

The transformative potential of gender justice in the land restitution programme in Colombia

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Abstract: This paper studies the existence of elements of gender justice in the ongoing land restitution process in Colombia, in order to analyse the potential of the Land Restitution Programme to contribute to the elimination of structural violence against women and the resulting gender inequalities. In this context, the sources of the analysis comprises the Victims' and Land Restitution Law of 2011, the implementation programmes by the Land Restitution Unit, and the sentences by the specialized judges for land restitution. The paper argues that the land restitution programme could contribute to the elimination of structural forms of discrimination and exclusion of women in the Colombian society, if the elements of gender justice are applied in a coherent and systematic way and if it is accompanied by additional measures aimed at reducing the high security risks for internally displaced women in the land restitution process and changing the patriarchal system deeply rooted in the Colombian society.

Keywords: Transitional Justice, displacement, land restitution, gender justice, structural violence, transformative justice, differential approach

Resumen: Este artículo estudia la existencia de elementos de justicia de género en el actual proceso de restitución de tierra en Colombia para analizar el potencial del Programa de Restitución de Tierras en la contribución a la eliminación de violencia estructural contra mujeres internamente desplazadas y las inequidades resultantes. En este contexto, las principales fuentes de datos para el análisis son la Ley de Víctimas y Restitución de Tierras de 2011, los programas de acción de la Unidad de Restitución de Tierras y las sentencias de los jueces especializados en la restitución de tierras. Este trabajo sostiene que el programa de restitución de tierras podría contribuir a la eliminación de formas estructurales de discriminación y exclusión de mujeres en la sociedad colombiana si los elementos de la justicia de género son aplicados de una manera coherente y sistemática, y si van acompañadas por medidas adicionales enfocadas a reducir el alto riesgo para mujeres internamente desplazadas en dicho proceso y a cambiar el sistema patriarcal, firmemente arraigada en la sociedad colombiana.

Palabras clave: Justicia transicional, desplazamiento, restitución de tierra, justicia de género, violencia estructural, justicia transformativa, enfoque diferencial.

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List of abbreviations

Bacrim	Bandas criminales Emergentes (Emerging criminal gangs)
CC	Constitutional Court
CEDAW	Covenant on the Elimination of Discrimination against Women
CODHES	Consultoría para los Derechos Humanos y el Desplazamiento (Consultancy for Human Rights and Displacement)
HLP rights	Housing, land and property rights
ICTJ	International Centre for Transitional Justice
IDP	Internally displaced person
RUV	Registro Único de Víctimas (Central Registry of Victims)
SGBV	Sexual and gender-based violence
TJ	Transitional Justice
UN	United Nations
URT	Unidad de Restitución de Tierras (Land Restitution Unit)

1. Introduction

For more than 60 years, internal displacement and dispossession of land has been a continuous characteristic of the internal armed conflict in Colombia and one of the most obvious expressions of the humanitarian crisis prevailing in the country. With nearly 5,000,000 people affected by these crimes, Colombia is the country with the second largest number of internally displaced people (IDPs) in the world.¹

More than half of the country's IDPs are female. They constitute an especially vulnerable group among the internally displaced population and are therefore particularly affected by the armed conflict. This condition has a very clear expression in the high number of women victims of sexual violence, before and after their displacement, and their difficult situation as single heads of household with the sole responsibility for their children. In addition, they face enormous difficulties to claim their rights to justice and reparations and those women who do fight for their rights, particularly their rights to land and property, face high security risks. The solution of the land issue and the restitution of land as a response to the human rights violations against the victims of forced displacement is one of the key issues in the governments effort to bring an end to the country's long-standing armed conflict. But given the magnitude of seized land and the

¹ Internal Displacement Monitoring Centre, *Global Overview 2012: People internally displaced by conflict and violence* (Geneva: 2013), p. 34.

high concentration of land in the hands of few owners, in addition to the manifold political, economic and military interests, it is also a highly complicated and politically sensitive issue.

In June 2011, the Colombian Congress adopted Law no.1448, the Victims' and Land Restitution Law (Victims' Law)², which is part of the Transitional Justice (TJ) framework in Colombia.

It contains a set of judicial and administrative measures in favour of victims' rights and their effective enjoyment, and provides for assistance, attention and comprehensive reparations for the victims of the internal armed conflict and sets up measures which allow for the restitution of roughly two million hectares of land to the victims as the rightful owners of that property.

Nevertheless, the context of the ongoing Colombian armed conflict, and the persistent and even increasing violence and displacement applied by the so-called "bandas criminales emergentes" ("emerging criminal bands" or "Bacrim") and criminal anti-restitution movements, as well as the patriarchal structure of Colombian society and the historical discrimination of women are still leading to an increased risk of being displaced in the first place and cause enhanced vulnerability and poverty of women during and after their displacement.

Against this backdrop, the concrete research questions guiding this paper are first, if and how elements of gender justice are incorporated in the provisions concerning land restitution in the Victims' Law, in the implementation instruments and the subsequent sentences by special courts for land restitution, and second, which factors represent major obstacles for the Land Restitution Programme to have a positive impact on the situation of displaced women and are responsible for the gap between the objectives of the Victims' Law and its impact on the internally displaced women's lives in reality.

It is still early to conduct a comprehensive evaluation of the implementation of the Land Restitution Programme and its effects on the situation of displaced women. But initial data is available through, among others, the Land Restitution Unit (URT) which has already received around 40,000 claims by victims of displacement and dispossession, and more than 100 sentences delivered by the special judges for land restitution.

² Ministry of the Interior and Justice, *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* (Bogotá: 2011).

2. Theoretical Framework

2.1. A Gender focus in Land Restitution

Recognition of the need for reparations to play a role in fighting the existing gender inequalities is gaining importance in international policy and jurisprudence. Of all the transitional measures, reparations have the most victim-oriented perspective and therefore a high potential to redress underlying inequalities and contribute to the transformation of society.³

Pablo de Greiff presents an understanding of reparations in transitional justice, according to which they can offer the basis for a new social contract in transitional societies, where a minimal degree of trust in the institutions of the "new state", but also between the citizens can be regained and some of the pre-existing structural gender inequalities, often deeply rooted in societies, be reverted.⁴ This potential is also mentioned in an important case of the Inter-American Court for Human Rights concerning reparations for women, namely the "Cotton Field" case against Mexico in 2009. It stated that:

450. The concept of "integral reparation" [...] entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused. However, bearing in mind the context of structural discrimination [...], the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification.⁵

Rubio-Marín also mentions the structural context and confirms, especially taking women's experiences in conflict into account, that even when women are suffering similar violations as men, they have a different impact on women, due to their pre-existing socio-economic and legal status, as well as the gender constructions in patriarchal societies.⁶

³ Ruth Rubio-Marín, "The Gender of Reparations: Setting the Agenda", pp. 20-47, in Ruth Rubio-Marín, ed., *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York: Social Science Research Council, 2006), p. 25.

⁴ Pablo de Greiff, "Introduction. Repairing the Past: Compensation for Victims of Human Rights Violations", pp. 11-15, in Pablo de Greiff, ed., *The Handbook of Reparations* (Oxford: Oxford University Press, 2006), pp. 11-15.

⁵ *Caso González y otras ("Campo algodón") v México*, Inter-American Court of Human Rights, Series C no. 205 (16 november 2009).

⁶ Ruth Rubio-Marín, op. cit., p. 22.

An increased interest in restitution as part of reparations can be observed to have led to the adoption of the Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles)⁷ by the UN Sub-Commission on Human Rights and the UN's Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles)⁸, both adopted in 2005. The right to restitution of land after having been internally displaced is the "legally enforceable right to return to, recover, repossess, re-assert control and reside in the homes and lands they had earlier fled or from which they had been displaced".⁹

The right to restitution for property, which has been lost as a result of forced displacement is fundamental for IDPs and according to the Pinheiro Principles "the preferred remedy for displacement and [...] a key element of restorative justice."¹⁰ In practice, an increasing number of peace agreements that include provisions for restitution programmes in post-conflict situations further exemplifies this trend.¹¹

Especially for women, HLP rights and land restitutions are important. First, because the impact of forced displacement leaves them in a very vulnerable situation due to exclusion, discrimination and violence, and second, because land restitution as part of a reparation programme can have a very high transformative potential for women's lives. However, although the Pinheiro Principles themselves demand restitution that improves the unequal distribution of land across genders¹², a programme that does not focus on gender equality in land titles and not take historical inequalities into account is likely to restore an unjust system.¹³ It could even mean that restitution programmes without a gender perspective could have a disparate impact on women, who are prone to be under-represented among

⁷ See UN Sub-Commission on the Promotion and Protection of Human Rights, *E/CN.4/Sub.2/2005/17* (28 June 2005).

⁸ See United Nations General Assembly, *A/RES/60/147* (16 December 2005).

⁹ Scott Leckie, *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (New York: Transnational Publishers, 2003), p. 4.

¹⁰ Sub-Commission on the Promotion and Protection of Human Rights, *E/CN.4/Sub.2/2005/17* (28 June 2005), Principles, 2.2.

¹¹ Barbara McCallin, "Restitution and Legal Pluralism in Contexts of Displacement", in ICTJ/Brookings-LSE, *Case Studies on Transitional Justice and Displacement* (2012): p. 4.

¹² See UN Sub-Commission on the Promotion and Protection of Human Rights, *E/CN.4/Sub.2/2005/17* (28 June 2005), Principle 4.2.

¹³ Donny Meertens & Margarita Zambrano, "Citizenship Deferred: The Politics of Victimhood, Land Restitution and Gender Justice in the Colombian (Post?) Conflict", pp. 189-206, *International Journal of Transitional Justice*, 4 (2010): p. 200.

land or property owners.¹⁴ A gender focus is especially important if the restitution is done on a collective level, as men are the majority owners of land in the communities and therefore could hamper women's access to the community property.¹⁵ Land restitution as part of TJ is contributing to the redress of past human rights abuses, but at the same time has the potential to address structural inequalities and contribute to more social justice for the victims in the future.

2.2. *The transformative potential of gender justice*

In 1969, Johann Galtung identified the concept of "structural violence"¹⁶, in which "violence is built into the structure and shows up as unequal power and consequently as unequal life chances".¹⁷ He further states, that in a situation of structural violence, the distribution of resources is unequal as is the "power to decide over the distribution of resources".¹⁸ Galtung identifies patriarchy as one of the forms of structural violence, where men are dominating women.¹⁹ He sees patriarchy as a violent social formation in which direct violence, structural violence and cultural violence are present.²⁰

Using this concept of structural violence, it can be argued that social, political and economic gender inequalities are forms of structural violence that exist due to unequal power relations between men and women and the discrimination and sub-ordination of women in patriarchal societies, which may be impaired during conflict.²¹ This patriarchal structural violence has to be understood in the context of the existing socio-cultural,

¹⁴ Rubio-Marín, op. cit., p. 29.

¹⁵ Claudia Paz and Paz Bailey, "Guatemala: Gender and Reparations for Human Rights Violations", pp. 93-135, in Ruth Rubio-Marín, ed., *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York: Social Science Research Council, 2006), p. 111.

¹⁶ Galtung makes a distinction between personal and structural violence. In contrast to personal violence that is inflicted directly to an object and alternates over time, structural violence is more stable, does not cause direct violence to an object and is based on structures of inequality and social injustice, see Johan Galtung, "Violence, peace, and peace research", pp. 167-191, in *Journal of Peace Research*, vol. 6, n.º 3 (1969): pp. 170-173.

¹⁷ *Ibid.*, p. 171.

¹⁸ *Ibid.*

¹⁹ Johan Galtung, *Peace by Peaceful Means: Peace and Conflict, Development and Civilization* (London: Sage Publications, 1996), pp. 30-33.

²⁰ *Ibid.*, p. 40.

²¹ Wenona Mary Giles & Jennifer Hyndman, *Sites of Violence: Gender and Conflict Zones* (London: University of California Press, 2004); Gaby Oré Aguilar, "Asserting women's eco-

economic and political system through which it is built, legitimized, reproduced, and naturalized.²²

Cockburn takes this framework to describe that the unequal distribution of resources generally has a disproportionate impact on women as the group that has been systematically excluded from political decision making.²³ This form of structural violence limits women to access basic needs and enjoy fundamental freedoms and therefore constitutes a human rights violation, in particular a violation of economic, social and cultural rights. However, precisely these rights are important for women to be able to escape exclusion, dis-empowerment and the successional poverty, which eventually can lead to forms of direct violence. Hence, the removal of structural violence and discrimination is fundamental to achieve complete gender equality in a society, where women can enjoy their human rights.²⁴ But as Mazurana and McKay argue, patriarchy based structural violence will not be put right until women are able to play more active roles making decisions about how resources are distributed.²⁵

Deduced from observations of women's struggles over productive resources, status in the family, or protection from gender-based violence, and women's mobilization for legal reform, Goetz contributes a very important gender aspect to the concept of transformative justice with a special focus on women. She provides us with a guide to basic standards of gender justice, where she defines gender justice as the "ending of—and if necessary the provision of redress for— inequalities between women and men that result in women's subordination to men".²⁶ These inequalities may be in the field of economic, social and cultural rights, as the distribution of resources and opportunities. Or, they may be in the area of political and civil rights, denying women physical integrity and the capacity to make autonomous choices about their lives. Hence, gen-

conomic and social rights in transitions", pp. 125-172, in Gaby Oré Aguilar & Felipe Gómez Isa, eds., *Re-thinking Transitions* (Cambridge: Intersentia, 2011), p. 128.

²² Catia C. Confortin, "Galtung, Violence and Gender: The Case for a Peace Studies/Feminism Alliance", pp. 333-367, in *Peace & Change*, vol. 31, n.º 3 (2006): p. 356.

²³ *Ibid.*

²⁴ Oré Aguilar, *op. cit.*, p. 127.

²⁵ Dyan Mazurana & Susan McKay, "Women, Girls, and Structural Violence", pp. 130-188, in D.J. Christie & R.V. Wagner & D.A. Winter, eds., *Peace, Conflict, and Violence: Peace Psychology for the 21st Century*, Englewood Cliffs (New Jersey: Prentice-Hall, 2011), p. 137.

²⁶ Anne Marie Goetz, "Gender Justice, Citizenship and Entitlements: Core Concepts, Central Debates and New Directions for Research", pp. 15-57, in Maitrayee Mukhopadhyay & Navsharan Singh, *Gender Justice, Citizenship and Development* (New Delhi: Zubaan, 2007), p. 31.

der justice implies access to and control over resources, combined with agency.²⁷

This approach gives an important idea of which elements of gender justice are needed in order to end forms of structural violence against women. First, the concept of gender justice implies not only access to and control over resources, but also agency, thereby emphasizing women's capacity for individualized choice and action. Second, it adds an element of accountability. Gender justice requires that women are able to hold power-holders legally accountable in order to punish or prevent actions that limit women's access to resources or capacity to make choices. Through this element, Goetz' model focuses not only on formally equal citizenship rights but on the effective enjoyment of their rights by women and draws attention to the way the institutions that produce rules and adjudicate disputes between women and men institutionalize biases against women. A third point is the addition of the element of redress which is normally not found in discussions of women's empowerment.²⁸ To understand and accurately analyse violence against women, the classical distinction between times of war and peace is not helpful, as women experience violence at all times, and the existence of structural violence in a society often leads to direct SGBV against women.²⁹ With this approach in mind, the issue of structural violence in states in post-conflict situations and the link between transitional justice and structural violence against women will be considered.

The deep-rooted inequality in a pre-conflict society enhances the vulnerability of women and girls in conflict situations. This leads to the disproportionate impact of conflict on the situation of women, which reinforces their vulnerability to discrimination, exclusion, poverty and the violence—structural as well as direct—inflicted on them. In light of this recognition, it is essential in every post-conflict situation to address the existence of gender inequality and the violations of their economic and social rights, in order to achieve a real and sustainable transition for all citizens towards positive peace³⁰ in the country. Post-conflict scenarios provide a critical opportunity for transformative constitutional moments in societies. As such they are an occasion for publicly addressing fundamental issues such as poverty reduction, distribution of resources, land reform, and develop-

²⁷ Ibid.

²⁸ Ibid.

²⁹ Cynthia Cockburn, "The Gendered Dynamics of Armed Conflict and Political Violence", pp. 13-30, in Caroline O.N. Moser and Fionna C. Clark, eds., *Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence* (London: Zed Books, 2001), p. 17.

³⁰ Positive peace according to Galtung means the absence of structural violence, see Johan Galtung, op. cit. (1969), p. 183.

ment.³¹ At the same time, forms of structural violence are very persistent in societies with a violent past, especially inequalities based on gender as they are often deeply-rooted in culture, customs and traditions and institutionalized in the public and private sphere. Their removal depends on the ways in which structural inequalities are recognized and redressed and justice is done. There is therefore a need for transitional justice to link challenges in the present clearly to structural continuities in the past.³²

Former UN High Commissioner on Human Rights, Louise Arbour, argued for the inclusion of elements of transformative justice in societies in transition:

Transitional justice must [...] reach to, but also beyond the crimes and abuses committed during the conflict which led to the transition, into the human rights violations that pre-existed the conflict and caused, or contributed to it.³³

Concretely, transformative justice through land restitution can be furthered by linking land restitution to comprehensive land reform and redistribution policies, including land tenure reform; it should also be linked to rural development programmes so that women's livelihood capabilities are supported and through land ownership and financial control.³⁴

In the case of female victims of displacement and other human rights abuses, land restitution programmes can have a double transformative effect. The first, as outlined above, concerns the general advantage of the re-distribution of land in the margin of a general land reform, which could lead to a more equal rural society and the guarantee of economic, social and cultural rights for the displaced population. But this transformative effect only can have a positive impact on women if the following core elements of gender justice are realized: the recognition that development and peace require gender equity; the participation of women in all aspects of the process; the access to and control over resources; the development of laws that respect and foster gender equity; and the facilitation and estab-

³¹ Morten Bergsmo et al., "Introduction", pp. 1-14, in Morten Bergsmo, César Rodríguez-Garavito, Pablo Kalmanovitz & Maria Paula Saffon, eds., *Distributive Justice in Transitions* (Oslo: Torkel Opsahl Academic Epublsher, 2010), p. 1.

³² Paul Gready et al., "Transformative Justice: A concept Note" (2010), available at www.wun.ac.uk/sites/default/files/transformative_justice_-_concept_note_web_version.pdf, p. 3.

³³ Luise Arbour, "Economic and Social Justice for Societies in Transition", *Second Annual Transitional Justice Lecture* hosted by the Centre for Human Rights and Global Justice at New York University School of Law and by the ICTJ (25 October 2006).

³⁴ N. Valji, R. Sigsworth & A.M. Goetz, *A Window of Opportunity: Making Transitional Justice Work for Women* (UN Women, 2012, 2nd edition), p. 18.

lishment of a transitional justice system that does not allow for impunity for crimes committed during the conflict against women and girls, and offers protection and guarantees of non-repetition in order to avoid a re-victimization.³⁵ If this is the case, the situation for displaced women can improve in two ways. One is the respect and protection of their right to land, the end of discrimination and gender injustice, and their empowerment in the public and private sphere through structural change in laws and practices.

3. The gendered impact of Forced Displacement in Colombia

In *auto* 092, the Constitutional Court highlighted the disproportionate impact of violence on women during and after displacement in qualitative and quantitative terms and ordered the Colombian government to adopt specific measures for the attention and protection of the rights of internally displaced women in order to end the unconstitutionality of the state of affairs, acknowledging that

[...] the situation of women, young women, girls and elder women displaced due to the armed conflict constitutes one of the most critical manifestations of the unconstitutionality of the state of affairs declared in sentence T-025 of 2004 [...]³⁶

The CC identified ten special risks women are exposed to in armed conflicts due to their gender, which are reasons for displacement and at the same time explain, in their combination, the disproportional impact of the forced displacement on women: sexual violence, domestic exploitation, family contacts with armed groups, forced recruitment of their sons and daughters by armed groups, persecution by reason of their membership in social organisations, persecution or murder as control strategies, lack of protection due to the disappearance of the provider during the violence or the displacement, discrimination of Afro-Colombian and indigenous women, the risk for women to be more easily dispossessed from their lands and territories by the illegal armed actors given their traditional position with regard to property, especially rural properties.³⁷

³⁵ Valji, op. cit., p. 4.

³⁶ Colombian Constitutional Court, Sala Especial de Seguimiento sentencia T-025 de 2004, Auto 92 (Bogotá: 2008), p. 23 (own translation).

³⁷ Ibid.

From a quantitative point of view, the disproportional impact on women due to *the interrelation of violence*³⁸—within the context of the armed conflict and due to structural violence in the society— can be confirmed with 52, 4% of the displaced population being female and 65% under 25 years old.³⁹

The CC also refers to the historical patterns of violence, exclusion and discrimination against women in Colombian society, which have special consequences for displaced women, as these patterns are exacerbated during times of armed conflict, and lead to the aforementioned disproportionate impact of the conflict, in which they are victims of several forms of violence. But historical discrimination and exclusion also represent a severe obstacle for women in situations of displacement, when claiming their rights, in order to get access to justice, assistance, reparations and guarantee of non-repetition.⁴⁰

Consequently, the CC ordered the government and other relevant bodies to adopt specific programs to protect displaced women from these risks and restore their rights in a participative manner.⁴¹ In 2011, a report presented to the CC by the *Mesa de Seguimiento del auto 092* (Working Group to monitor compliance with Auto 092 of 2008 of the Colombian Constitutional Court) concluded that the programmes ordered by the CC three years ago still have not been realized by the responsible institution.⁴²

The *Auto 092* shows a considerable amount of elements of gender justice in its considerations and decisions, and questions traditional government policies concerning the situation of displaced women. This approach led to a recognition of the displaced population as victims and the recognition of women's rights in particular. The comprehensive risk analysis and conceptualization of disproportionate impacts on women added new dimensions to the formulation of public policy, leading ultimately to the inclusion of elements of gender justice in the Victims' Law

³⁸ Donny Meertens, "La tierra, el despojo y la reparación: justicia de género para mujeres víctimas en Colombia", pp. 195-226, in *Justicia desigual. Género y derechos de las víctimas en Colombia* (Bogotá: Unifem, 2009), pp. 215-16.

³⁹ CODHES, "Desplazamiento creciente y crisis humanitaria invisible", *CODHES Document 25*, ISBN: 978-958-57325-8-2 (2012): p. 77.

⁴⁰ Colombian Constitutional Court, op. cit. (2008), p. 34.

⁴¹ *Ibid.*, p. 10.

⁴² Working Group to monitor compliance with Auto 092 of 2008 of the Colombian Constitutional Court, "Access to justice for women victim of sexual violence", *Fourth Follow-up Report to Auto 092 of the Colombian Constitutional Court* (2011), available at www.dejusticia.org/admin/file.php?table=documentos_publicacion &field=archivo&id=210, p. 67 (consulted on 30 June 2013).

in 2011.⁴³ There are two specific ways, in which displaced women are negatively affected by the crime of displacement and put in an especially vulnerable situation: through sexual and gender-based violence and for being female heads of households.

According to Meertens, the relationship between sexual violence and displacement is three-fold: sexual violence can be part of several forms of violence that caused the forced displacement; threats of sexual violence can be the direct cause of displacement; and continuing sexual violence is committed against displaced women due to their particularly vulnerable situation during and after displacement.⁴⁴

The aims pursued by sexual violence in armed conflicts are often not exhausted by the act of sexual violence itself, but are connected with strategic goals of the armed actors.⁴⁵ Sexual violence directed toward women in the Colombian conflict has been used for different purposes; as a strategy of war in order to gain military control over people and territory, to sow terror within communities to force them to flee their land, as punishment for supposed connections with the adversaries, or because they have challenged rules of conduct or prohibitions imposed on them by the armed groups, to accumulate trophies of war, to exploit women as sexual slaves.⁴⁶

During and after the crime of forced displacement takes place, many women lose their partners or husbands or separate from them due to family ruptures caused by the displacement. As a consequence, the women and their children are in a situation of vulnerability, as in a patriarchal society, the conditions for them to assume the new role as head of household are very difficult.⁴⁷

⁴³ Donny Meertens, "Forced Displacement and Gender Justice in Colombia: Between Disproportional Effects of Violence and Historical Injustice", paper prepared for ICTJ / Brookings, *Project on Transitional Justice and Displacement* (2012a), available at <http://www.brookings.edu/~/media/Projects/idp/tj%20case%20studies/Meertens%20Gender%20and%20Colombia.pdf>, pp. 12-13 (consulted on 30 June 2013).

⁴⁴ *Ibid.*, p. 10.

⁴⁵ Lina María Céspedes-Báez, «Les vamos a dar por donde más les duele. La violencia sexual en contra de las mujeres como estrategia de despojo de tierras en el conflicto armado colombiano», pp. 273-304, in *Revista Estudios Socio-Jurídicos*, vol. 12, n.º 2 (2010): p. 275.

⁴⁶ Amnesty International, "'Eso es lo que nosotras exigimos. Que se haga justicia': Impunidad por actos de violencia sexual cometidos contra mujeres en el conflicto armado de Colombia", *AI Index: AMR 23/018/201* (2011): p. 5.

⁴⁷ Colectivo de Abogados José Alvar, "Guía frente al desplazamiento forzado" (2009), available at <http://www.nrc.org.co/docs/guiaedesplazamientoforzadocorporacioncolectivodeabogados2009.pdf>), p. 53 (consulted on 30 June 2013).

The *Comisión de Seguimiento* found out that 45% of displaced households are headed by a woman as sole provider⁴⁸, a number much higher than the 29,9% of female-headed households in the national population of Colombia, according to the 2005 national census.⁴⁹ In the *auto 92* the CC acknowledges the difficulties of women heads of household due to the abrupt adoption of the position as only financial providers of their families in an unknown, often urban setting, without support or social network, and little work experience or education. The women and their families often live in poverty, and therefore are vulnerable to sexual exploitation, and often forced to sell their bodies for food or money.⁵⁰

4. Women's rights in the process of land restitution

4.1. *Victims' and Land Restitution Law*

4.1.1. THE VICTIMS' LAW

In June 2011, the Colombian Congress approved Law 1448, known as the Victims' Law.⁵¹ According to the final legislation, the Victims' Law creates a restitution programme that generally complies with the Pinheiro Principles. Article 25 in the Victims' Law establishes the right to comprehensive reparation. The victims have the right to receive reparation in an adequate, differential, transformative and effective way for the harm they have suffered as consequence of the violations mentioned in article 3 in the same Law. Reparation comprises of measures of restitution, indemnification, rehabilitation, satisfaction and guarantees of non-repetition, in their individual, collective, material, moral and symbolic dimensions.

The restitution process will occur basically in two phases, one administrative and one judicial.

⁴⁸ Comisión de Seguimiento a la Política Pública sobre Desplazamiento Forzado, «Tercer Informe de Verificación sobre el Cumplimiento de Derechos de la Población en Situación de Desplazamiento» (Bogotá: 2010), available at http://www.codhes.org/index.php?option=com_docman&task=doc_download&gid=168, p. 50 (consulted on 5 July 2013).

⁴⁹ Departamento Administrativo Nacional de Estadísticas, "Presentación Censo General 2005", 2005, available at http://www.dane.gov.co/censo/files/presentaciones/jefes_hogar.pdf (consulted on 30 May 2013).

⁵⁰ María Dolores Gandulfo, "Roles de género y desplazamiento interno en Colombia", *Working paper No. 15* (Centro Argentino de Estudios Internacionales, 2007), p. 51.

⁵¹ Ministry of the Interior and Justice of Colombia, "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", n.º 1448, *Diario Oficial* n.º 48,096 (Bogotá: 2011).

4.1.1.1. *Positive aspects*

In article 13 the law establishes a differential approach, recognizing that parts of the population have particular characteristics due to their age, sex, sexual orientation and disability. It provides for special guarantees and protection measures for groups who are exposed to greater risks within the dynamics of the armed conflict in general and forced displacement in particular. Women are especially mentioned among this group, as well as children, IDPs, farmers, social leaders and human rights defenders, etc. How this differential approach looks regarding the restitution process can be seen more concretely in articles 114-118, where special regulations for female victims of dispossession are presented.

The first measure has the aim to prioritize the claims for land restitution by women, and especially women heads of household, during the administrative and judicial stage and to guarantee them special protection by the State throughout the process of land restitution through the establishment of a special programme.⁵²

The second measure concerns the protection of women in the actual return of the land by the URT, as well as the police authorities and military forces. It demands the creation of security conditions which allow the women to effectively enjoy their property.⁵³ This point is fairly vague and controversial, as especially the presence of the armed forces has not been a guarantor for the security of the population, but rather has been part of the armed conflict and responsible for human rights violations and violations of international humanitarian law, and therefore can even represent a greater risk for the returning population.⁵⁴

In article 117, women are entitled to a prioritization in receiving a number of social benefits as for example credits and technical assistance, social security, education and land allocation. These benefits are based on Law 231 of the year 2003 (Law on rural women), which, according to Meertens, is old and mostly inoperative.⁵⁵

The next provision is crucial regarding gender justice. It demands that in all cases in which the plaintiff and his or her spouse or the permanent partner had been victims of dispossession and have been granted the resti-

⁵² *Ibid.*, arts. 114, 115.

⁵³ *Ibid.*, art. 116.

⁵⁴ Comisión Colombiana de Juristas, *VII Informe de seguimiento a la aplicación en Colombia de las recomendaciones del representante especial del Secretario General de las Naciones Unidas para los Derechos Humanos de las Personas Internamente Desplazadas*, julio 2010-diciembre 2011, n.º 7 (2012): p. 26.

⁵⁵ Donny Meertens, *op. cit.* (2012a), p. 14.

tution of the land by the judge, the restitution of the land and the formalization of the land titles should be registered as a joint title, even if only the partner who holds the legal title is present during the procedure.⁵⁶

Given the historical injustice concerning women's land rights and the highly unequal distribution of land titles between men and women among the rural population (which in itself already is characterized by a high amount of informality in land titles), this measure could contribute to more gender justice through access and control over resources for women who have suffered displacement and dispossession.⁵⁷ In this context, also the principles of the shift of burden of proof from the accuser to the accused, the sufficiency of summary proves to start the legal process of land restitution, the principle of good faith in favour of the victims, as well as the existence of presumptions regarding the absence of consent in certain negotiations and contracts of sale leading to a transfer of land rights, have to be positively evaluated from a gender justice point of view, as they all have the potential to provide more legal certainty regarding the land rights for displaced peasant women, a condition which has been identified throughout the thesis as one of the main elements of gender justice.

With regard to the security and well-being of displaced women in the course of the land restitution process, article 31, 3 demands that the protection mechanisms for female victims must take into account the modalities of the aggression, the special risks women are facing and the difficulties women have protecting themselves against their aggressors.

By the same token, article 139 g. refers to "the support for the reconstruction of the social movement and the social net of farmers' communities and especially of women" (own translation) in the framework of satisfaction measures. Although this article does not particularly refer to women who are in the process of land restitution, but to general measures of satisfaction, they are relevant especially for rural women single heads of households claiming their land back, as social networks and women's organisations in their former communities can give them additional security and reduce their vulnerability during and after the land restitution process. Furthermore, it could lead to a more active participation of women in their communities and strengthen their agency, which is another important element of gender justice.⁵⁸

The demanded differential approach that has to be applied to all measures of article 139 and the guarantee for mechanisms and strategies that allow for an effective participation of the victims in the design of the plans,

⁵⁶ Victims' Law (2011), op. cit., art. 118.

⁵⁷ Donny Meertens, op. cit. (2012a), p. 14.

⁵⁸ Anne Marie Goetz, op. cit. (2007), p. 31.

programmes and projects of attention, assistance and integral reparation established in Article 168 is another measure to strengthen women's agency.

Article 149 d. directly refers to the topic of the guarantee of non-repetition, which is central for internally displaced women due to their heightened risk of being victims of violations. According to this article, special prevention measures must be offered to women, children and adolescents, social leaders, unionists, human rights defenders and victims of forced displacement, which are aimed at "overcoming stereotypes which favour discrimination especially against women and violence against them in the context of the armed conflict" (own translation). The recognition of existing discriminatory structures and the special risk for women of suffering violations in the armed conflict are contributing to more gender justice.⁵⁹

Paragraph 149 h. makes special reference to training strategies with a differential approach for public servants and members of the armed forces, which includes a "policy of zero tolerance for sexual violence in State entities" (own translation), which could lead to more gender-sensitivity in protection systems carried out by the armed forces and the attention of women who are victims of conflict in the administrative procedures of the Land Restitution Programme and therefore abolish possible obstacles for them to access the system.

4.1.1.2. *Shortcomings*

The Colombian and International civil society has been very active in evaluating and criticising the Victims' Law and has found many flaws in the provisions. The following section however will just focus on those provisions problematic for the effective restitution of land for displaced women, taking into account the limited scope of this paper.⁶⁰

A shortcoming regarding the definition of victims is the exclusion of victims of displacement due to socio-political and common criminal activities, as the law only recognizes victims who suffered harm caused by the armed conflict. That means the rights to restitution of many displaced women who had to leave their lands due to fumigations of illicit crops as

⁵⁹ Gaby Oré Aguilar, op. cit. (2011), p. 127.

⁶⁰ For comprehensive analysis of the shortcomings of the Victim's law see for example Amnesty International, "Colombia: Hidden from Justice. Impunity for conflict-related sexual violence, a Follow up-report", *AI Index: AMR 23/031/2012*, 2012; Comisión de Seguimiento a la Política Pública sobre Desplazamiento Forzado, *Balance aproximativo de la Ley de Víctimas aprobada por el Congreso de la República (Ley 1448 de 2011)* (Bogotá: 2012), available at http://www.codhes.org/index.php?option=com_docman&task=doc_download&gid=204 (consulted on 5 July 2013).

well as violations committed by “Bacrim” are violated. This is especially worrying, as “Bacrim” are considered to be one of the main perpetrators of displacement since the paramilitary demobilization in 2005 and they uphold many practices of the paramilitary groups, as for example targeted violence against women.⁶¹

Another weakness can be found in article 71 of the Victims’ Law, where restitution is defined as “the realization of measures for the re-establishment of the situation prior to the violations mentioned in article 3 of the law” (own translation). This interpretation of the figure of restitution is problematic and contradictory to other provisions in the law, as the situations of most women prior to displacement and dispossession were already characterized by exclusion, discrimination and violence and therefore not a situation which should be aspired to go back to.⁶²

4.2. *Implementation through the Land Restitution Unit*

It is still early to evaluate the implementation of the Land Restitution Programme, because, although the Victims’ Law was adopted in June 2011, the URT and the specialized judges in land restitution only started their work in January 2012. Nevertheless, the process has begun, the administrative process of receiving claims for the restitution of properties and including the applications in the Registry and forwarding the cases to the specialized judges for land restitution is advancing and can offer some clues about the application of elements of gender justice in their policies.

4.2.1. NATIONAL PLAN OF ASSISTANCE AND INTEGRAL REPARATION FOR VICTIMS

In August 2012, the “Plan Nacional de Atención y Reparación Integral a las Víctimas” (National Plan of Assistance and Integral Reparation for Victims) was adopted.⁶³ The aim of this plan is to establish the necessary

⁶¹ UN Human Rights Council, “Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia”, *UN Doc. A/HRC/10/32* (2009).

⁶² Linda Maria Cabrera Cifuentes, “Comentarios a los proyectos de ley de víctimas y restitución de tierra, bajo la perspectiva de los derechos humanos de las mujeres”, *Sisma Mujer* (2011), available at <http://www.viva.org.co/pdfs/victimas/Comentarios%20a%20proyectos%20de%20victimas%20y%20restituciones%20SISMA.pdf>, p. 1 (consulted on 2 June 2013).

⁶³ Departamento Nacional de Planeación, Consejo Nacional de Política Económica y Social, *Documento Conpes 3726 de 2012. Lineamientos, plan de ejecución de metas, presupuesto y mecanismo de seguimiento para el plan nacional de atención y reparación integral a víctimas* (2012), available at <https://www.dnp.gov.co/LinkClick.aspx?fileticket=Tkr7QU7lss0%3D&tabid=1475> (consulted in 30 June 2013).

mechanisms in order to implement all measures of attention and integral reparation mentioned in the Victims' Law from 2011.⁶⁴

In all components and concepts of the Plan the different perspectives for children, adolescents, women and ethnic groups are reflected, taking into account articles 13 and 182 of the Victims' Law and its decrees.

With regard to the component of the integral reparation, two aspects are interesting from a women's rights perspective. First, the recognition of special needs and interests of women in the framework of an integral reparation programme for victims, and the recognition that there are hurdles in the system that could prevent women from actively enjoying their right to reparation. This awareness is a pre-condition for the application of a comprehensive differential approach. The second component is linked to the first one, and concerns the active participation of the victims in the process of the design and implementation of the plan for integral reparation. This refers clearly to the aspect of empowerment, as women are recognized as agents, whose voices have to be heard.⁶⁵ Due to the concrete harms many women suffered and the subsequent psychological, physical and economic impacts for their individual life projects, but also the ones of their families and communities, the reparation measures have to answer to these situations and consider the particular characteristics of women concerning their age, origin, sexual orientation and gender identity, ethnicity, disabilities and act of victimization.⁶⁶

In addition, special plans for women who have been victims of sexual violence have to be designed. In the text itself, they recognize that in order to allow for reparation measures to transform the lives of women, they need to "have an impact on the structural factors of the violence and discrimination".⁶⁷ This is fully compatible with the idea of transforming the realities of women through gender justice and really gets to the point of how reparations should be applied for women, that is to say through the tackling of underlying root causes and not only of visible damages.⁶⁸

This important section is followed by recommendations on which steps, in the concrete implementation, must follow.⁶⁹ In the concrete case of the land restitution process, the gender perspective is mentioned in mat-

⁶⁴ *Departamento Administrativo para la Prosperidad Social*, Decree n.º 725 (2012).

⁶⁵ Anne Marie Goetz, *op. cit.* (2007), p. 31.

⁶⁶ *Ibid.*

⁶⁷ Departamento Nacional de Planeación, Consejo Nacional de Política Económica y Social, *op. cit.* (2012), p. 30 (own translation).

⁶⁸ Morten Bergsmo et al., *op. cit.* (2010), p. 10; Valji, *op. cit.* (2012), p. 4.

⁶⁹ Departamento Nacional de Planeación, CONPES, *op. cit.*, p. 30.

ters of the difficulties of women to prove their right to land and property, given the fact that in most of the cases, the documents and land titles are on behalf of the husbands or permanent partners. An additional drawback comes with the informality of most of the relationships, or the requirements to register de-facto partnerships, in order for the spouse to have the same legal certainty as in conjugal unions.⁷⁰ These cases represent special challenges for the employees of the URT, if they aim to guarantee women's land rights as determined by the differential approach.

With regard to the gender perspective concerning the guarantee of non-repetition as part of the reparation framework, the Counsellor's Office for Women's Equity therein has an important role to play as it lies in its responsibility to develop a plan aimed at the abolishment of gender stereotypes which favour discrimination and violence against women in the context of the armed conflict, a plan of zero tolerance for sexual violence for civil servants, as established in the Victim's Law, and a campaign for the prevention of violence against women in the context of the armed conflict.⁷¹ Although not very concrete, it can be stressed favourably that the link between gender stereotypes and discrimination and violence is established.⁷²

Concretely addressing the protection of women, the document shows awareness of the fact that in some occasions the existing protection measures are not sufficient and that there is a need to discuss further measures to reach more effective protection for women.⁷³ The mentioned imperative to hear women's opinions in order to make protection measures effective for them can be considered as gender-sensitive contribution to more security within the process of land restitution for women, although they centre more on basic pre-conditions than far reaching affirmative actions.

4.2.2. ANNUAL MANAGEMENT REPORT 2012

In the management report of the URT 2012, the URT presents to the public its management activities carried out in the framework of the creation of public policies for the land restitution for victims of forced displacement and dispossession.⁷⁴ In the report, one chapter is dedicated to the

⁷⁰ Ibid., p. 40.

⁷¹ Departamento Nacional de Planeación, CONPES, op. cit. (2012), p. 91.

⁷² Morten Bergsmo et al., op. cit. (2010), p. 1.

⁷³ Ibid., p. 108.

⁷⁴ Unidad de Restitución de Tierras, *Annual Management Report 2012* (2013b), available at <http://restituciondetierras.gov.co/media/descargas/gestion%202013/Informe%20De%20Gestion%20UAEGRTD%202012.pdf> (consulted on 5 July 2013).

differential approach within the process of land restitution, referring to the respective provision in the Victims' Law.⁷⁵

The Unit formulated guidelines for the application of a differential approach in the administrative process of the land restitution, with the input from a former investigation about access barriers and difficulties in relation to the right to land for groups with special constitutional protection needs. The report refers to concrete cultural obstacles, which make it difficult to abolish the patriarchal character of land rights. The following obstacles are mentioned: the women do not see themselves as right-holders and do not recognize that they can claim their rights over the dispossessed land even if their husbands separated, died or disappeared; women tend not to have land titles; the wide-spread existence of de facto partnerships requires special proof on the part of the owner, co-owner or occupier; the existence of multiple conjugal relationships and new types of family forms can generate legal uncertainties, when it comes to the identification of the right-holders; the vulnerability of widowed women head of households due to forced disappearances or kidnapping of the husband and finally the existence of forced sales of property and land due to the aforementioned vulnerabilities.⁷⁶

This list contains many important factors presenting obstacles for women, however, what is missing is the recognition of the use of SGBV against women in the context of the armed conflict but also in the private sphere. This kind of violence is one of the most concrete and severe expressions of structural violence against women, which is connected to the crime of displacement.⁷⁷ Therefore, it is especially important for women victims of sexual violence to be supported in the search for their rights and their special needs have to be attended in a sensitive and adequate way. It has to be clear, that SGBV has not started with the conflict nor does it end with it automatically, as this practice is based on deep rooted stereotypical gender constructions, which have to be fought actively. Only like this, the guarantee of non-repetition can be given as part of an integral reparation programme.

4.2.3. PROGRAMME FOR THE SPECIAL ACCESS FOR WOMEN, GIRLS AND ADOLESCENTS

The long-awaited programme concerning the implementation of women's rights within the first phase of the restitution process, the "Programa

⁷⁵ Ibid., pp. 32-36.

⁷⁶ Ibid.

⁷⁷ Donny Meertens, op. cit. (2012a), p. 9.

de Acceso Especial para las Mujeres, Niñas y Adolescentes a la etapa administrativa del proceso de Restitución de Tierras Despojadas” (Programme for the special Access for Women, Girls and Adolescents in the administrative stage of the Land Restitution Process) by the URT was adopted on 31 January 2013 by the Ministry for Agriculture and Rural Development through resolution no.80.⁷⁸ In the preliminary considerations of resolution no.80, references are made, first, to the principles of equality and non-discrimination in the Colombian Constitution, second, the Sentence T-025 of 2004 by the CC with special regard to the state of unconstitutionality, emphasizing the need for the implementation of special programmes in favour of women heads of households and single mothers in order to overcome the particular vulnerability of these women, and third, to the *autos* 92 and 237 from 2008 by the CC and the therein demanded 13 programmes for the special protection of the rights of displaced women. Another reference is made to the Convention for the Elimination of all forms of Discrimination Against Women (CEDAW) which is part of the Colombian Constitutional Bloc.

In the articles 10 and 11, the programme establishes four strategic lines: first, to strengthen a gender focus and a differential approach in all activities of the URT; second, to empower women, girls and adolescents about their land rights and right of restitution; third, to collaborate and coordinate with other entities for the due documentation of the cases and attention for the women, girls and adolescents; and fourth, have a positive impact on the legal procedures about land restitution.

The gender focus, on which the programme is based, demands the recognition of historical inequalities against women in the effective enjoyment of their rights, in this case, especially their land rights. Therefore, according to the programme, actions against cultural patterns that lead to the subordination, discrimination and exclusion of women with respect to their land rights have to be established. Sensitisation, capacity building and formation of civil servants and all citizens regarding the rights of women to land, the promotion of a differential approach acknowledging the diverse situations and conditions women are experiencing regarding their right to land due to gender-based discriminations in the public but also in the private sphere, and the fostering of equality of opportunity for women and the recognition of their right to land through the elimination of all forms of barriers impeding the women to access the Land Restitution Programme

⁷⁸ Unidad de Restitución de Tierras, *Resolution no. 80* (31 January 2013a), available at <http://restituciondettierras.gov.co/media/descargas/resoluciones/resolucion-No.-80-de-2013.pdf> (consulted on 5 July 2013).

but also to enjoy preferential and favourable treatment during the process are necessary.

The programme takes into account the realities of women, girls and adolescents the URT saw in the time immediately after the beginning of the land restitution process. The formulation was realized in collaboration with women victims and victims' organisations in three meetings in three different cities, as well as with the participation of a working group formed by several women's organisations, among others "Casa de Mujer", "Ruta Pacífica" and the "Cooperación Sisma Mujer". It can be assumed, that it is due to this participation that many core elements of gender justice are contained in the programme.

In line with the importance of a gender focus in reparation programmes, the information of displaced women about their rights, the approach of realizing reparations in a participative and accountable way and guaranteeing women access to land by providing them with land titles can have an empowering effect in the way that women achieve economic independence and at the same time are involved in the transformation of power relations within society as right-holders and agents.⁷⁹ What has to be emphasized very positively about this programme is the recognition that restitution in its traditional legal understanding aiming at restoring a victim to their original situation which existed prior to the displacement is not the way it should be, as Colombia has a long tradition of women living in unequal and unjust conditions, in which their relation to land is normally an indirect and informal one.

The impact of the programme will depend on how successful the mentioned trainings and sensitisations of the employees and judges are carried out and to which degree the education of displaced women about their rights is leading to a better access to the restitution process. However, as gender justice is also about the agency of women⁸⁰, the participatory process through which the programme was created, is a good step towards more justice for displaced women during and after the land restitution process.

Unfortunately, at the moment of research, the programme had attracted very little attention. Apart from the resolution itself, only one article on the homepage of the Ministry for Agriculture and Rural Development was available for the analysis. Additionally, in none of the analysed cases, as will be seen in the next chapter, reference is made to the programme.

⁷⁹ Claudia Paz y Paz Bailey, op. cit. (2006), p. 111.

⁸⁰ Goetz, op. cit. (2007), p. 31.

4.3. *Analysis of the existence of a gender focus in the land restitution cases*

4.3.1. CASES

At the time of the research, 102 cases out of around 1500 presented to the 39 specialized judges in land restitution and 15 magistrates in office, have been decided. On the homepage of the “Rama Judicial Poder Público” (Judicial branch), at that time, 79 cases were accessible, issued in the following departments Antioquia, Bolívar, César, Córdoba, Chocó, Nariño, Norte de Santander, Meta, Popayán, Putomayo, Sucre, Tolima and Valle de Cauca. Of these 79 cases, 30 cases address women in an exclusive way, meaning not together with their permanent partner or husbands, in 35 cases women are addressed as partners or spouses, in 11 cases, women do not appear at all, and in three cases, preliminary measures were ordered for community property.

Although only those 30 cases in which women are addressed on their own and not in their position as wives or partners of the actual owner, holder or occupier of the land property will be considered, it is important to mention from a women’s rights perspective, that in all cases, where women appeared as permanent partner or wives, in line with article 118 of the Victims’ Law, the land titles were always restored and registered on behalf of both partner or spouses, even in cases where the women originally did not appear in the titles before the dispossession or displacement. Why this is important is shown in statistics of the displaced population revealing that 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 and 9.3% reported joint ownership.⁸¹ The granting of joint titles gives women much more legal certainty about their property in the future, strengthens their role within the partnership or marriage but also within society and empowers them. It addresses one of the root causes of displacement and reduces their vulnerability for being re-victimized.⁸²

The existing judgements represent less than 1% of the claims registered by the URT. This is important to bear in mind, when evaluating the sentences, as it is impossible to establish with certainty the general interpretation lines the judges are going to apply in the long-term, especially, as

⁸¹ UNDP Colombia Office, “Mujeres rurales, gestoras de esperanza”. Cuaderno del *Informe de Desarrollo Humano Colombia 2011* (Bogotá: UNDP, 2011), p. 47, cited in Meertens, op. cit. (2012b), p. 4.

⁸² Meertens, op. cit. (2012a), p. 14.

will be seen, a lot of possible difficulties have not yet appeared in the cases before the Court. Even so, the 30 cases give a first idea of how the judges are applying the provisions and concepts of gender justice in their jurisdictions so far and allow for a first evaluation of their transformative potential for displaced women.

4.3.2. ELEMENTS OF GENDER JUSTICE

The majority of the women victims of displacement, who are represented in these cases are widows, who lost their husband due to the armed conflict and are now head of household. In all the cases, where women had no proof of their property rights, as either the respective contracts were orally agreed on or just not existent, as the women had occupied and worked on the land but never formalized it, the judges were very flexible and used alternative methods of prove, as for example interviews with neighbours who confirmed the occupation and exploitation of the respective land, inspections of the territory, social mapping, etc. In all cases except for one, the judges restored the land legally to the women and awarded them formal land titles.

In most of the cases, in which the property of land could be proved, it was on the name of the deceased husband or partner, so that the judges had to decide about the kind of relationship the claimant had to the owner, holder or occupier of the land in question and if she was entitled to the property rights of the land in the land restitution process. In most of the cases the women could prove that she was married or living in a permanent partnership with the deceased through documents. In the cases where there was none such document, the judges again applied the concept of "good faith" as established in the Victim's Law and tried to prove the legality of the relationship through interviews with neighbours, co-claimants or other family members. Regarding the stage of prove in general, it can be said that all judges or magistrates respected and applied the concepts of flexibility of proof, the shift of burden of proof, the presumption of dispossession and absent of legal consent in cases where there was any involvement of illegal armed actors, and the good faith in the testimonies of the women.

Although, in many cases, it is not explicitly written down, these principles are favouring especially women, as they are the group with less legal certainty in relation to their property rights and therefore benefit from this legal practice. However, regarding the direct revelation of the need for a differential and transformative approach due to the history of discriminatory and exclusionary practices in the Colombian society in the line of argumentation, differences can be made out among the sentences, and especially among the different departments.

In sum, the picture is very diverse. On the one side, there are cases like the ones issued by the specialized judges for land restitution in Nariño, Meta, Sucre and Cartagena, with a nearly perfect application of different aspects of gender justice, emphasizing the transformative character reparations should have. They include the application of a differential approach and a preferential treatment for women in legal restitution of land due to the historical discrimination and exclusion of women in the Colombian society and the special impact of the armed conflict of women, the application of a differential approach regarding special protection measures for women during an after the land restitution process confirming their special needs and putting emphasis on the abolishment of root causes for the violations as preventive measures and finally the awareness that the State has the responsibility to guarantee the effective enjoyment of the right to land and property for the returned women by assisting them through positive measures aimed at the improvement of their economic well-being.

On the other hand, there are cases, seen in the departments of Antioquia and Norte de Santander, which only mention the principle of a differential approach in one sentence and refer to isolated measures aimed at the improvement of the economic situation of women after their return. This is a good start as it proves some knowledge of the requirement to include a gender focus in the land restitution process, but compared with the cases of the first category, much can be improved to reach a level where the coherent application of a differential approach in all aspects can lead to more comprehensive understanding of gender justice.

Regrettably, there are also cases in Putomayo, Tolima and Bolivar, where the differential approach is hardly mentioned or not mentioned at all and no elements of gender justice are applied. This could be seen especially in cases, where the women were part of a larger family or group, with mixed gender. So in this cases, it is essential to especially focus on the female members of the group or family and grant them a differential treatment. Training activities by the URT should be focused on the judges or magistrates operating these departments which a low record of gender justice in their judgements.

As last point, it should be mentioned that in none of the cases analysed, women appeared as victims of SGBV. Regarding the analysis by the CC and many women's organisations, but also international organisations and the Colombian government, sexual violence plays an important role as cause of displacement and seizure of land. Therefore it would be important for the specialized Courts to create emblematic cases in which they explicitly refer to this special form of violence in the context of displacement and order tailored measures of assistance, as well as prevention and

protection instruments according to the special needs of women victims of sexual violence.

5. Obstacles for the successful implementation of the Land Restitution Programme for women

The aim of this chapter is to indicate factors, which could endanger the successful implementation of the land restitution process in Colombia and especially impede women from the effective enjoyment of their rights. By no means a presentation of an exhaustive list and analysis of all structural factors negatively influencing the land restitution process is intended, acknowledging the complex Colombian reality with many political, social and economic interests that are highly fluctuant and often hard to see. Two factors will be highlighted: First, the security risk for women acting as leaders in the land restitution process and second the persistence of a patriarchal system defining gender roles which affects women's every day life and the lack of guarantee of non-repetition and the risk of poverty for these women.

5.1. Security Risks

It is not surprising, given Colombia's history of conflict and the important role land always has played in it, that there is a big opposition composed of landlords, transnational and national enterprises, paramilitary groups, drug producers, and guerilla members involved in the drug business, intending to preserve the *status quo* of the unequal distribution of land by all means. Often these groups form alliances in order to benefit from each other.

In Colombia, women's organisations have been very active in different areas fighting for their rights, despite the difficulties and hazards caused by the armed conflict and the existing patriarchal system. The violence against female leaders, especially human rights defenders, has been addressed by many national and international NGOs and confirmed by several *autos* by the CC. The latest *auto 098* from May 2013 provides a detailed overview of the precarious situation which many displaced women who are active in the promotion and protection of their rights, have to face.⁸³ Especially

⁸³ Colombian Constitutional Court, Sala Especial de Seguimiento sentencia T-025 de 2004, *Auto 098* (21 May 2013).

women's engagement in land restitution has provoked resistance among land elites, great land owners, drug dealers and illegal armed actors. Special "anti-land-restitution gangs" were created, responsible for threats and murders of many women leaders of IDP organisations and land restitution movements.⁸⁴

These anti-restitution gangs follow similar strategies to the paramilitary groups, show presence in many parts of the country, and consolidate a strategy of control and intimidation of the civil population, often focusing on women, in order to impede the restitution of land to the IDPs. These groups are present in areas with mining activities, monocultures, coca plantations, and where routes of drug trafficking are situated.⁸⁵ The URT has classified two types of groups opposing the land restitution process. The "grey actors" are the illegal armed groups responsible for the direct displacement and dispossession. The second group are the people behind the scenes, who take advantage of the circumstances of the forced displacement and make sales deals with the armed groups.⁸⁶

In 2012, Human Rights Watch documented several cases of abuse and criminal acts against more than 30 women in nine different departments since the publication of the *auto* 92 in 2008 and concluded that many of the threats and violations were directly linked to their roles as leaders of IDP movements.⁸⁷

According to the *auto* 92, the worsening of the situation for women active in their roles as leaders since 2009 has two dimensions, a quantitative one, and a qualitative one.

Only during 2011, 12 leaders of the displaced population linked with the process of land restitution were killed in six different departments of Colombia, namely Antioquia y Córdoba, Tolima, Putumayo, Sucre and Cesar.⁸⁸

In a report presented by various human rights and women's organisations to the UN Special Representative of the Secretary-General on Sexual Violence in Armed Conflict, they confirm, that since 2009, the threats, at-

⁸⁴ Ibid.

⁸⁵ CODHES, "De la seguridad a la prosperidad democrática en medio del conflicto", *CODHES Document* 23, ISBN: 978-958-99715-8-1 (2011): p. 12.

⁸⁶ Álvaro Sierra & María Clara Calle, "Los grandes desafíos, 2013", *Semana* (2013), available at <http://www.semana.com/Especiales/restitucion-tierras/index.html> (consulted 10 June 2013).

⁸⁷ Report presented to the CC by José Miguel Vivanco, HRW Director of the Americas and Liesl Gerntoltz, HRW Director of the Womens' Rights Division (2012), cited in CC, Sala Especial de Seguimiento sentencia T-025 de 2004, *auto* 98 (21 May 2013), p. 17.

⁸⁸ CODHES, *op. cit.* (2012), p. 23.

tacks and harassments against women leaders in situations of displacement increased drastically in different regions of the country. The working group got to know about nine pamphlets that contained threats against more than 93 women, 12 organisations of women victims of forced displacement and accompanying organisations, among them five members of the working group *Mesa de Seguimiento del auto 092*.⁸⁹

In the qualitative dimension, women leaders face a double risk, the first derives from what they do in their roles as leaders challenging existing political, economical and social power relations through their fight for human rights and especially the right to restitution of land, and the second from their condition as women, challenging the existing paternalistic system based on discriminatory gender stereotypes and demanding rights and participation.⁹⁰

Apart from the seriousness the threats represent from a perspective of violations of human rights, they also represent other consequences for women in the land restitution process. Due to the threats, many displaced women avoid even knowing about the actual situation of their properties, letting alone to start the process of land restitution exactly because they fear to again become victims due to the precarious security situations in many parts of the country.⁹¹ The seriousness of this obstacle for any positive change the land restitution progress could bring for the lives of many displaced women and for the active role of women in organisations for IDPs and women's rights can not be taken serious enough.

5.2. *Historical discrimination and patriarchal society*

As already mentioned in the precedent chapter, in many parts of Colombia, women are threatened and killed due to their condition as women and therefore these forms of violence have an indisputable gender dimension. This is what the aforementioned women leaders in the land restitution process share with all other women in Colombia, namely the struc-

⁸⁹ Red Nacional de Mujeres, Ruta Pacífica de Mujeres, Iniciativa de Mujeres Colombianas por la Paz et al., "Report presented by organisations of women and human rights to the Special Representative or Sexual Violence in contexts of armed conflicts, Mrs. Margot Wallström" (2012), available at http://www.dejusticia.org/admin/file.php?table=documentos_publicacion&field=archivo&id=265, pp. 3-6 (consulted on 27 may 2013).

⁹⁰ Colombian Constitutional Court, Sala Especial de Seguimiento sentencia T-025 de 2004, *Auto 098* (21 may 2013), p. 26.

⁹¹ Garay, Luis Jorge y Vargas, Valencia Fernando, "Los retos de la restitución de tierras y reparación en Colombia", in *Revista Foro*, n.º 76 (2012): p. 237.

tural gender violence existent in many social and cultural discriminatory and exclusive practices, that aggravate during the armed conflict and especially affect women in vulnerable situation, as are displaced women.⁹² This prevalence of structural discrimination and exclusion are combined with alarming levels of direct violence against them, in the private as well as in the public sphere. Therefore the government has to take the existence of these structural factors into account when designing its security policies for displaced women and focus on the elimination of cultural factors that existed already before the conflict, especially the sexist and degrading stereotypes of women in Colombian society, which contribute to the augmentation of violence and discrimination against women and lead to a naturalization of such forms of violence.⁹³

The exclusion of gender-based violence in armed conflict in Colombian law is highly criticized by civil society organisations. At the end of July 2012, legislators Iván Cepeda and Ángela María Robledo from Colombia's Chamber of Representatives presented a bill in congress that classifies sexual violence in armed conflict as a war crime and guarantees access to justice for victims of sexual violence, especially in the context of the armed conflict.⁹⁴ Results of the "First Survey on the Prevalence of Sexual Violence Against Women in the Context of the Colombian Armed Conflict" of December 2010 issued by the humanitarian organization Intermon Oxfam show that from 2001 to 2009, 89 687 women were victims of sexual violence in municipalities where security forces, guerrillas, paramilitary or other armed groups were present.⁹⁵

But it is important also to consider the numbers of women who suffer intrafamiliar violence outside the direct sphere of influence of the armed conflict. The National Institute for Legal Medicine published numbers showing an increase from 69,713 reported cases of intrafamiliar violence in 2010 to 70 134 cases in 2011. According to sexological exams, in 2010, 1,409 women victims of sexual violence per month were registered in comparison to 1 581 cases in 2011, showing an increase of 12,21%, corresponding to 172 cases. These augmentation of violence indicates that

⁹² Colombian Constitutional Court, Sala Especial de Seguimiento sentencia T-025 de 2004, *Auto 098* (21 may 2013), p. 27.

⁹³ Colombian Constitutional Court, Sala Especial de Seguimiento sentencia T-025 de 2004, *Auto 92* (Bogotá: 14 april 2008), p. 26.

⁹⁴ Amnesty International, op. cit. (2012), p. 8.

⁹⁵ Intermón Oxfam, "Sexual Violence against Women in the Context of the Colombian Armed Conflict: First Prevalence Survey" (2011), available at http://www.intermonoxfam.org/sites/default/files/documentos/files/101206_Primeras_Encuesta_de_Prevalencia.pdf, p. 7 (consulted on 4 July 2013).

the above mentioned discrimination against women already lead to a certain naturalization of such forms of violence, promoted by the high levels of impunity, chronic subregistration of the cases and underenforcement of public policies to address these tendencies.⁹⁶

Displaced women also have to face forms of structural economic violence before, during and after their displacement. This form of violence has its expression in the particular vulnerable economic situation of many internally displaced women due to discriminatory factors like the difficulties for women to get access to credits, and well-paid jobs.⁹⁷ In addition, many rural women have lacked access to basic social services already before their displacement. During the conflict many women lose their partners, who often were the main bread-winners, mentioned by the *auto* 92 as one of the ten risks displaced women face. Due to the material and economic dependence from their male partners, having its roots in the traditional separation of gender roles in the Colombian society, women in situations of displacement, who have lost their partners in the conflict, now bear the sole responsibility of the well-being of their family as heads of households, without sufficient support. This often leads to precarious economic situations for many families victims of conflict.⁹⁸ Due to this difficult security and material situation, women often do not want to return to their land, as they know of the risks to face economic hardship, insecurity and in cases of victims of sexual violence even stigmatization and exclusion.

Law 1257, its decrees and other initiatives, instruments, guidelines and policies exist and apply gender sensitive language and show awareness of gender-specific needs. Often this gender focus was introduced or demanded by women's organisations who served as consultants in the design. However, this legislation and the public policies are not sufficiently reflected in the lives of the women concerned, due to their insufficient operationalisation.⁹⁹ The government needs to pursue a political transformation tackling the subjectivities and practices which have been part of the daily life of many Colombian women, and therefore invest a significant part of the national budget in programmes adopted to the special needs of displaced women, victims of the conflict in terms of security and economic well-being, but also to all women who suffer SGBV in their families.¹⁰⁰

⁹⁶ Meertens & Zambrano, op. cit. (2010), p. 191.

⁹⁷ Colombian Constitutional Court, Sala Especial de Seguimiento sentencia T-025 de 2004, Auto 92 (Bogotá: 14 april 2008), p. 84.

⁹⁸ Ibid., p. 48.

⁹⁹ Red Nacional de Mujeres et al., op. cit. (2012), p. 2.

¹⁰⁰ Natalia Sánchez, "Las mujeres en la Ley de Víctimas", in *Ciendias*, n.º 75 (may-july 2012), available at <http://www.cinep.org.co> (consulted on 4 July 2013).

6. Conclusion

There are some interesting findings with regard to the questions of how the application of elements of gender justice in the design and implementation of the Land Restitution Programme could contribute to the abolition of structural violence against internally displaced women. It could be asserted that the Victim's Law itself contained the notion that the aim of integral reparations for victims of the armed conflict should be, among others, differential and transformative. This statement written down in the Law is crucial as it serves as a basis for the evaluation of other provisions concerning reparations and especially land restitution for their compliance with these principles.

The intention of the above mentioned transformative approach is set forth in the Victims' Law without ambiguity. It aims to change previous conditions that allowed for the victimizations to happen in the first place and contribute to the elimination of the schemes of discrimination and marginalisation and thereby avoiding their repetition. An important element from a gender justice perspective is article 118, demanding that in all cases the restitution of the land and the formalization of the land titles should be registered as a joint title, even if only one partner holds the legal title, can make a contribution to the transformation of the situation of women's land rights in Colombia.

Also some shortcomings could be established.

The analysis of the existing implementation programmes and the first annual management plan of the URT turned out to be worthwhile, as it allowed to draw valuable conclusions about the URT's understanding of gender justice in the implementation of the Land Restitution Programme. Two aspects are especially interesting from a women's rights perspective. First, the recognition of special needs and interest of women in the framework of an integral reparation programme for victims, and the recognition that there are hurdles in the system that could prevent women from actively enjoying their right to reparation. The plan recognizes that in order to allow for reparation measures to transform the lives of women, they need to tackle the structural violence against women. This is fully compatible with the fundamental idea of transformative justice set out in the theoretical part of this paper and gets to the point of how reparations should be applied for women, that is to say through the tackling of underlying root causes and not only of visible damages. Although not very concrete, the linkage between gender stereotypes on the one hand, and discrimination and violence on the other has been established.

The "Programme for the special Access for Women, Girls and Adolescents in the administrative stage of the Land Restitution Process" addresses

the main elements of gender justice. One thing that especially needs to be positively emphasized, is the acknowledgement of restitution in its traditional legal understanding not being in line with the purpose of transforming the reality of rural women.

Tackling the question on how gender justice is applied in the sentences of land restitution delivered a number of useful conclusions. Regarding the stage of proof in general, it can be said that all judges or magistrates respected and applied the concepts of flexibility of proof, the shift of the burden of proof, the presumption of dispossession and absent of legal consent in cases where there was any involvement of illegal armed actors, and the good faith in the testimonies of the women. This is in line with the idea of a victim-centred Land Restitution Programme, acknowledging the realities in the Colombian society concerning the practice of informal land tenure. These principles are especially favouring women, as they are the group with less legal certainty in relation to their property rights and therefore benefit from this legal practice.

Among the different departments, the picture of sentences is very diverse. Ranging from cases with a very good application of different aspects of gender justice in line with the theory of gender justice outlined in this paper, over cases, which only marginally mention the principle of a differential approach and only refer to isolated measures aimed at the improvement of the economic situation of women after their return, to cases, where the differential approach is not mentioned at all and no elements of gender justice are applied. Training activities by the URT should be focused on the judges or magistrates heading such departments with a low track record of gender justice in their judgements.

Now coming to the obstacles which have been identified as potentially preventing women from the effective enjoyment of their land rights, the first to mention is the security risk for women acting as leaders in the land restitution process. And second the persistence of a patriarchal system which is deeply engrained in society and which defines gender roles, thereby affecting women's everyday life. At the same time, this structure of society also causes a lack of guarantee of non-repetition and the risk of poverty for these women. This trend is especially alarming from two perspectives of gender justice: first, it may prevent women to be active in demanding their rights, leading to more exclusion and dis-empowerment for women in the public and private space. And second, it could lead to a situation where women prefer not to participate in the land restitution process in order to avoid a re-victimization. This second point would not only hamper the land restitution process, but also lead to more injustice for displaced women.

A second obstacle is to be found in the existence of a patriarchal society, where the construction of gender stereotypes and deeply rooted pat-

terms of discrimination and exclusion of women lead to high levels of SGBV and economic violence. The success of the Land Restitution Programme depends significantly on how effectively women can enjoy their legally given land rights in practice. Therefore, some recommendations will be laid out in the following paragraph as examples of how the Colombian government and its responsible entities could tackle the identified obstacles.

The Colombian government should:

- support the creation of forms of horizontal, communitarian and collective security systems, strengthen the networks within and among communities, establish early warning systems with more participation of civil population and a special focus on women, and particularly on women leaders of restitution movements;
- promote the abolition of degrading gender stereotypes in education programmes and campaigns;
- put less emphasis on a military strategy as guarantee for security for the returning families, and rather focus on strengthening the rule of law in rural and remote areas through the presence of civil authorities that exercise control over the military.

The URT should:

- offer trainings for its employees and the specialized judges for land restitution on gender justice, with a special focus on the rights of women heads of households and women victims of SGBV;
- recognize victims of displacement and dispossession by violent acts of “bacrim” as falling within the scope of article 3 in the Victims’ Law in line with the orders by the CC.

The specialized judges for land restitution should:

- carry out more collective restitutions, in order to make the restitution process more effective and bring more guarantee of non-repetition for the returning women through the reconstruction of social networks in the returning communities;
- make sure that women are treated with a differential approach, and that their special needs and interests are respected in accumulated or mass restitution cases.

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