

The forced displacement of indigenous peoples in Colombia

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Abstract: *The creation of more than seven million internally-displaced persons and the subsequent territorial expropriation in the context of the internal armed conflict in Colombia constitute both a humanitarian and a human rights tragedy. Indigenous peoples and Afro-descendants have especially been affected by forced displacement and loss of their ancestral territories. Some of these people are in a situation very close to extinction. International and domestic legal standards have progressively developed the rights of victims to truth, justice, reparation and guarantees of non-repetition. Restitutive justice, a human rights approach, and differential attention are essential ingredients for a consistent public policy to adequately deal with IDPs, especially those of indigenous origin, given their special relationship with their lands and territories. The General Agreement for the Termination of the Conflict and the Construction of Stable and Lasting Peace is to be regarded as a window of opportunity for the protection of the rights of IDPs and for the protection of the rights of indigenous peoples in Colombia.*

Key words: *Colombia; internally-displaced persons; indigenous peoples; Peace Agreement*

Losing our land is losing ourselves.

Testimony of a member of the displaced indigenous Siona people, UNHCR

1 Introduction

The fact that there are more than seven million internally-displaced persons (Registro Único de Víctimas 2018) is one of the most dramatic consequences of the armed conflict in Colombia, both from a humanitarian standpoint and from the perspective of the protection of their rights (Acción Social 2010). This has particularly affected the indigenous peoples living in Colombia. As noted by the United Nations (UN) Special Rapporteur on Indigenous Rights, 'the forced displacement of indigenous peoples threatens their cultural and physical survival', since 34 peoples are in grave danger of being either culturally or physically

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exterminated (Anaya 2010: 10). Often, the ultimate reasons for forced displacement rest on a perverse dynamics of territorial appropriation and control for strategic, military and purely economic purposes. Both domestic and international legal standards establish the right of victims to the restitution of their land and their homes as the 'preferred means' of redress in cases of displacement, considered essential to ensure the return of the displaced population. Unfortunately, restorative justice and the human rights approach are not at the core of public policies related to displacement, either by the Colombian government or the various international institutions working in Colombia, that continue to favour a welfare approach and to treat the situation as merely a humanitarian emergency. The purpose of this article is to analyse the applicable legal standards to ensure that the rights of the displaced, both to the restitution of their lands and territories and to return to their places of origin, are fully and effectively enforced, particularly in the case of indigenous peoples. After discussing the main developments in applicable laws and regulations and case law, a proposal will be made for overcoming dispossession and establishing assurances that it will not be repeated. Any comprehensive policy on reparations for victims must contemplate reversing land dispossession in Colombia that took place during the internal armed conflict. Voluntary property restitution and safe return, ensuring the dignity of the displaced population, thus would become one of the most powerful instruments in the prevention of forced displacement.

2 Land, territory and property dispossession in Colombia

2.1 The reality of dispossession

Territory appropriation and control is undeniably part of the armed conflict in Colombia, with a widespread and systematic strategy being applied by the various armed groups involved, including the powerful drug traffickers, whereby the forced displacement of the population is used to complete processes of 'territorial cleansing' (Moncayo 2006: 43). This has led to people being forcibly displaced and having to leave their land and property and, in many instances, this has resulted in processes of appropriation and dispossession of property belonging to thousands of farmers and indigenous and Afro-descendant communities, in what may be termed a true 'de-territorialisation process, not only geographically but also in cultural, political, and especially, legal terms' (Andrade 2006: 73).

Although there is no completely reliable and definitive data about the actual extent of land dispossession, it seems to range from the 4 million hectares identified by the UN World Food Programme (WFP 2001) to the 5,5 million hectares estimated by the Monitoring Committee of Public Policy on Displacement (Comisión de Seguimiento a la Política Pública sobre Desplazamiento 2009), to the 6,8 million hectares acknowledged by the governmental agency Social Action (Proyecto de Protección de Tierras y Patrimonio de la Población Desplazada 2005), and the 10 million hectares claimed by the National Movement of Victims of State Crimes in Colombia (*Movimiento Nacional de Víctimas de Crímenes de Estado en*

Colombia (MOVICE 2007)).¹ The figure therefore has reached very high levels, suggesting that there was a war for control of the territory that has led to genuine land counter-reform in the country (Comisión Internacional de Juristas 2005: 23).

2.2 Causes of dispossession

The dispossession of territory in Colombia reveals a complicated combination of motives and types of exploitation of misappropriated property that require a discussion of the political perspective of dispossession.

The basic reasons for displacement and dispossession have to do, first, with the military strategy needs associated with the armed conflict. The different armed actors seek to control territorial spaces to develop military strategies and secure mobility corridors for provisioning and for controlling the transit along these routes.

Drug-trafficking today is a real form of economic support for armed actors, and another important reason that could explain the dynamics of population expulsion and land control (Kálin 2007: 6). Both paramilitary groups and guerrillas seek to control various territorial areas in order to establish processing and marketing centres, as well as to secure strategic corridors for drug-trafficking routes. Different armed actors also use drug trafficking to fund an important part of their activities in a context in which the alliances and dynamics of war increasingly depend on the geography of drug trafficking.

Another fundamental aspect that helps to understand certain displacement instances and the resulting land dispossession has to do with projects that are clearly driven by economic reasons in the context of a profound structural transformation of the Colombian economy (Moncayo 2006: 40). Population displacement and the misappropriation of property have served as a means of acquiring land for the benefit of large landowners and their extensive livestock projects; of drug traffickers; and of private enterprises that undertake large-scale projects for the exploitation of natural resources (Deng 2000: 23). The processes of displacement and misappropriation of land have opened the doors to help establish industrial and agro-industrial processes aimed at the food and agro-fuel industries,² as well as the exploitation of raw materials in the mining and energy sectors. In addition, certain mega-projects linked to transnational corporations in industry, services and the construction of infrastructure networks in the field of transport and communications have instigated and benefited from the expulsion of the population and territory control (Área de Memoria Histórica 2009: 72; Martín-Ortega 2008).

1 This initiative was driven by the victims themselves as a strategy to record dispossessed property, land and territories. For the relevance of this initiative for the reparation to victims and the establishment of assurances that it will not happen again, see CEPEDA 2006: 149.

2 The case of the expropriation of collective titles from the Afro-Colombian communities in Curvaradó and Jiguamiandó for agro-industrial projects related to African palm is emblematic of this type of the economic uses of displacement and dispossession (Orejuela 2006: 53-59; Comisión Intereclesial de Justicia y Paz y Banco de Datos del CINEP 2005).

3 Legal standards for land restitution

This section discusses the legal instruments that recognise restitution as one of the essential ingredients of the victims' rights to reparation. Since this issue has considerably changed in recent years (Gómez Isa 2006), there are now fairly advanced standards that provide a clear roadmap for reparations to be awarded to the victims that have suffered serious and systematic violations of their human rights, as in the case of the vast number of displaced persons in Colombia who have been stripped of their land and property.

3.1 International standards

An important milestone in the progressive recognition of the victims' right to reparation has come from the 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 Law³ adopted by the UN General Assembly in December 2005 after several years of intense negotiations (Shelton 2005). As the Principles explicitly point out, they did not seek to establish 'new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law'.⁴ That is to say, they did not involve new obligations, but were rather a mere clarification of the scope and content of the obligations to make reparations to victims of human rights violations and of international humanitarian law. These Principles established the five basic forms of reparation, starting with restitution, and following with compensation,⁵ rehabilitation,⁶ satisfaction⁷ and guarantees of non-repetition.⁸

3 Resolution 60/147 of 16 December 2005.

4 Para 7 Preamble to the Principles and Guidelines.

5 Principle 20. Compensation is one of the classic and most frequent forms of reparation. Compensation, as stated in this principle, should be provided 'as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law'. The damages considered by the Principles as eligible for compensation include 'physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; costs required for legal or expert assistance; medicine and medical services; and psychological and social services'.

6 Principle 21. Rehabilitation includes 'medical and psychological care as well as legal and social services'. Rehabilitation is particularly appropriate where human rights violations have had significant physical and psychological consequences (cases of torture, people who disappeared, or cases of forced displacement through violence).

7 Principle 22. Satisfaction is one of the most important elements in any reparation process, since it addresses the symbolic issues that have to do with social imaginary and memory. The measures that claim to deliver satisfaction include 'the full and public disclosure of the truth ... the search for the whereabouts of the disappeared ... an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim ... a public apology ... memorials and tributes to the victims ...' These are ultimately a catalogue of measures to be used to develop a suitable policy of memory as an integral part of the reparations programme.

8 Principle 23. The guarantees of non-repetition refer to all those measures aimed at preventing any human rights violations that have taken place from recurring in the future. The preventive measures that states can implement include 'ensuring effective civilian control of military and security forces; strengthening the independence of the judiciary; providing, on a priority and continued basis, human rights and international

3.1.1 *The right to restitution: Towards restorative justice*

Restitution 'should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred'.⁹ Among the restitution measures, the Principles and Guidelines on the Right to Reparation refer to the 'restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property'.¹⁰ As will be seen, this type of reparation has to be the preferred approach in the case of displaced persons in Colombia who have had their possessions and property misappropriated. The right to restitution and return must become the primary objective of any public policy on displacement and dispossession (Leckie 2003). Only then will such public policy be preventive and lay the foundations for the non-repetition of dispossession in the future.

The Guiding Principles on Internal Displacement¹¹ adopted in 1998 clearly opted for this restorative approach to reparation measures for victims of forced displacement. First, it is expressly stated that 'no one shall be arbitrarily deprived of property and possessions',¹² and the Principles go on to establish an obligation that 'the property and possessions of internally displaced persons shall in all circumstances be protected'.¹³ The Principles also impose on the competent authorities 'the *primary* duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country'.¹⁴ In order to further reinforce the restorative approach promoted in the Guiding Principles on Internal Displacement, it is established that the competent authorities have the duty and responsibility 'to assist returned and/or resettled internally-displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement'.¹⁵ Only when recovery is impossible the 'competent authorities [shall] provide or assist these persons in obtaining appropriate compensation or another form of just reparation'.¹⁶ Therefore, the priority must be the restitution of property and the return to the place of origin, unless the displaced persons voluntarily opt for another place of resettlement. Compensation or other forms of reparation take a secondary place, since they are to be implemented only when possessions cannot be recovered.

humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law'.

9 Principle 19.

10 As above.

11 E/CN.4/1998/53/Add.2, 11 February, 1998. These Principles, also known as the Deng Principles as they were developed under the mandate of Francis M Deng as Representative of the Secretary-General on the issue of internally-displaced persons, are intended 'to address the specific needs of internally displaced persons worldwide by identifying rights and guarantees relevant to their protection'.

12 Principle 21.1.

13 Principle 21.2.

14 Principle 28.1 (my emphasis).

15 Principle 29.2.

16 As above.

These Principles on Displacement were supplemented in 2005 by the Principles on Housing and Property Restitution for Refugees and Displaced Persons,¹⁷ also known as the Pinheiro Principles.¹⁸ As the title suggests, these Principles are specifically devoted to the restitution of property and possessions of persons who have been displaced or have become refugees. The Principles are based on a clear recognition of the right to restitution of all property (Paglione 2008; COHRE 2005). It is stated that ‘all refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal’.¹⁹ In addition, the Principles firmly state the absolute priority that the right to restitution must have in relation to any other form of reparation (Gould 2009: 181). Fundamentally, the Principles enshrine a clear commitment to what they call *restorative justice* (Gómez Isa 2017). As stated in the Principles, ‘states shall demonstrably *prioritise* the right to restitution as the *preferred remedy* for displacement and as a key element of *restorative justice*’.²⁰ Finally, the Principles envisage the right to restitution of housing, land and property as ‘a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons’. This consideration of the right to restitution as *a right in itself* has very important implications for any public policies for assisting the displaced population. The right to restitution of possessions and property must be guaranteed in all cases, regardless of whether the displaced population returns or not. Even in those situations when the conditions for return are not met, or when people voluntarily do not wish to return, every attempt should be made to guarantee the restitution of possessions and property. This aspect is extremely important since, if restitution is not prioritised and alternative forms of reparation are sought (such as compensation²¹ or resettlement elsewhere), this might be seen as an attempt to ‘legitimise the processes of land encroachment and territory appropriation and the displaced population being condemned to the urban margins after a short period of ‘public welfare’ (Romero 2006: 103), something that, in the opinion of many, is what seems to be happening in Colombia. Obviously, these considerations also have repercussions for the prevention of forced displacement and the establishment of guarantees that it will not happen again. Unless restitution and return are firmly committed to, this would be tantamount to giving *carte blanche* to new processes of displacement and dispossession.

3.1.2 *The right to voluntary return in safety and dignity*

The right to restitution and the right to return are two autonomous and independent rights that should give rise to different, but related and

17 E/CN.4/Sub.2/2005/17, 28 June 2005.

18 This name emanates from the fact that these Principles were formally approved under the mandate of Paulo Sergio Pinheiro. As noted in the Preamble to these Principles, they ‘reflect widely accepted principles of international human rights, refugee and humanitarian law and related standards’.

19 Principle 2.1.

20 Principle 2.2 (my emphasis).

21 Principle 21, fully devoted to compensation, reiterates that ‘states shall, in order to comply with the principle of restorative justice, ensure that the remedy of compensation is only used when the remedy of restitution is not factually possible’.

complementary, policies in each case. The restitution of possessions and property to the population displaced by violence must occur whatever else happens, while the right of return must be governed by the principles of *voluntariness, security and dignity*. As the Pinheiro Principles point out in this regard, '[a]ll refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence, in safety and dignity'.²² Voluntariness implies that the return is merged into 'based on a free, informed, individual choice', with the displaced being provided with 'complete, objective, up-to-date, and accurate information, including on physical, material and legal safety issues in countries or places of origin'.²³

Physical safety is a crucial element in the return of the displaced population in Colombia since, in most cases, the coercion and violence that caused their displacement remain in place.²⁴ According to the data provided by the First National Survey for the Verification of the Situation of the Displaced Population carried out in 2007, only 3,1 per cent of the displaced family groups wished to return to their place of origin, an extraordinarily low figure. The lack of willingness to return is justified 'in 69,2% of the cases, by the belief or conviction that the causes that originated their displacement still apply' (Comisión de Seguimiento a la Política Pública sobre Desplazamiento 2009: 106). This data is not surprising, as it raises the major limitations of policies put in place for the restitution of property and return of the displaced population. Until the underlying problems that caused displacement and dispossession in the first place have been resolved, public policies for the displaced population will be doomed to fail or, at best, to be relegated to a purely humanitarian and care-oriented approach.

Similarly, the informal nature of land tenure and the fraudulent legalisation of seized property is another key obstacle for restitution and return policies to be effective. At this point, firm steps must be taken to ensure that the properties will be restored with at least a measure of legal safety. Some proposals to that effect will be analysed later. The legal safety demanded by the Pinheiro Principles is one of the fundamental elements in order to guarantee the return of the displaced population. As provided by these Principles, 'states should establish or re-establish national multipurpose cadastral or other appropriate systems for the registration of housing, land and property rights as an integral component of any restitution programme, respecting the rights of refugees and displaced persons when doing so'.²⁵

In the same vein, in order to make the return possible with at least a measure of success, an attempt should be made to meet the psychosocial needs of the displaced population. Psychosocial care is needed 'in a structured and systematic way, so as to overcome the emotional states

22 Principle 10.1.

23 As above.

24 On 18 May 2010, peasant leader Rogelio Martínez, who had led the return of 52 families displaced by paramilitaries from the Bloque de Héroes de los Montes de María to 'La Alemania' farm in San Onofre, Sucre, was killed. To date, 12 people have been killed in the process of reclaiming of this property, which clearly demonstrates the absence of the necessary conditions to guarantee a safe return, in 'La finca en Sucre que le ha costado la vida a 12 personas por intentar reclamarla', *El Tiempo* 24 May 2010.

25 Principle 15.1.

generated by displacement, to recover morale and self-esteem, to allow the many families who have not said goodbye to their dead to mourn, new levels of socialisation are achieved and the hope of living is restored' (ILSA 2006: 112).

Finally, the socio-economic conditions that underlie the principle of a dignified return call for economic support policies to assist the people and communities that decide to return (Barnés 2005: 36). Only if strong support is given to the economic initiatives of the displaced population that chooses to return will they be able to lay the foundations for the necessary sustainability of this return to take place.

If all the requirements established by the Pinheiro Principles to guarantee a return that is voluntary and in safety and with dignity are compared to the priorities and the data from the public policies aimed at the displaced population in Colombia, it is difficult to escape the conclusion that these public policies have not prioritised the restitution of misappropriated properties and the return of the displaced population to their places of origin. In addition, some of the experiences of early restitution and return have not been as satisfactory as they should have been, and have led to a high level of frustration and mistrust among the displaced population. Therefore, the incentive to return has become even more blurred (ILSA 2006).

3.2 National standards

As will be seen, Colombia has approved a wide range of laws and decrees in an attempt to deal with the phenomenon of forced displacement and the resulting land dispossession. As in other areas, regulations exist that are relatively advanced from the formal point of view, but that face numerous obstacles in terms of their implementation. This has come to be described as an actual *simulation* process.²⁶ Under very progressive statements and formal principles, there is a clear lack of political will to take significant steps to provide redress for the victims, reverse the territorial encroachment and effectively prevent the forced displacement of the population.

3.2.1 Main internal regulations

Law 387²⁷ on forced displacement, approved in July 1997, established a framework to take action for attending to the displaced population. From the outset, this Law was made in full awareness of the need to enhance the protection of the property of the displaced population in order to prevent displacement, to try to avoid dispossession and, eventually, to allow for the restitution of encroached property and for the displaced population to return. Article 19(1) orders the Colombian Institute for Agrarian Reform (INCORA, currently INCODER, Colombian Institute of Rural Development) to keep 'a record of rural land abandoned by those

26 Hernando Valencia Villa discussed this simulation process in the context of the 2005 Justice and Peace Act (Ley de Justicia y Paz de 2005). This law, under the guise of an apparent commitment to human rights and reparation to victims, ultimately seeks to maintain a high level of impunity (Valencia Villa 2005: 9).

27 Law 387 of 18 July 1997 adopted measures for the prevention of forced displacement; the attention, protection, consolidation and socio-economic stabilisation of persons who have been internally displaced by violence in the Republic of Colombia.

displaced by violence' and to inform 'the relevant authorities in order to prevent any alienation or transfer of titles of property of these possessions, when such action is taken against the will of the holders of the respective rights'. This crucial aspect of the law was partially developed by Decree 2007 (2001), which established specific measures to protect the possessions of the population that was at imminent risk of displacement or actually displaced (Osorio Pérez 2006). Once the Municipal, District or Departmental Committee for Comprehensive Care of the Population Displaced by Violence declares the imminence of risk of displacement, or that the displacement has occurred, several measures are implemented to protect the land and the property of the displaced population. First, based on the information contained in the existing registries and the *Oficinas de Catastro y de Registro de Instrumentos Públicos* (Land Registry Offices and Registry of Public Instruments), the relevant institutions must submit to the Committee 'a report on the rural estates that existed when imminent risk was declared, or when the initial actions that caused the displacement took place, specifying the title to the established rights'²⁸ within a period not exceeding eight days. Most importantly, once this report has been endorsed by the Committee, it 'constitutes sufficient evidence to prove the status of the possessor, holder or occupier of the displaced persons'.²⁹ In the same vein, the *Comités de Atención Integral a la Población Desplazada* (Committees for Comprehensive Care of the Displaced Population) must inform the appropriate *Oficina de Registro de Instrumentos Públicos* (Public Instrument Registry Office) that a certain area has been declared to be at imminent risk of displacement or forced displacement, 'providing the names of the owners or holders of rural estates who may be affected by such situations, and requesting them to refrain from registering any transfers under any title of said rural property, as long as the declaration remains in force'.³⁰ Finally, the Committee for Care to the Displaced Population must request that INCODER refrain from granting any titles to property in the area of imminent risk of displacement or forced displacement at the request of individuals other than those listed as occupants in the report endorsed by the Committee'.³¹

An attempt to complete this battery of measures intended to protect the land and the property of the displaced population, very much in line with the Pinheiro Principles,³² was made within the *Proyecto de Protección de Tierras y Territorios de la Población Desplazada por la Violencia* (Project for the Protection of Land and Territories of the Population Displaced by Violence), developed in 2003 by the *Agencia Presidencial para la Acción Social* (Presidential Agency for Social Action) using international aid

28 Art 1(1) of Decree 2007 of 24 September 2001.

29 As above.

30 Art 1(2) of Decree 2007 of 24 September 2001.

31 Art 1(3) of Decree 2007 of 24 September 2001.

32 Principle 5.3 directs states to prohibit 'forced eviction ... and the arbitrary seizure or expropriation of land as a punitive measure or as a means or method of war'. Principle 15.6 also provides that 'states and other responsible authorities or institutions conducting the registration of ... displaced persons should endeavour to collect information relevant to facilitating the restitution process, for example by including in the registration form questions regarding the location and status of the individual refugee's or displaced person's former home, land, property'. Finally, as stated in Principle 12.1 of the Pinheiro Principles, 'states should establish and support equitable, timely, independent, transparent and non-discriminatory procedures, institutions and mechanisms to assess and enforce housing, land and property restitution claims'.

funding (Escobar 2006). The main objective of this project was to protect the victims' rights to their land and territories when they are at risk of displacement and abandonment or dispossession of their property, or when displacement has already occurred, so that such properties are not unlawfully appropriated by the persons responsible for the displacement or by a third party.³³

Unfortunately, little progress has been made with an essential task, that is, coordinating the policy for the protection of land and territories of the displaced population carried out within this project with the institutions responsible for the comprehensive treatment of the displaced population, such as the *Comités de Atención a la Población Desplazada*, as necessary. In addition, the activities carried out within this project need to be coordinated with the institutions responsible for transfers of title, such as the *Superintendencia de Notariado y Registro* (Department of Notaries Public and Registry) (SNR), the *Oficinas de Registro de Instrumentos Públicos* (ORIP), Notaries Public's offices, the *Instituto Colombiano de Desarrollo Rural* (Colombian Institute for Rural Development) (INCODER), the *Instituto Geográfico Agustín Codazzi* (Agustín Codazzi Geographic Institute) (IGAC), and the *Oficinas de los Catastros*. A successful coordination of the above bodies will to a large extent depend on the effectiveness of all the legal and institutional measures that seek to protect the property of people displaced by violence. There is full awareness of this within the project.³⁴ Ultimately, all these institutions will need profound changes if priority is to be given to the effective execution of the right to restitution of the property unlawfully seized from the displaced population. This is a task of vast proportions that requires an institutional framework that lives up to the challenge of reversing the land dispossession processes.

One of the most important measures that took place in this area during the presidency of Juan Manuel Santos was the adoption of the so-called *Ley de Víctimas y Restitución de Tierras* (Law on Victims and Land Restitution) in 2011.³⁵ This Law, based on the international principles and standards analysed above, established an ambitious programme for the recognition of and guarantee to the victims of the Colombian armed conflict of the right to truth, justice and reparation, with a significant focus on the restitution of territory. Although article 13 of the Law recognised the principle of a *differential approach*, it did not establish specific measures for indigenous peoples, giving the President of the Republic a period of six months in which to adopt measures in favour of the indigenous peoples and Afro-descendant communities. In compliance with this legal mandate, in December 2011 the President approved Decree

33 This protection is specified in property protection mechanisms that operate through three routes, namely, the Collective Route, which is intended to protect the territorial rights of a community that is at risk of displacement or has already been displaced; the Individual Route, which seeks to protect the rights of a person or a family nucleus to a property that they have been forced to abandon; and the Ethnic Route, which aims at the protection of collective territorial rights of the ethnic groups when they have been displaced or are at risk of being displaced (Proyecto de Protección de Tierras y Territorios de la Población Desplazada por la Violencia 2009).

34 For more information, see the interesting document prepared within the project, which contains very precise recommendations for the different institutions involved in the processes of protection of the possessions of the displaced population (Proyecto de Protección de Tierras y Patrimonio de la Población Desplazada 2008).

35 Law 1448 of 10 June 2011, on measures for the comprehensive care of, assistance and reparation to victims of the internal armed conflict and other provisions.

4633,³⁶ which established a set of highly-progressive measures intended to ensure comprehensive reparation to the victims belonging to indigenous peoples. Once again, as in so many other areas in Colombia, regulations and institutional frameworks are not the problem; instead, the issue concerns the political will and ability to ensure compliance. Such compliance will to a large extent depend on the progress of the implementation of the Peace Agreement between the FARC and the government adopted in 2016 (*Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz estable y duradera 2016*). The successful conclusion of the peace process would be a huge step towards the recognition and guarantee of indigenous peoples' rights to reparation and land restitution.

3.2.2 *Case law from the Colombian Constitutional Court on restitution*

The Colombian Constitutional Court has also placed a special emphasis on the right to the comprehensive reparation of victims of displacement and territorial and property dispossession, by making pronouncements that are in line with international law principles that impose very specific obligations on the Colombian state.

The Constitutional Court has firmly stated that the rights of the displaced population to property of which they have been dispossessed deserve special attention by the state. In the words of the Court,

persons who have been forcefully displaced and violently dispossessed of their land (of the land they own) have a fundamental right to having their rights to property or possession preserved by the state, and the use, enjoyment and free disposal thereof reinstated under the conditions established by applicable international law.³⁷

For this reason the Court considers that 'in these cases the right to property or possession *is particularly strengthened*, and deserves *special attention from the state*'.³⁸ This line of case law has led the Court to stress that the policy of comprehensive attention to the displaced population 'must have a *restorative approach* that is clearly differentiated from the policy of humanitarian assistance and socio-economic stabilisation'.³⁹

Furthermore, as the Pinheiro Principles demonstrated, the Court made it clear that 'the right to restitution and/or compensation is independent from return and restoration'.⁴⁰ In this sense, the Court envisaged restitution as being 'not only a measure of reparation but a measure for the non-repetition of the criminal acts that sought dispossession'.⁴¹ Therefore, the Court concluded that 'full assurances must be given to the displaced

36 Decree Law No 4633 of 9 December 2011, which provides measures of assistance, care, comprehensive reparation and restitution of territorial rights to victims belonging to indigenous peoples and communities. The President also on the same day approved Decree Law No 4633 of 9 December 2011, which provides measures of assistance, care, comprehensive reparation and restitution of territorial rights to victims belonging to black, Afro-Colombian, Raizales and Palenqueras communities.

37 Corte Constitucional, Sentencia T-821 (Constitutional Court Judgment T-821), 5 October 2007 para 60.

38 As above (my emphasis).

39 Corte Constitucional (n 37) para 68 (my emphasis).

40 As above.

41 As above.

population that they will recover their property, regardless of whether or not the affected person wishes to reside there'.⁴²

To reinforce the special protection of the right to property or possession, the Constitutional Court has further proclaimed that article 17 of the Protocol Additional to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),⁴³ the Guiding Principles on Internal Displacement and the Principles on the Restitution of Housing and Property of Refugees and Displaced Persons 'are part of the constitutional block in the broadest sense, since they are developments of the fundamental right to integral reparation for the damage caused adopted by international doctrine'.⁴⁴ Both the Deng Principles and the Pinheiro Principles are considered to be an integral part of the constitutional block. This domestic inclusion of these Principles is unprecedented in the world (Duque 2006: 108), and should serve as a basis for the design and implementation of much firmer public policies to guarantee the restitution of the misappropriated possessions to the displaced population and the return to their places of origin if they so wish.

Finally, given the gaps and deficiencies in the legal and institutional system for the protection of the displaced population's possessions and property, the Constitutional Court has ordered the government agency Acción Social that

if it does not have it yet, it should consider the feasibility of establishing a *special register* for displaced persons who abandoned rural and urban property in order to identify the victims who ... are entitled to reparation, via restitution of their property, or compensation.⁴⁵

The objective of this special register would be 'to establish mechanisms to promote the right to property and possession of the displaced population and demand a differential policy on reparation for those who were forced to abandon or were dispossessed of their property'.⁴⁶

Despite all these developments and, particularly, despite the enormous institutional and regulatory arsenal in the area of care for forcefully-displaced persons, and of their right to restitution and return, the Constitutional Court concluded that the situation faced by displaced persons reveals an 'unconstitutional state of affairs',⁴⁷ that is, a general

42 As above.

43 Para 1 of this provision states that 'the displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.' The second paragraph goes on to state that 'civilians shall not be compelled to leave their own territory for reasons connected with the conflict'.

44 Corte Constitucional (n 37) para 60. The Court makes explicit reference to art 93 of the 1991 Political Constitution of the Republic of Colombia, which provides that 'international treaties and conventions ratified by Congress which recognise human rights and prohibit their limitation in states of exception, prevail domestically. The rights and duties enshrined in this Charter shall be interpreted in accordance with the international treaties on human rights ratified by Colombia.'

45 Corte Constitucional (n 37) para 72.3 (my emphasis).

46 As above.

47 Corte Constitucional, Sentencia T-025 (Constitutional Court, Judgment T-025) 22 January 2004, Chapter IV, First Decision.

violation of the obligation to protect people from forced displacement, the obligation to assist them once such displacement has taken place, and the duty to design effective reparation policies, which must include restitution and return. The Court has also pointed out that the violation of basic rights, such as the right to live in dignity, the right to personal integrity, equality, work, health, social security, and education,

has been occurring on a massive scale, on a continuous, long-term basis, and is not attributable to a single authority, but rather due to a *structural problem* that affects the entire policy designed by the state on this matter and its different components, as a result of the insufficient funding made available for this policy and the precarious institutional capacity to implement it.⁴⁸

Recently, the Constitutional Court has again carefully considered the government's response to the extreme vulnerability affecting the displaced population, and reached a conclusion that again caused confusion, hopelessness and frustration. The Court 'finds that the unconstitutional state of affairs persists'.⁴⁹ In its qualified opinion, 'despite the achievements regarding some rights, systematic and comprehensive progress has not been made to ensure the effective enjoyment of all the rights of the population who have been victims of forced displacement'.⁵⁰ In addition, as the Court remarked, one of the most precarious policies is the land policy in place, 'both with regard to the protection and restitution of land abandoned by the displaced population, and to land delivered for relocation and for conducting production projects'.⁵¹ This opinion is shared by the Division for Preventive Action on Human Rights and Ethnic Affairs. This body has stated that we are witnessing a 'repeated failure on the part of the state authorities to fulfil their duties to protect, guarantee and ensure the conditions for the effective implementation of the right of the displaced population to their property and possessions' (Procuraduría Delegada para la Prevención en Materia de Derechos Humanos y Asuntos Étnicos 2008: 57). In addition, the Division for Preventive Action went one step further, in an extremely important qualitative leap in the treatment of displacement and dispossession, as will be seen later. In its view, the right to reparation in respect of property rights

cannot be reduced to the restitution of property without the creation or reestablishment of the right, or to mere economic compensation, without recognising the violation and the damages caused, and without investigating and punishing those responsible, and clarifying the causes of the dispossession.⁵²

4 Some proposals for guaranteeing the right to restitution

I will provide a brief analysis of some of the proposals that are being considered to implement the right of the displaced population to the restitution of their lands and territories, which can open the door to their voluntary return, in safety and dignity.

48 Corte Constitucional (n 47) sec 6.3 (my emphasis).

49 Corte Constitucional, Auto No 008 (Constitutional Court, Resolution No 008) 26 January 2009, ch IX, First Decision.

50 As above.

51 Corte Constitucional (n 49) sec III, 4.2, para 70.

52 As above.

4.1 Towards a comprehensive and differentiated reparation policy

It has been shown how the victims' rights to reparation have been articulated in contemporary international law through an entire set of measures ranging from restitution to compensation, including measures in the field of rehabilitation, satisfaction, memory, and guarantees of non-repetition. A comprehensive reparation policy for victims of forced displacement and territorial dispossession in Colombia must adequately combine these different forms of reparation, while relying on the participation and qualified opinions of the victims. Restitution and return must be accompanied by a process of memory about displacement and dispossession, about its meaning, its dynamics, its perpetrators and beneficiaries. Both victims and society as a whole have the right to know all the aspects of one of the most serious and dramatic human rights violations committed in the context of the armed conflict in Colombia. The gap in collective memory regarding the meaning of the process of dispossession 'leads public policies ... to be confined to a formal and restricted recognition of the rights of the displaced population to the abandoned land, without proposing any strategies to reverse and prevent the effects of such dispossession' (Área de Memoria Histórica 2009: 13).

A *differential approach* to the reparations for the victims of displacement and dispossession⁵³ is also necessary. This differential policy on reparation must begin with an analysis of the impact of displacement and dispossession on the different affected groups. The impact on particularly vulnerable groups, such as women, indigenous peoples, Afro-descendant communities and people with disabilities, needs to be dealt with. Only if the different impacts are taken into account, depending on the conditions and circumstances of each social group, can adequate compensation measures be taken that include these differential elements. Otherwise, if global and indiscriminate policies are established for the displaced population as a whole, 'vulnerable situations tend to be aggravated' (Área de Memoria Histórica 2009: 55).

In the case of women, for example, the Constitutional Court has identified ten gender-related risks, namely, 'ten specific vulnerability factors to which women are exposed because of their female status in the context of armed confrontation in Colombia, which are not shared by men and thoroughly explain the disproportionate impact of forced displacement on women'.⁵⁴ One of these gender-related risks is 'the risk of being dispossessed of their land and property more easily by illegal armed actors given their historical position on property, especially rural real estate'.⁵⁵ In view of this, the Court ordered a differentiated policy to try and prevent gender-based risks that caused women to suffer a disproportionate impact by being displaced. The Pinheiro Principles established an obligation to ensure that 'a gender perspective is

53 Corte Constitucional, Sentencia T-821 (Constitutional Court, Judgment T-821) (n 37) para 69.

54 Corte Constitucional, Auto N° 092, 14 April, 2008.

55 Corte Constitucional, Auto N° 092 (Constitutional Court, Resolution No 092) V.B.1. In spite of the traditional invisibility of women's formal relationships with the land, their 'identification with the land, just like the life-giving mother earth, must be emphasised' (Puerto 2006: 60).

incorporated into programmes, policies and practices for the restitution of housing, land and property'.⁵⁶

The internal armed conflict has also had a significant impact on indigenous peoples living in Colombia. Indigenous peoples have been exposed to severe processes of forced displacement and land dispossession that have seriously threatened their own physical and cultural survival. As the Constitutional Court has pointed out in a resolution specifically aimed at addressing the situation of the rights of indigenous peoples displaced by the conflict, 'because of its destructive consequences on the ethnic and cultural fabric of these groups, forced displacement generates a clear risk of extinction, cultural or physical, of indigenous peoples'.⁵⁷ These specific circumstances faced by indigenous peoples, together with their historically-vulnerable situation, demands a differentiated treatment in which the territorial element becomes fundamental. Given the special relevance of the land and territories⁵⁸ for indigenous peoples, the right to restitution and land demarcation must become an essential ingredient of any reparation policy. Only in this way will the foundations be laid for the prevention of future territorial harassment and the forced displacement of indigenous peoples. Luis Evelyn Andrade, leader of the *Organización Nacional Indígena de Colombia* (ONIC), has demanded 'actions aimed at securing the affected property, developing programmes that guarantee access to land and strengthening the community social fabric, emphasising the importance of identifying legal, institutional and community-based mechanisms for the protection of ethnic territories' (Andrade 2006: 76).

5 Conclusion

The dynamics of land appropriation and dispossession is one of the elements that characterise the forced displacement of people and communities in the context of the internal armed conflict that has for several decades ravaged Colombia. Both domestic and international legal standards have gradually shaped the rights of victims to truth, justice, reparation and the establishment of guarantees of non-repetition of the violations committed. The rights of the victims of displacement and dispossession to comprehensive reparation include as a preferred means the restitution of their property and the voluntary return to their places of origin with the assurance of safety, dignity and sustainability. The reversal of a process of territorial encroachment that has reached proportions that lead to the need for a genuine agrarian counter-reform is one of the basic conditions for preventing forced displacement and establishing guarantees of non-repetition. Restorative justice, a rights-based approach and a differential focus should provide an outline for the roadmap for designing the public policies aimed at the displaced population, in particular

56 Principle 4.2.

57 Corte Constitucional, Auto No 004 (Constitutional Court, Resolution No 004) 26 January 2009 11.

58 In the indigenous worldview, this distinction between land and territory is important. The territory goes far beyond the pure physical element, pointing to 'a vital relationship between community and the lived-in, appropriated, and represented space'. From this perspective, the territory 'is a social product derived from the population dynamics, the symbolic and material appropriation of space and the representations constructed by a society through history and its experiences' (Área de Memoria Histórica 2009: 93).

indigenous people, due to their special link with the land and the territory. Unfortunately, as the Colombian Constitutional Court has repeatedly pointed out, a humanitarian approach to care for the displaced population has not yet placed sufficient emphasis on the right to restitution and return, constituting a structural violation of their rights and an 'unconstitutional state of affairs'. If this situation persists, a process of perpetuation of displacement and territorial dispossession will ensue, since policies on restitution and the conditions associated with the armed conflict do not generate sufficient incentives to encourage the displaced to enable their return. In order to reverse this situation, it has been proposed that specific institutions be created that can guarantee the right to the truth and the right to restitution of the victims of forced displacement. From my point of view, these proposals deserve to be seriously considered if there is a true intent to pay off the historical debt that the Colombian society and state have contracted with the victims of displacement and land dispossession.

The fact that the General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace (*Acuerdo General para la terminación del conflicto y la construcción de una paz estable y duradera 2016*) between the Colombian government and the FARC explicitly mentions 'the human rights of the victims' provides a window of opportunity for guaranteeing the rights of the victims, in particular their rights to truth, justice, reparation and land restitution of the indigenous peoples of Colombia, who have experienced with special intensity the collateral damages of the Colombian armed conflict.

The General Agreement has explicitly recognised the 'historical conditions of injustice' suffered by indigenous peoples, something that has to be taken into consideration in the process of implementation of the peace agreement. At the same time, the agreement mentions some rights that are of utmost importance to the indigenous peoples in Colombia, namely, the right to self-determination and autonomy; the right to participation in decisions that affect their lives; free, prior and informed consent; and last but not least, the right of indigenous peoples to their lands, territories and natural resources.

From the procedural point of view, a specific body has been created to effect the follow-up of the implementation of the agreement as far as indigenous peoples are concerned, namely, the High-Level Instance with Indigenous Peoples for the Follow-Up of the Agreement.

If adequately implemented, the peace agreement in Colombia can mark a turning point for indigenous peoples in the Andean country. On the other hand, one must be aware of the huge distance between rhetoric proclamations and the harsh reality that indigenous peoples face in their daily lives.

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