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**Colombia’s law on victims and restitution:
a challenge for gender-sensitive transitional justice¹**

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¹ We recognize that notions of “post-conflict”, “transitions” and “transitional justice” in Colombia are contested, but this debate exceeds the scope of the paper. The measures here presented as part of a process of “transitional justice” are carried out in the context of ongoing violence, particularly in the countryside.

* The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations.

1. The Victim's Law: advancing towards the restitution of victim's rights?

Land has been one of the central issues in Colombia's protracted internal armed conflict. Its unequal distribution has given rise to social protest and peasant movements in the past. Today, land is still crucial for territorial control and political and economic power, and therefore it remains a particular asset in the dynamics of war - and also in the debates on how to end it. However, until recently, the land question was not an essential part of the negotiation tables with the guerrilla, the DDR processes with the paramilitary or the humanitarian assistance for the Internally Displaced. The loss and restitution of land only became part of the political arena when the issue of *reparations* was introduced as part of a "transitional" scenario towards peace.

In June 2011, the Colombian Congress approved Law 1448, known as the Law on *Victims and Land Restitution*². Compared to the Justice and Peace Law, enacted since 2005 by former President Uribe's government, the new Victims Law shifts the focus from the *perpetrators* (facilitating the demobilization of the paramilitary), to the *victims* of conflict, addressing their assistance and integral reparation. The Law is part of an effort by the President Santos government to redress the harms and losses that suffered the victims, particularly the Internally Displaced, who amount over 5 million people since 1985³. The new statute acknowledges victim's status from that date onwards, accepts land restitution claims from 1991 onwards and includes procedures that shift the *burden of proof* from the victims to the perpetrators.

Before, the concept of comprehensive reparations was formally enshrined in the Justice and Peace Law, and an administrative program for individual monetary reparations was created by decree. However, violations of property rights and the losses of material goods, land and housing had expressly been *excluded* from the definition of crimes for which reparation could be claimed⁴. The reparations program was carried out independently from the national system of assistance and protection for the displaced population, thus creating two separate scenarios for victim's claims and institutional response⁵. The new victim's law pretends to make an end to this separation. It builds in part on the sentences and rulings of Colombia's Constitutional Court that since 2004 order the government to comply with international standards for assistance and reparations for IDPs⁶. It has also required a new institutional architecture, channeling implementation through two semi-autonomous entities: The Victims Unit assigned to the Prosperity Department of the Presidency and the Restitution Unit assigned to the Ministry of Agriculture and Rural Development. These new institutions face a huge task, as the magnitude of the problem of land restitution has been demonstrated by the Monitoring Commission on Public

² *Ley de Víctimas y Restitución de Tierras, Por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno y se dictan otras disposiciones (2011)*. Bogotá, Ministerio del Interior y de Justicia.

³ According to the NGO Codhes, quoted by UNHCR. <http://www.acnur.org/t3/operaciones/situacion-colombia/desplazamiento-interno-en-colombia/>. Accessed June 10 2012.

⁴ Decree 1290, 2009. Government programs for IDPs included the option of *return* to their zones of origin without assessing the legal and factual status of their possessions.

⁵ See Meertens, Donny and Margarita Zambrano (2010) Citizenship deferred: The Politics of Victimhood, Land Restitution and Gender Justice in the Colombian (Post?) Conflict. *The International Journal for Transitional Justice* (4) 2 :189-206, doi:10.1093/ijtj/ijq009, p. 202.

⁶ Constitutional Court of Colombia (2004) Sentence T 025; Constitutional Court of Colombia (2008) Ruling 092 On the disproportionate impact of conflict on displaced women.

Policy for Internal Displacement, reporting more than *six million hectares of agricultural land forcibly abandoned* by rural populations, as a consequence of armed conflict⁷.

*So, in the context of the new law, what will happen to the women?*⁸ The victim's statute explicitly adopts a *gender sensitive approach* and extends its sensitivity to special characteristics of age, sexual orientation and disablement. (Article 13). In the same article, the Colombian state offers special guarantees and protection measures for all those who are exposed to special risks of violation of their human rights in the context of armed conflict and internal forced displacement: women, youth, children, old people, disabled people, peasants, social leaders, trade unionists, human rights defenders and victims of forced displacement. *Women's rights* are addressed in two particular ways. Firstly, sexual violence in the context of armed conflict comes up in Article 38, and subsequent articles refer to the principles that should guide the collection of evidence, following the Rome Statute and ICC protocols on the subject.

Secondly, of particular interest for this paper, the articles 114, 115, 116, 117 and 118 ("Regulations for Women in Restitution Processes") refer to *prioritization of women* for *administrative and judicial procedures of land restitution*; for the factual handing over of land; for renewed access to the benefits (credit and other productive resources) rescued from the old (and up to now ineffective) law 731 on Rural Women (2002); and for the *formal titling* of the recuperated possessions. The land deeds should be issued and registered as *joint titles* for spouses or permanent partners, even if the spouse or partner is not present during the trial or administrative procedure⁹.

Critical voices on the Victim's Law and its possibilities for gender-equitable outcomes, have concentrated on two issues of implementation: (a) the context of continuing violence in the countryside that requires the strengthening of *protection* measures, particularly for women leaders who claim land and (b) the need for strengthening non-judicial mechanisms to assess the history of informal land tenure by displaced women who reclaim restitution of their former land holdings.

The implementation¹⁰ of the Victim's and Land Restitution Law is still in too early a phase for its revision *as a (best) practice*. However, we can revise *the obstacles* for the full and equitable inclusion of women in its implementation. Identifying and addressing these obstacles is an important exercise to convert the legal dispositions into a successful practice. Therefore, in the

⁷ Comisión de Seguimiento a la Política Pública sobre Desplazamiento forzado (2011) *El Reto ante la tragedia humanitaria del desplazamiento forzado. Vol. 10: Reconocer y resarcir debidamente los daños y perjuicios. Proceso nacional de verificación*. Bogotá, CODHES: 27.

⁸ Rubio Marín, Ruth ed. (2006) *What happened to the Women? Gender and Reparations for Human Rights Violations*. New York, Social Science Research Council. Also: Rubio Marín ed. (2009) *The Gender of Reparations. Unsettling Sexual Hierarchies while Redressing Human Rights Violations*. Cambridge, Cambridge University Press.

⁹ Joint titling has been made mandatory under the Agrarian Reform Law (nr. 160) of 1994, a "market assisted and market oriented" statute meant to promote competitiveness, more than redistribution of land amongst the peasantry. Its practical implementation has been very limited and so are its results in matters of joint titling. Even more, as long as 10 years ago, the effects of joint titling on the real empowerment of peasant women in Colombia and other Latin American countries were already been severely criticized. See: Deere, Carmen Diana and Magdalena León (2001) *Empowering Women: Land and Property Rights in Latin America*, Pittsburg, University of Pittsburg Press.

¹⁰ Decree 4829 of 2011

following chapters we will outline these *Obstacles*, resume them in *Lessons learned* and elaborate some *Recommendations*.

2. Introducing women's rights in land restitution: the obstacles.

In the following paragraphs we will revise five different situations that rural women in Colombia have to confront when reclaiming their land under the new victim's law.

2.1. Cultural entitlements, social practices and under-enforcement of corrective measures. Many socially and culturally embedded practices in rural society hamper the effective enjoyment of property rights for women; they deny or minimize their productive roles and disregard their capabilities to engage in productive and financial management of landed properties. Official measures of *positive action* (special funds, forgiving or reducing debts for rural women), intended to counteract these obstacles, have not been enforced. Land assignment to displaced women who are heads of household, does not acknowledge their past experience as *de facto* rights bearers and loss of land is not accounted for in their cases.

Example 1: Banks refuse to give loans to peasant women, even if there is a joint title of ownership, with the argument that the husband needs to agree and take the decision. The special fund for rural women designed in the 2002 law, remained un-funded for over 10 years¹¹.

Example 2: The case of María Zabala. María Zabala, a widely recognized female peasant leader in Colombia's Caribbean coast, organized a group of displaced women, heads of household and widows of violence, into an association that searched for access to land under the agrarian reform law of 1994. They got the land, but were never asked about their forms of victimhood, their relationship with the land before displacement, or their productive experiences. There was no recognition of losses, no reparation. The women had to pay for the new land, there was no proper technical assistance for their cattle farm and they accumulated an enormous debt that still threatens their joint enterprise. "We fight against a new displacement" says María, "first it was violence that displaced us, now it is the debt that will force us to leave our home and land"¹².

2.2. Informality of land tenure, particularly by women, undermines legal security and hampers the collection of evidence for restitution¹³.

Colombia ranks as one of the countries with the most skewed landed property distribution in the world, as is shown by its Gini coefficient of 0.87 (2011)¹⁴. According to studies by the World

¹¹ Meertens, Donny (2006) *Tierra, Derechos y Género: leyes, políticas y prácticas en contextos de guerra y paz*. Bogotá, UNIFEM.

¹² Comisión Nacional de Reparación y Reconciliación, Grupo de Memoria Histórica (2010) *La Tierra en Disputa*. Bogotá, Fundación Semana /Taurus: 365,366. See also: "Land holds promise of Peace in Colombia", Case study Colombia (2011). *Women and Land . Securing Rights for better lives*. Debbie Budlender and Eileen Alma , Ottawa, IDRC Collection In Focus. (E-pdf).

¹³ See also Meertens, Donny (2009) *La tierra, el despojo y la reparación: Justicia de Género para mujeres víctimas en Colombia. ¿Justicia desigual? Género y derechos de las víctimas en Colombia*. Bogotá, Unifem.

Bank, about 40% of the land holdings in Colombia lack proper land deeds. Many land holdings, particularly the smaller and middle sized ones, are possessed or occupied by informal tenants, who work –and also informally transfer to their children or relatives – the land that formally still belongs to the state. Others possess an informal piece of paper that makes for an act of transfer between a seller and a buyer of private property. Statistics of the displaced population show a striking *disparity* between men and women with respect to land ownership: in 64.2% of the cases of displaced households that reported ownership of their forcibly abandoned land, the rights bearer was a man. Only in 26, 5%, the owner was a woman. An insignificant 9.3% reported joint ownership (only prevalent in the scarce agrarian reform holdings after 1994)¹⁵. This underrepresentation of women in formal landownership makes it more difficult for them to prove their rights. Although the state’s registers of abandoned land holdings receive information provided by all kind of formal and informal rights bearers, a claim for restitution of one’s possessions requires documentation. This difficulty becomes a true obstacle when the female claimant is a widow or has been abandoned by a man who was an *informal* marital partner and *informally* exercised land tenure...

Example: In one of the workshops held by the Historical Memory project on violent land seizures, twenty women narrated their traumatic experiences and expressed them in drawings of their former *fincas*: beautifully remembered landscapes, disrupted by terrifying scenarios of horror. Only one out of the twenty reported a land deed, shared with her husband (they had been beneficiaries of a land reform holding). The other women did not even consider the possibility of defending their rights. How to look for protection or restitution of a plot that – although they had been working and harvesting on it for a whole life- did not belong to them? What to do if the formal owner was the uncle of the deceased husband? Or the grandfather? Some women did not want to go back to the sites of trauma; others did, but lacked the official support for their possible claims against those of other, male, family members.

2.3. Vulnerability of women in local contexts of violence: land seizures and gender based (sexual) violence conflate into a lack of human security.

Several studies by the Historical Memory group and by women’s organizations have shown the connections between violent land seizures and (threads of) sexual violence against peasant women. Moreover, the brutal assassinations of women leaders who demanded restitution of land for members of their organization, have been reported for many parts of the Caribbean Coast (where violent land seizures occurred most frequently). Recent media reports show the conformation of “*Counter-Restitution Armies*” – new criminal bands or remnants of paramilitary groups that never demobilized- and that are supposed to defend the interests of big landowners and drug traffickers who have usurped the land to be restituted¹⁶.

¹⁴ <http://m.eltiempo.com/justicia/se-necesita-ir-mas-alla-de-la-restitucion-de-tierras-absalon-machado/8839912/1>, accessed June 10 2012.

¹⁵ UNDP Colombia office (2011) *Mujeres Rurales, Gestoras de Esperanza*. Cuaderno del Informe de Desarrollo Humano Colombia 2011. Bogotá, UNDP: 47.

¹⁶ See the national newspapers El Tiempo and El Espectador June 10, 2012.

Example: In the rural municipality of *Chivolo*, department of Magdalena, the paramilitary raped two women in order to force the whole community into displacement and seize their land (small plots assigned by agrarian reform law). Now, this place will be one of the pilot experiences of land restitution by government but requires an extraordinary and prolonged effort of protection by the central state in order to control local violence against women¹⁷.

2.4. The interplay of patriarchal marital practice and male-biased family policies make women and their children lose their rights after family rupture

Forced displacement, the arrival in new urban environments and divergent expectations of *return*, frequently bring along family ruptures. These family ruptures amongst the IDP are particularly problematic when marital relations are not formalized. In February 2012, the Victim's Unit reported 8005 demands for land restitution, 39% of them put forward by women. Nearly half of these women (46%) reported to live in informal marital relationships¹⁸. The lessons learned during the (earlier) state –promoted returns to home lands show that usually *men, not women, do benefit from these family ruptures (and re-compositions)*. This is related to the fact that public policies remain based on the notion of *male headed households*¹⁹. Men are considered the “normal” bearers of patrimonial rights, and used to be the ones that asked for the installment of protection measures for their land after displacement²⁰. When they return to their zones of origin after family rupture, they may recover their patrimony, independently from household re-composition with a new partner. As victim's rights remain tied to the male or paternal figure, women and children that had separated from him (or were abandoned by him) lose their rights in practice. This has generated intense disputes over land between the originally displaced family members and the newly constituted families. How to avoid or to settle them? Some of the clues to this issue are the registration of all family members and the periodic updating of the victims register, so family ruptures can be identified, and by these means, *the enforcement of individual victim's rights* vis a vis land restitution may be guaranteed.

2.5. Tensions between formal justice systems and informal or customary law (proper, indigenous or communitarian) and between collective victimizations and women's individual rights.

Whereas the regulations for afrodescendent communities are still under discussion, the Presidential Decree 4633 (2011) regulates the integral reparation and the restitution of territorial rights for victims that belong to *indigenous* people and communities. In this case individual claims of reparation (by individual victims of human rights violations) are supposed not to interfere with collective claims for recovering territorial rights. Nevertheless, indigenous women express the need for *proper routes* that allow them to demand their rights *within* the traditional authority structure of their communities. Until now, traditional authorities usually are

¹⁷ Comisión Nacional de Reparación y Reconciliación, Grupo de memoria Histórica (2011) *Mujeres y Guerra. Víctimas y resistentes en el Caribe Colombiano*. Bogotá, Fundación Semana/Taurus : 249-251.

¹⁸ Information provided by the Victim's Unit (*Unidad Administrativa Especial de Gestión de Restitución de Tierras Despojadas, del Ministerio de Agricultura y Desarrollo Rural*).

¹⁹ With the exception of the World Bank promoted anti-poverty programs called *Familias en Acción*.

²⁰ Measures of patrimonial protection are, for instance, the freezing of all transfer movements to third parties. However, these measures do not prevent the violent occupation of the land.

disregarding or underestimating women's cases for rights claiming and if they want to proceed they have to present their cases to the formal justice system.

3. Lessons learned and recommendations derived from the Colombian case.

The interplay of *historical discrimination of women* (that is cultural norms, social practices, the non enforcement of gender equity laws) and *the disproportionate impact of violence* on women make for a particular set of disadvantages that affect displaced women during return and land-restitution processes and procedures. These disadvantages should be properly addressed in order to make the restitution of rights (to property, to productive resources) an effective exercise of *transformation of gender inequalities*.

The lessons from the Colombian context give rise to the following recommendations:

3.1. Strengthen the enforcement of anti-discriminatory measures or positive actions for rural women's empowerment; making them into respectable and legitimate economic and political actors in rural areas.

3.2. Improve the knowledge of routes and practical access to justice for women

3.3. Prioritize judicial cases put forward by women reclaiming land

3.4. Provide special training for women on judicial and administrative procedures in land restitution processes

3.5. Make recording women's history and relationship with the land into a prerequisite for evidence collection on women's rights to land

3.6. Allow for extra-judicial mechanisms during collection of evidence on land possession (community voices, testimonies)

3.7. Provide effective protection of individual (female) victim's rights, allowing for registering independently from male-biased household registration

3.8. Make victim's registers more flexible and allow updating of demographic and marital information

3.9. Provide special and prolonged protection mechanisms against the threads of sexual violence and femicides of women leaders

3.10. Prioritize land titles for women and in the case of joint ownership, provide special judiciary measures that privilege women's rights in case of family ruptures.

3.11. Allow indigenous and afrodescendent women to develop their own routes for rights restitution, combining formal (statutory) justice systems with indigenous or customary law systems.

3.12. Promote women's organized participation in the institutions that implement integral reparations and land restitution.