Conclusions and recommendations

Colombia's land restitution process is moving forward slowly. The comprehensive documentation of each individual case and resources required for the courts will make it impossible to help the more than 5 million IDPs (Gutierrez Sanin, 2013). A large proportion of the IDPs will probably never benefit from the restitution process, or perhaps the government will be forced to give monetary compensations, often based on collective judicial processes, instead.

If, contrary to expectations, the URT is able to reach all IDPs and formalize their property rights in the process, one may still question whether the state apparatus is strong enough to defend these rights later. The institutional presence in the countryside is weak, and vulnerable to pressure and corrupt practices that may undermine the achievements. Furthermore, land formalization processes tend to become single episodes of titling and the creation of a registry that is not updated afterwards. If information on land sales, inheritance and other transfers is not updated in the Public Registry because the actors feel the process is too complicated, time- and money-consuming, the registry will soon lose relevance.

Restitution of land does not necessarily mean that the IDPs will move back. A generation might have passed since they lost their land, and they may have now settled down in other areas, earning a living in other professions than agriculture. Their offspring often have no relationship to the area their parents left and will probably not consider relocating when they inherit the land. Preliminary fieldwork indicates three possible outcomes as the most common: the land remains idle; the land is used solely for recreational purposes; or the land is sold as soon as the two years of embargo have passed. In the course of our fieldwork we have not encountered any returning IDPs who have actually resettled on their original land. Those who take up farming again do so by migrating seasonally to conduct the farm work.

How could Colombian society achieve more in the process? The 'rural problem' has haunted Colombia ever since the foundation of the nation. Wars, violent uprisings and guerrilla activity have erupted periodically, with hundreds of thousands killed in each round. There are two fundamental underlying issues: conflict over landownership; and the weak presence of the rule of law and central state governance in the countryside. The aim of the Victims' Law is to put an end to both phenomena. The restitution of each individual land parcel to the original owner is intended to break with the historical experience and expectations that it is possible to steal land and keep it if violence again erupts. And the coordinated presence of state institutions to facilitate and guarantee the restitution of land should lessen the grip of local power-lords and introduce the rule of law. In theory, then, the conditions for lasting peace will finally be present in Colombia.



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In practice, however, the process of land restitution may create more tension than it alleviates in the countryside. The process is slow, and innocent third parties perceive loss of land as unjust confiscation. Furthermore, only part of what is perceived as a property will be restituted and titled, due to the maximum limit set for each family unit on previously untitled state land. Furthermore, few IDPs indicate they will actually return to the land, which delegitimizes both the use of state resources and the eviction of current users. An alternative strategy could be as follows:

- The URT could start the restitution process of larger properties, possibly with many claimants, where the current holder is thought to be a former paramilitary or other clearly improper holder, rather than starting with the individual IDP farmer and small parcels of land as the unit of restitution. The URT would then gain access to large land areas rather quickly.
- Open for monetary compensations at the start of the registration process, to avoid lengthy procedures and delegitimizing of the process, since few families are likely to end up farming the land after all.
- Make family-unit farmland available for to any poor inhabitant in Colombia who can prove willingness to invest time and energy in agriculture. The number of people willing to start farming is probably rather low. Precisely because few IDPs, and the urban poor in general, are willing to resettle in the countryside, the confiscation of large illegally acquired land properties, state purchase of land at market prices, and facilitation of land at the agricultural frontier will probably be sufficient to satisfy demand.

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