

**COLOMBIA:
THE VICTIMS
AND LAND
RESTITUTION
LAW**

**AN AMNESTY
INTERNATIONAL ANALYSIS**

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1. INTRODUCTION

On 10 June 2011, President Juan Manuel Santos signed into law the Victims and Land Restitution Law (Ley de Víctimas y Restitución de Tierras, Law 1448). The Law and its associated decrees, cover a range of interrelated issues. This report focuses specifically on its provisions dealing with land restitution, an aspect of the Law that has provoked strong opposition both from sectors of society who fear it may jeopardize their control of lands seized illegally through human rights violations, and those seeking the return of lands they were forced to abandon.

The Colombian government has presented this Law as a mechanism that will facilitate the restitution of millions of hectares of lands abandoned or stolen as a result of human rights abuses and violations. Law 1448 includes some welcome steps forward. Crucially, it acknowledges the existence of an armed conflict, something which the previous Colombian government consistently failed to do. It, therefore, acknowledges the relevance of international humanitarian law to the situation in Colombia and the right of the population to the protections it provides. The Law also provides for comprehensive reparations for some survivors of human rights abuses committed in the context of the armed conflict and contains measures allowing the return to the rightful owners of millions of hectares of stolen land. Members of paramilitary groups, sometimes acting in collusion with the security forces, were responsible for misappropriating most of this land. Forced displacement of civilians by guerrilla forces has also resulted in many civilians losing control of their lands.

The Office of the UN High Commissioner for Human Rights in Colombia has highlighted a number of other positive aspects of the Law. These include special provisions for women and children survivors of human rights abuses, and those targeted because of their perceived sexual orientation; and the recognition of the importance of protection measures for victims returning to lands that are restored to them. However, the UN High Commissioner has made it clear the Law has both “strengths and weaknesses”.¹ Some aspects of the Law have provoked concern that it could be used to deny many victims effective reparation and could help legalize tenure over misappropriated or illegally occupied lands or the profits derived from these lands. In addition, the Law does not include provisions to secure the complete restitution of lost goods, such as housing, crops and livestock.

This report looks at shortcomings in Law 1448 that can have the effect of denying survivors of human rights violations justice. These include, the obstacles faced by victims in obtaining reparations; the complex process that needs to be undertaken to identify misappropriated lands; provisions that may have the effect of legitimizing tenure of stolen lands; and inadequate support for victims returning to their lands. The report ends with a series of recommendations to the Colombian government to remedy weaknesses in the existing legislation.

¹ UN High Commissioner for Human Rights in Colombia, press release of 7 June 2011.

2. OBSTACLES TO REPARATIONS

TRANSITIONAL JUSTICE

The Law presents itself as part of a project of transitional justice, implying that the internal armed conflict is a thing of the past. However, in reality the conflict, which has long been characterized by widespread violations of human rights and international humanitarian law, is continuing as are human rights abuses. By presenting this law as an element of transitional justice, victims of current or future abuses may find themselves excluded from its protections because they are seen as victims of criminal gangs rather than of parties to the armed conflict.²

DEFINITION OF VICTIMS

The government refuses to acknowledge that paramilitary groups, often colluding closely with the security forces, continue to operate in Colombia. Instead, the government refers to the activity of “criminal gangs”, known by the Spanish acronym Bacrim (*bandas criminales*). In 2009, paramilitaries were responsible for the largest percentage of displacements where the perpetrators have been identified, 32.9 per cent. The equivalent figures for other parties to the conflict are, 26.8 for guerrilla groups and 1.4 per cent for members of the armed forces.³

The UN High Commissioner for Human Rights has stated: “One of the causes of displacement in some areas is actions by illegal armed groups that have emerged since the paramilitary demobilization, to strip civilian populations of their lands”.⁴ In many cases, there appears to be a clear correlation between continued paramilitary activity and ongoing land grabbing. The failure by the government to acknowledge the continued activities of the paramilitaries and to attribute these actions to criminal gangs is a concern given that Law

² “**ARTÍCULO 8°. JUSTICIA TRANSICIONAL.** Entiéndase por justicia transicional los diferentes procesos y mecanismos judiciales o extrajudiciales asociados con los intentos de la sociedad por garantizar que los responsables de las violaciones contempladas en el artículo 3° de la presente Ley, rindan cuentas de sus actos, se satisfagan los derechos a la justicia, la verdad y la reparación integral a las víctimas, se lleven a cabo las reformas institucionales necesarias para la no repetición de los hechos y la desarticulación de las estructuras armadas ilegales, con el fin último de lograr la reconciliación nacional y la paz duradera y sostenible”.

Ley 1448 “por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno y se dictan otras disposiciones” approved on 10 June 2011.

³ Colombia: *La metáfora del desmantelamiento de los grupos paramilitares. Segundo informe de balance sobre la aplicación de la ley 975 de 2005*, Comisión Colombiana de Juristas, 2010, Bogotá.

⁴ Annual report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia, Human Rights Council, Tenth session, Item 2 of the provisional agenda. A/HRC/10/32, 9 March 2009.

1448 does not apply to victims of common crimes and, therefore, some victims of human rights violations may not be able to access its protections.⁵

Law 1448 creates a hierarchy of victims in which eligibility for reparations depends on the date on which human rights violations were carried out:

- Victims of forced displacement and other human rights abuses occurring before 1985 may only qualify for symbolic reparation, not land restitution or financial compensation.
- Victims of human rights abuses committed between 1985 and 1991 will be eligible for financial compensation, but not land restitution.
- Only victims whose lands were misappropriated or illegally occupied through human rights abuses after 1991 and before the end of the law's applicability⁶ will be eligible for land restitution. However, even this group faces a number of obstacles in obtaining reparation.

Survivors of human rights violations who remained in the areas where their lands are located only need formal recognition of their status as victims to claim return of their land. However, those who fled the areas where they lived can face difficulties in being recognized as victims if they have not been officially recognized as forcibly displaced people.⁷ Over recent years, forcibly displaced people have faced many problems in getting official recognition and records of forcibly displaced people have been far from complete. In this context, the provisions of Law 1448 threaten to exclude many victims with legitimate claims.⁸

⁵ **“ARTÍCULO 3°. VÍCTIMAS ...**

Parágrafo 3°. *Para los efectos de la definición contenida en presente artículo, no serán considerados como víctimas quienes hayan sufrido un daño en sus derechos como consecuencia de actos de delincuencia común.”*

⁶ The Law is applicable for a period of 10 years from the time it entered into the statutes.

⁷ In some areas, armed confrontation was accompanied by aerial spraying of coca plantations that affected food crops too, thus leading to the forced displacement of people. However, those affected by such actions were not recognized as internally displaced.

⁸ **“ARTÍCULO 3. VÍCTIMAS** *Se consideran víctimas, para los efectos de esta ley, aquellas personas que individual o colectivamente hayan sufrido menoscabo en sus derechos fundamentales, por hechos ocurridos a partir del 1° enero de 1985, siempre que este menoscabo sea consecuencia de infracciones al Derecho Internacional Humanitario o de violaciones graves y manifiestas a las normas Internacionales de Derechos Humanos*

Parágrafo 4°. *Las personas que hayan sido víctimas por hechos ocurridos antes del primero de enero de 1985 tienen derecho a la verdad, medidas de reparación simbólica y a las garantías de no repetición previstas en la presente ley.”*

“ARTÍCULO 76.- TITULARES DEL DERECHO A LA RESTITUCIÓN. *Las personas que fueran propietarias o poseedoras de predios, o explotadoras de baldíos cuya propiedad se pretenda adquirir por adjudicación, que hayan sido despojadas de éstas, o que se hayan visto obligadas a abandonarlas como consecuencia*

Under Law 1448, relatives of civilians unlawfully killed by the security forces may not be recognized as victims of human rights violations unless and until criminal investigations confirm that the person killed was not a member of an illegal armed group. Given that investigations into unlawful killings rarely if ever reach a conclusion, this provision could potentially exclude victims from receiving reparation under the Law.

The Law also does not recognize as victims members of illegal armed groups who have suffered human rights violations or breaches of international humanitarian law.

In addition, minors who under international standards are considered victims of forced recruitment are only recognized as victims if they are still minors at the time of their demobilization.⁹

STATE RESPONSIBILITY

Law 1448 recognizes that all victims have a right to truth, justice, reparation and non-repetition, in line with international standards. However, it seeks to play down state responsibility for the human rights crisis. There are concerns that this could result in the state failing to acknowledge its responsibility to provide reparation to the victims of human rights violations and so limit access to reparations for some victims.¹⁰

Although the law acknowledges the right to truth, justice and reparation, it does not take into

directa e indirecta de los hechos entre el 1º de enero de 1991 y el termino de vigencia de la Ley y que configuren las violaciones de que trata el artículo 3º de la presente Ley, pueden solicitar la restitución jurídica y material de las tierras despojadas o abandonadas forzosamente, en los términos establecidos en este capítulo.”

⁹ **“ARTÍCULO 3º. VÍCTIMAS**

Parágrafo 2º. Los miembros de los grupos armados organizados al margen de la ley no serán considerados víctimas, salvo en los casos en los que los niños, niñas o adolescentes hubieren sido desvinculados del grupo armado organizado al margen de la ley siendo menores de edad.”

¹⁰ **“ARTÍCULO 9º. CARÁCTER DE LAS MEDIDAS TRANSICIONALES.** *El Estado reconoce que todo individuo que sea considerado víctima en los términos en la presente ley, tiene derecho a la verdad, justicia, reparación y a que la violación de sus derechos fundamentales no se vuelva a repetir, con independencia de quién sea el responsable de los delitos*

Por lo tanto, las medidas de atención, asistencia y reparación contenidas en la presente ley, así como todas aquellas que han sido o que serán implementadas por el Estado con el objetivo de reconocer los derechos de las víctimas a la verdad, justicia y reparación, no implican reconocimiento ni podrán presumirse o interpretarse como reconocimiento de la responsabilidad del Estado, derivada del daño antijurídico imputable a este en los términos del artículo 90 de la Constitución Nacional, como tampoco ningún otro tipo de responsabilidad para el Estado o sus agentes.

El hecho que el Estado reconozca la calidad de víctima en los términos de la presente ley, no podrá ser tenido en cuenta por ninguna autoridad judicial o disciplinaria como prueba de la responsabilidad del Estado o de sus agentes. Tal reconocimiento no revivirá los términos de caducidad de la acción de reparación directa.”

account the failure of the authorities to put in place an adequate legal framework that fully respects these rights. The 2005 Justice and Peace Law (Law 975) and accompanying legislation enacted by the previous administration remain in force. This legislation facilitated the supposed demobilization of paramilitaries, but failed to guarantee the rights of victims or to dismantle effectively the paramilitary infrastructure.¹¹

The present government has promoted legislation that consolidates the Justice and Peace framework and may further jeopardize rights to truth, justice and reparation. For example, in December 2010, Law 1424 came into force, effectively protecting around 25,000 supposedly demobilized paramilitaries from prosecution and ensuring that any evidence they provide in their confessions will not be used as criminal evidence. In October 2011, the Constitutional Court ruled that information in these confessions could not be used in criminal proceedings against the individuals who made them or other members of the group from which they demobilized, although the information could be used as evidence in other criminal proceedings. In effect this means that many human rights violations and abuses will not be fully investigated and those responsible will not be identified. This in turn may limit the possibility of victims of human rights violations being officially recognized as such and obtaining reparation.

PENALIZING CAMPAIGNS FOR LAND RESTITUTION

Law 1448 contains provisions that could prevent those campaigning for restitution of lands from exercising their right to have their lands restored to them. This could affect anyone who has taken part in peaceful protest if they are considered to have invaded, occupied or used the land before a legal decision has been taken on the land in question. This raises a number of concerns, not least of which is the fact that the right to comprehensive reparation is a human right and therefore cannot be denied, even if a claimant commits a crime. In addition, the law could in effect criminalize actions undertaken by land claimants that would not normally be considered illegal.¹²

¹¹ Amnesty International has detailed its concerns about the Justice and Peace Law in a number of reports, including *Colombia: The Paramilitaries in Medellín: Demobilization or Legalization?* (Index: AMR 23/019/2005) <http://www.amnesty.org/en/library/info/AMR23/019/2005/en>, *Colombia: Killings, arbitrary detentions, and death threats -- the reality of trade unionism in Colombia* (Index: AMR 23/001/2007) <http://www.amnesty.org/en/library/info/AMR23/001/2007/en>, *Colombia: 'Leave us in peace!': Targeting civilians in Colombia's internal armed conflict* (Index: AMR 23/023/2008) <http://www.amnesty.org/en/library/info/AMR23/023/2008/en>, *Colombia: 'This is what we demand, justice!': Impunity for sexual violence against women in Colombia's armed conflict* (Index: AMR 23/018/2011) <http://www.amnesty.org/en/library/info/AMR23/018/2011/en>

¹² **“ARTÍCULO 207.** *Cualquier persona que demande la condición de víctima en los términos del artículo 3º de la presente ley, que utilice las vías de hecho para invadir, usar u ocupar un predio del que pretenda restitución o reubicación como medida reparadora, sin que su situación jurídica dentro del proceso de restitución de tierras despojadas y abandonadas forzosamente haya sido resuelta en los términos de los artículos 91, 92 y siguientes de la presente ley, o en las normas que las modifiquen, sustituyan o adiciones, perderán los beneficios establecidos e el Capítulo III del Título IV de esta ley. Lo anterior sin perjuicio de la aplicación de las demás normas vigentes que sancionen dicha conducta.”*

3. BARRIERS TO IDENTIFYING STOLEN LAND

TRANSACTION CONTRACTS

Law 1448 rewards victims who withdraw claims for reparation being pursued through the courts by granting them a higher indemnity than they would if they continued with court proceedings. Encouraging victims to withdraw lawsuits, albeit from civil courts, could help cover up evidence of responsibility for human rights abuses and so potentially hamper criminal investigations and help conceal stolen assets including lands.¹³

IMMUNITY FROM PROSECUTION

Although the Law provides for prison sentences for those who try to cover up land theft (Article 120), it also grants effective immunity from prosecution to strawmen (*testaferros*) – individuals who put their name to illegally secured lands on behalf of paramilitaries.¹⁴ It allows immunity to be granted in return for information on misappropriated lands or about those higher up the chain of command responsible for abuses, or that could prevent further crimes being committed.

If there were a real prospect of *testaferros* facing criminal prosecution, such provisions would be an incentive for them to volunteer information. However, under the Justice and Peace Law, the vast majority of paramilitaries are not subject to thorough investigation and few

¹³ **“ARTÍCULO 132. REGLAMENTACIÓN...**

La víctima podrá aceptar, de forma expresa y voluntaria, que la entrega y recepción de la indemnización administrativa se entienda realizada en el marco de un contrato de transacción en el cual la víctima acepta y manifiesta que el pago realizado incluye todas las sumas que éste debe reconocerle por concepto de su victimización, con el objeto de precaver futuros procesos judiciales o terminar un litigio pendiente. Lo anterior, sin perjuicio del reconocimiento de las demás medidas de reparación consagradas en la presente ley, de los derechos no patrimoniales de las víctimas, y en el entendido que ello no releva al victimario de su obligación de reparar a la víctima según sea establecido en el marco de un proceso judicial de cualquier naturaleza.

En el evento que la víctima acepte que la entrega y recepción de la indemnización administrativa se entienda realizada en el marco de un contrato de transacción, el monto de esta indemnización será superior al valor que le entregaría a la víctima por este mismo concepto, según el reglamento que para el efecto expida el gobierno nacional”.

¹⁴ Much of the stolen land has been signed over to third parties known as strawmen (*testaferros*), often close family members and friends of paramilitaries. Passing on the land in this way effectively shields former paramilitaries, and their backers in business and politics, from scrutiny over how the land was acquired. .

paramilitaries admit to misappropriating land. There is, therefore, little possibility that stolen land will be identified, especially as there is little likelihood that full and impartial investigations into the criminal responsibilities of *testaferros* will be undertaken. It is, therefore, doubtful that the authorities will be able to identify stolen lands or determine if they are in possession of such lands.¹⁵

¹⁵ **“ARTÍCULO 120 RÉGIMEN PENAL.** *El que obtenga la inscripción en el registro de tierras despojadas alterando o simulando deliberadamente las condiciones requeridas para su inscripción, u ocultando las que la hubiesen impedido, incurrirá en prisión de ocho (8) a doce (12) años. De la misma manera, el servidor público que teniendo conocimiento de la alteración o simulación fraudulenta, facilite, o efectúe la inscripción en el registro de tierras despojadas, incurrirá en la misma pena e inhabilitación para el ejercicio de derechos y funciones públicas de diez (10) a veinte (20) años.*

Las mismas penas se impondrán al que presente ante el Tribunal solicitud de restitución de tierras en desarrollo de las disposiciones de esta ley, sin tener la calidad de despojado, o a quien presente oposición a una solicitud de restitución, a través de medios fraudulentos o documentos falsos y a quien emplee en el proceso pruebas que no correspondan con la realidad.

Quienes acudan al proceso y confiesen la ilegalidad de los títulos o el despojo de las tierras o de los derechos reclamados en el proceso se harán beneficiarios al principio de oportunidad previsto en el código de procedimiento penal.”

4. LEGITIMIZING LAND THEFT

FACTORS LIMITING THE RESTITUTION OF LAND

Law 1448 will result in a significant proportion of the millions of hectares of stolen lands being returned to the rightful owners. However, there is a real danger that millions of hectares will remain in the hands of those who misappropriated land during the armed conflict and that the profits extracted from such land through agro-industrial and other economic projects will remain in the hands of those who acquired the land through illegal means. Indeed, the law could have the effect of legitimizing the theft of land by providing *de facto* or formal recognition of their ownership.

A statement by the Minister of Agriculture and Rural Development, Juan Camilo Restrepo in September 2011, highlighted the potential dangers. In an interview with the magazine *Semana*, he stated: “In the first place, it is not four but two million hectares that are estimated to have been stolen in the conflict and which the Victims and Land Restitution Law targets. This is the conclusion reached in the course of numerous calculations including those undertaken by the Commission Following Public Policy on Forced Displacement”.

Such statements appear to call into question the true scale of land theft and place a pre-set limit on the amount of land that could be returned, regardless of the rights of victims to reparation.

The Minister’s statement is also at odds with figures from other state and inter-governmental bodies. For example, in November 2005, the Office of the Comptroller General estimated that between 2000 and 2005 alone, 2.6 million hectares had been stolen after the members of 265,000 households had been forced to flee. According to the Vice-Comptroller-General, the World Bank estimated that 4 million hectares had been abandoned in total by 2005.¹⁶

The Third Public National Verification Survey of the Rights of the Forcibly Displaced Population, undertaken in 2010, estimated that more than 6.6 million hectares had been misappropriated or abandoned between 1980 and July 2010, excluding collectively held lands belonging to Afro-descendent and Indigenous communities. Of this figure, 9.4 per cent had been forcibly surrendered to third parties at the time the forced displacement occurred, or sold under duress (some 623,985.63 hectares of the total). By making clear that the Victims and Land Restitution Law only refers to 2 million hectares that it considers were subject to illegal appropriation, the government appears to be ignoring lands that were abandoned as a result of forced displacement and where those living on the land did not have

¹⁶ “*El Desplazamiento Forzoso de los Colombianos y sus Impactos Patrimoniales*”, *Intervención del Vicecontralor General de la República, Luis Bernardo Flórez Enciso, en el seminario internacional “Territorio, Patrimonio y Desplazamiento”, Bogotá, 24 de noviembre de 2005.*

official land titles. Much of this land is collectively claimed by Indigenous and Afro-descendent communities.

Unlike victims of enforced displacement who have land titles or can secure ownership rights because they have occupied the land for the period of time required by law to formalize their possession, those who do not fulfil these requirements may find that they are denied their right to have their lands restored to them. In effect, this could exclude tens of thousands of forcibly displaced peasant farmers and others from regaining their lands.¹⁷ Many thousands will also be excluded by the fact that, as noted earlier, victims who were forced from their lands as a result of human rights abuses and violations that occurred before 1 January 1991 are not eligible for land restitution under the Law.¹⁸

The Law commits the authorities to undertaking a gradual process of land restitution in locations which meet certain security conditions and where land misappropriation and illegal occupation through human rights abuses were particularly prevalent (Article 76). However, it is not clear how the government will determine whether or not an area meets its security criteria, nor when restitution in areas not deemed to be safe by the government would begin. In addition, the gradual nature of the restitution process is understood to involve a 10-year period.¹⁹ Those claiming land restitution often face lengthy and complex processes in pursuing their claim. There is, therefore, concern that this additional protracted timeframe may mean that peasant farmers may be forced to relinquish their claims, which in turn could make it easier for those who acquired lands illegally to legitimize their tenure.²⁰

¹⁷ **"ARTICULO 72.- ACCIONES DE RESTITUCIÓN DE LOS DESPOJADOS...** *En el caso de bienes baldíos se procederá con la adjudicación del derecho de propiedad del baldío a favor de la persona que venía ejerciendo su explotación económica si durante el despojo o abandono se cumplieron las condiciones para la adjudicación".*

¹⁸ **"ARTÍCULO 75.- TITULARES DEL DERECHO A LA RESTITUCIÓN.** *Las personas que fueran propietarias o poseedoras de predios, o explotadoras de baldíos cuya propiedad se pretenda adquirir por adjudicación, que hayan sido despojadas de éstas o que se hayan visto obligadas a abandonarlas como consecuencia directa e indirecta de los hechos que configuren las violaciones de que trata el artículo 3º de la presente Ley, entre el 1º de enero de 1991 y el término de vigencia de la Ley, pueden solicitar la restitución jurídica y material de las tierras despojadas o abandonadas forzosamente, en los términos establecidos en este capítulo."*

¹⁹ The Decree regulating the Victims and Land Restitution Law talks of a 10-year period during which the Decree would apply. Decreto Número 4800 de 2011, "Por el cual se reglamenta la Ley 1448 de 2011 y se dictan otras disposiciones". 20 December 2011.

²⁰ **"ARTÍCULO 76 - REGISTRO DE TIERRAS PRESUNTAMENTE DESPOJADAS Y ABANDONAS FORZOSAMENTE.** *Créase el "Registro de tierras despojadas y abandonas forzosamente" como instrumento para la restitución de tierras a que se refiere esta ley. En el Registro de Tierras Despojadas y Abandonadas Forzosamente se inscribirán también las personas que fueron despojadas de sus tierras u obligadas a abandonarlas y su relación jurídica con éstas, determinando con precisión los predios objeto de despojo, en forma preferente mediante georreferenciación, así como el período durante el cual se ejerció influencia armada en relación con el predio.*

The Law makes restitution claims dependent on claimants being able to provide information including exact land registration details. However, many forcibly displaced people do not have this information. This is a particular problem for women whose partners have either died or are missing and who do not have access to land titles. In some cases, displaced families lose their documentation when they fled their homes. In such situations the requirement for

El registro se implementará en forma gradual y progresiva, de conformidad con el reglamento, teniendo en cuenta la situación de seguridad, la densidad histórica del despojo y la existencia de condiciones para el retorno. La conformación y administración del registro estará a cargo de la Unidad Administrativa Especial de Gestión de Restitución de Tierras Despojadas que se crea por esta Ley”.

ARTÍCULO 143.- DE LA INSCRIPCIÓN EN EL REGISTRO DE TIERRAS DESPOJADAS Y ABANDONADAS FORZOSAMENTE. *Ante la Unidad Administrativa Especial de Gestión de Restitución de Tierras Despojadas, las personas interesadas diligenciarán el formato de solicitud de inscripción en el Registro de Tierras Despojadas y Abandonadas Forzosamente, que contendrá la información relacionada con la identificación del predio, de los solicitantes cuyos derechos o expectativas sobre estos fueron afectados por el despojo y/o abandono, el tiempo de vinculación con el predio y los aspectos conexos que interesan para el trámite respectivo. Radicada la solicitud de inscripción, cualquiera que sea su origen, la Unidad Administrativa Especial de Gestión de Restitución de Tierras Despojadas adelantará las siguientes actuaciones:*

- 1. Análisis Previo. La Unidad analizará la solicitud y adelantará las diligencias que sean necesarias para determinar si debe iniciarse formalmente el estudio para la inclusión o no de un predio en el registro mencionado, atendiendo los requisitos establecidos en la Ley 1448 de 2011. Si no existiere mérito suficiente y se concluye que no es procedente el estudio, la Unidad se abstendrá de continuar con el respectivo trámite.*
- 2. Iniciación formal del estudio. Una vez agotado el análisis anterior, y verificadas las condiciones de procedencia, la Unidad acometerá formalmente el estudio, contando con un término de 60 días prorrogables hasta por otros 30, para decidir de fondo sobre la inclusión en el Registro del predio y de las personas con derechos vinculados y vulnerados sobre aquellos. Iniciado formalmente el estudio, se comunicará a las personas que se hallen en el predio para que puedan intervenir en el trámite.*
- 3. Pruebas. La Unidad practicará las pruebas que sean pertinentes para identificar física y jurídicamente el predio, establecer el tiempo o las causas de despojo o abandono, las personas afectadas en sus derechos, y toda la información necesaria para tomar una decisión de fondo.*
- 4. Decisión de inscripción o no en el Registro. De conformidad con la información recaudada en las etapas anteriores, la Unidad Administrativa Especial de Gestión de Restitución de Tierras Despojadas procederá a decidir sobre la inclusión o no en el Registro de Tierras Despojadas y Abandonadas Forzosamente, de los predios sobre los que acometió el estudio, así como de las personas que pretenden derecho a reclamar sobre ellos.*

PARÁGRAFO. *Los temas no contemplados anteriormente, como las competencias, distribución territorial, colaboración interinstitucional, mecanismos administrativos y demás aspectos relacionados con la inclusión e ingreso al Registro de tierras despojadas o abandonadas, se desarrollarán en los decretos sobre implementación gradual y progresiva del Registro, y sobre su trámite ante la Unidad, así como en otros actos administrativos que para estos efectos debe expedir el gobierno nacional con el fin de facilitar el ejercicio de las reclamaciones en todo el territorio nacional, y desde el exterior cuando fuere el caso.”*

detailed information can result in legitimate claims for land restitution being denied.²¹

Law 1448 would seem to require people to travel to the regions in which the lands they are claiming are located to present their case to a local judge. However, given that those responsible for human rights abuses that led people to flee may still be in the area, this poses a significant threat to the security of people seeking to have their lands restored to them. Human rights organizations continue to argue, therefore, that displaced people should be able to submit their cases for land restitution to judges in the areas in which they are living, as guaranteed by a law passed in 1997 (Article 27 of Law 387).²²

LEGALIZING PROFITS FROM STOLEN LANDS

Illegal armed groups have frequently brought in civilians from the area and from further afield to work on agro-industrial projects on stolen lands. Many of these workers are forcibly displaced and the Law could result in the recognition of claims by these workers over the lands they currently work, possibly at the expense of others who were forcibly displaced from these areas. As forcibly displaced people, the workers have a right to restitution. However, in the absence of safeguards, this could lead to the legalization of agro-industrial and other economic projects on lands secured through human rights abuses. This could, therefore, have the effect of recognizing the *de facto* control over land by those behind the

²¹ **“ARTÍCULO 84. CONTENIDO DE LA SOLICITUD.** *La solicitud de restitución o formalización deberá contener:*

- a. La identificación del predio que deberá contener como mínimo los siguientes datos: la ubicación, el departamento, municipio, corregimiento o vereda, la identificación registral, número de la matrícula inmobiliaria e identificación catastral, número de la cédula catastral.*
- b. La constancia de inscripción del predio en el registro de tierras despojadas.*
- c. Los fundamentos de hecho y de derecho de la solicitud.*
- d. Nombre, edad identificación y domicilio del despojado y de su núcleo familiar, o del grupo de personas solicitantes, según el caso.*
- e. El certificado de tradición y libertad de matrícula inmobiliaria que identifique registralmente el predio.*
- f. La certificación del valor del avalúo catastral del predio.*

Parágrafo 1°. Se garantizará la gratuidad a favor de las víctimas, de los trámites de que trata el presente artículo, incluyendo la exención del arancel judicial a que se refiere la Ley 1394 de 2010.

Parágrafo 2°. En los casos en que no sea posible allegar con la solicitud los documentos contenidos a literales e) y f) del presente artículo, se podrán acreditar por cualquiera de los medios de prueba admisibles señalados en el Código de Procedimiento Civil su calidad de propietario, poseedor u ocupante de las tierras objeto de restitución”.

²² **“ARTÍCULO 81. COMPETENCIA TERRITORIAL** *Serán competentes de modo privativo los jueces y Magistrados del lugar donde se hallen ubicados los bienes, y si éstos se encuentran en varios municipios con distintas jurisdicciones, serán competentes el juez y los magistrados del municipio de la respectiva jurisdicción donde se presente la demanda.”*

misappropriation or illegal occupation.²³

The Law allows those in possession of stolen land to receive compensation for lands that they return as part of the restitution process, provided they have not acted in bad faith. While those holding lands bought in good faith should clearly not be forced to relinquish them without due process, this provision can effectively open the door for those responsible for misappropriation of lands to benefit. This is because *testaferros*²⁴ may not be identified as such and so exploit the provision to their advantage.²⁵

DE FACTO RECOGNITION OF THE SPOILS OF LAND THEFT

Although the Law provides that victims can have their ownership of land recognized, their right to “use” the land is limited. This means that if someone is in possession of lands and has developed it, for example for agro-industrial production, they will only be required to pay a rent to the rightful owner, unless it can be proved that they stole the land in the first place. As the vast majority of demobilized paramilitaries are not under investigation for human rights violations it is extremely unlikely that many people who were acting in collusion with them or on their behalf will be exposed, so proving that occupiers acted illegally is both difficult and rare. However, a positive aspect of the Law is that it imposes a rigorous standard on individuals claiming land, namely that they are occupying land in “good faith without culpability”. Under this standard the holder of the land must show that by action or omission he or she was not involved in the theft of the land. Nevertheless, in the absence of a framework guaranteeing full and impartial investigations, it is unclear how it will be established that an individual did not occupy land in good faith.²⁶

²³ **“ARTÍCULO 78. INVERSIÓN DE LA CARGA DE LA PRUEBA.** *Bastará con la prueba sumaria de la propiedad, posesión u ocupación y el reconocimiento como desplazado en el proceso judicial, o en su defecto, la prueba sumaria del despojo, para trasladar la carga de la prueba al demandado o a quienes se opongan a la pretensión de la víctima en el curso del proceso de restitución, salvo que éstos también hayan sido reconocidos como desplazados o despojados del mismo predio.”*

²⁴ See footnote 14.

²⁵ **Artículo 91. CONTENIDO DEL FALLO.** *La sentencia se pronunciará de manera definitiva sobre la propiedad, posesión del bien u ocupación del baldío objeto de la demanda y decretará las compensaciones a que hubiera lugar, a favor de los opositores que probaron buena fe exenta de culpa dentro del proceso. Por lo tanto, la sentencia constituye título de propiedad suficiente.*

La sentencia deberá referirse a los siguientes aspectos, de manera explícita y suficientemente motivada, según el caso:

j. Las órdenes pertinentes para que se haga efectivo cumplimiento de las compensaciones de que trata la ley, y aquellas tendientes a garantizar los derechos de todas las partes en relación con las mejoras sobre los bienes objeto de restitución;....

r. Las órdenes necesarias para garantizar que las partes de buena fe exenta de culpa vencidas en el proceso sean compensadas cuando fuera del caso, en los términos establecidos por la presente ley.”

²⁶ **“ARTÍCULO 99. CONTRATOS PARA EL USO DEL PREDIO RESTITUIDO.** *Cuando existan proyectos*

5. INADEQUATE SUPPORT FOR VICTIMS

RESTRICTION OF RESOURCES AVAILABLE FOR REPARATION

Law 1448 refers to “fiscal sustainability” as a principle which should be borne in mind in making decisions on amounts of reparation. This could severely restrict the resources available to ensure that victims receive full reparation for the damages they have suffered, especially as the Law may oblige state institutions to provide reparations without additional state resources being made available to make this possible.²⁷

agroindustriales productivos en el predio objeto de restitución y con el propósito de desarrollar en forma completa el proyecto, el Magistrado que conozca del proceso podrá autorizar, mediante el trámite incidental, la celebración de contratos entre los beneficiarios de la restitución, y el opositor que estuviera desarrollando el proyecto productivo, sobre la base del reconocimiento del derecho de dominio del restituído o restituídos, y que el opositor haya probado su buena fe exenta de culpa en el proceso.

Cuando no se pruebe la buena fe exenta de culpa, el Magistrado entregará el proyecto productivo a la Unidad Administrativa Especial de Gestión de Restitución de Tierras Despojadas para lo explote a través de terceros y se destine el producido del proyecto a programas de reparación colectiva para víctimas en las vecindades del predio, incluyendo al beneficiario de la restitución.

El Magistrado velará por la protección de los derechos de las partes y que éstos obtengan una retribución económica adecuada.”

27 “ARTÍCULO 9°. CARÁCTER DE LAS MEDIDAS TRANSICIONALES

En el marco de la justicia transicional las autoridades judiciales y administrativas competentes deberán ajustar sus actuaciones al objetivo primordial de conseguir una reconciliación duradera y estable. Para estos efectos se deberá tener en cuenta la sostenibilidad fiscal, la magnitud de las consecuencias de las violaciones de los Derechos Humanos o infracciones al Derecho Internacional Humanitario y la naturaleza de las mismas.”

“ARTÍCULO 19. SOSTENIBILIDAD. *Para efectos de cumplir con las medidas de ayuda humanitaria, atención, asistencia y reparación dispuestas en el presente marco, el Gobierno Nacional dentro de los seis (6) meses siguientes a la expedición de la presente Ley, creará un Plan Nacional de Financiación mediante un documento CONPES que propenda por la sostenibilidad de la ley, y tomará las medidas necesarias para garantizar de manera preferente la persecución efectiva de los bienes de los victimarios con el fin de fortalecer el Fondo de Reparaciones del que trata el artículo 54 de la Ley 975 de 2005.*

El desarrollo de las medidas a que se refiere la presente ley, deberá hacerse en tal forma que asegure la

The fact that the authorities are obliged to work within restricted budgets could result in the purchase and return of only a portion of the land claimed by the victim in some cases.²⁸

DENIAL OF LAND RESTITUTION BY DEFAULT

The Law does not provide a full compensation package to victims receiving land restitution. Instead, it provides credits and some assistance in paying tax arrears on the returned properties.²⁹

The fact that the returning peasant farmer has to take on board a part of the debts incurred as a result of unpaid taxes is contrary to the right to reparation in cases of human rights abuses and means that many returning peasant farmers could face financial ruin. At the time of writing, it was not clear if a recent Constitutional Court ruling could protect returning

sostenibilidad fiscal con el fin de darles, en conjunto, continuidad y progresividad, a efectos de garantizar su viabilidad y efectivo cumplimiento.”

“ARTÍCULO 197. FINANCIACIÓN DE MEDIDAS DE ATENCIÓN Y REPARACIÓN INTEGRAL A LAS VÍCTIMAS DE VIOLACIONES A LOS DERECHOS HUMANOS E INFRACCIONES AL DERECHO INTERNACIONAL HUMANITARIO, CON OCASIÓN DEL CONFLICTO ARMADO INTERNO. Las medidas que impliquen un aumento de las funciones de las instituciones del Estado, deben ser asumidas con el espacio presupuestal establecido para cada una en el Marco Fiscal de Mediano Plazo. De igual forma los programas o proyectos estructurados en desarrollo de esta ley deben priorizarse por las entidades dentro de su oferta institucional y su espacio fiscal, sin perjuicio de las demás funciones constitucionales y legales que les han sido asignadas a los demás organismos y entidades estatales, que también tienen carácter prioritario.”

²⁸ **Artículo 91.** See footnote 24.

²⁹“ **ARTÍCULO 129. TASA DE REDESCUENTO.** Finagro y Bancoldex, o las entidades que hagan sus veces, establecerán líneas de redescuento en condiciones preferenciales dirigidas a financiar los créditos que otorguen los establecimientos de crédito a las víctimas de que trata la presente ley, para financiar actividades tendientes a la recuperación de su capacidad productiva. Para el efecto, se tendrá en cuenta lo previsto en la Ley 418 de 1997, prorrogada, modificada y adicionada por las leyes 548 de 1999, 782 de 2002, 1106 de 2006 y 1421 de 2010.

Parágrafo. Las entidades de redescuento de que trata este artículo, deberán asegurar que los establecimientos de crédito redescotantes realicen una transferencia proporcional de los beneficios en la tasa de redescuento a los beneficiarios finales de dichos créditos.

ARTÍCULO 105. FUNCIONES DE LA UNIDAD ADMINISTRATIVA ESPECIAL DE GESTIÓN DE RESTITUCIÓN DE TIERRAS DESPOJADAS. Serán funciones de la Unidad Administrativa Especial de Gestión de Restitución de Tierras Despojadas las siguientes:...

9. Crear y Administrar programas de subsidios a favor de los restituidos o de quienes se les formalicen los predios de conformidad con este capítulo, para la cancelación de los impuestos territoriales y nacionales relacionados directamente con los predios restituidos y el alivio de créditos asociados al predio restituido o formalizado.”

peasant farmers from such unpaid tax obligations.³⁰ Provisions in Law 1448 do at least prevent peasant farmers from being pressured to sell their land for a two-year period after the land is returned, but they allow financial institutions to secure possession of the land as payment for debts. Effectively, this may mean that land restitution could be rendered meaningless in many cases.³¹

The Law does not appear to provide full support to peasant farmers wishing to return to their lands and engage in subsistence agriculture. Rather, the emphasis appears to be on encouraging peasant farmers to participate in agro-industrial, infrastructure, tourist or mining projects. In effect, Article 99 could see the continuation of some agro-industrial projects which were either the reason for the forced displacement in the first place, or were initiated in the wake of land theft resulting from human rights abuses. These concerns are reinforced by the fact that Law 1448 will be followed by a General Land and Rural Development Law (Ley General de Tierras y de Desarrollo Rural), which, according to the Minister of Agriculture and Rural Development's advisor,³² will seek to encourage peasant farmers to join agro-industrial projects through alliances and associations with large industrial concerns.

There is, therefore, a danger that the Law could help legitimize a process which has often involved the use of human rights violations to force through changes in Colombia's rural economy.³³

³⁰ *Constitutional Court ruling of 20 September 2011, Sentencia T-697/11, Referencia: expediente T-2948870, Acción de tutela instaurada por Eder José Torres, Sofanor Torres, Rodrigo Peñate, Enilsa Cárdenas, Agustín Ricardo, Álvaro Peñate, Julia Torres, Rafael Solar, Carmen Geney, Manuel Joaquín Castro, Estalishao Gómez Contreras, Jorge Antonio Torres Ricardo contra el Juzgado Segundo Civil del Circuito de Sincelejo, Caja Agraria- en liquidación y el Instituto Colombiano de Desarrollo Rural- INCODER.*

³¹ "**Artículo 101. PROTECCIÓN DE LA RESTITUCIÓN.** Para proteger al restituido en su derecho y garantizar el interés social de la actuación estatal, el derecho a obtener la restitución no será transferible por acto entre vivos a ningún título durante los siguientes dos años contados a partir de la entrega del predio, salvo que se trate de un acto entre el despojado y el Estado.

Asimismo, una vez obtenida la restitución, cualquier negociación entre vivos de las tierras restituidas al despojado dentro de los dos (2) años siguientes a la fecha de ejecutoria de la decisión de restitución, o de entrega, si ésta fuera posterior, será ineficaz de pleno derecho, sin necesidad de declaración judicial, a menos que se obtenga la autorización previa, expresa y motivada del Juez o Tribunal que ordenó la restitución.

Parágrafo. La autorización de que trata el segundo inciso de este artículo no será necesaria cuando se trate de respaldar créditos a nombre del restituido otorgados por entidades vigiladas por la Superintendencia Financiera."

³² *Gonzalo Araújo Muñoz, Política Integral de Tierras. El Desafío de la Formalización y Restitución a Despojados. Una apuesta social y de desarrollo rural, Corporación Pensamiento Siglo XXI, Konrad Adenauer Stiftung, May 2011.*

³³ "**ARTÍCULO 206. DESARROLLO RURAL.** El Gobierno Nacional, a través del Ministerio de Agricultura y Desarrollo Rural, deberá presentar en un término de seis (6) meses a partir de la expedición de la

presente Ley, la iniciativa que regule el desarrollo rural del país, donde se prioricen las víctimas de despojo y abandono forzado, en el acceso a créditos, asistencia técnica, adecuación predial, programas de comercialización de productos, entre otros, que contribuyan a la reparación de las víctimas.”

6. TARGETTING COMMUNITIES AND CAMPAIGNERS

AFRO-DESCENDENT AND INDIGENOUS COMMUNITIES

On 13 May 2011, Colombia's Constitutional Court issued a ruling on Law 1382 of 2010 modifying Colombia's mining law. The Court ruled that Indigenous and Afro-descendent communities had a right to free, prior and informed consultation with regards to legislation that could impact on their rights.

Law 1448 does not explicitly cover reparation for Afro-descendent and Indigenous communities. Instead, the government has issued two decrees which will regulate reparation for these communities. According to press reports, Afro-descendent and Indigenous organizations have been very critical of these decrees on the grounds that they do not respect the right to free, prior and informed consultation of affected communities. Despite these concerns, President Santos signed the decrees.

PEOPLE CAMPAIGNING FOR LAND RESTITUTION

The Law provides for the protection of vulnerable sectors of society, including those campaigning for land restitution. In recent years Amnesty International has documented and received information on continuing threats against and killings of those campaigning for land restitution and representing displaced communities. Reference to measures to secure protection for these people is positive, but it remains to be seen if these measures will be sufficient and implemented effectively. The approval of the Law has not improved the security situation of those campaigning for land restitution. Amnesty International continues to document such cases and to campaign for decisive action by the government to guarantee the safety of these activists.³⁴

³⁴ **"ARTÍCULO 31. MEDIDAS ESPECIALES DE PROTECCIÓN.** *Las autoridades competentes deberán adoptar medidas de protección integral a las víctimas, testigos y a los funcionarios públicos que intervengan en los procedimientos administrativos y judiciales de reparación y en especial de restitución de tierras, a través de los cuales las víctimas reclaman sus derechos, cuando ello sea necesario según el nivel de riesgo evaluado para cada caso particular, y en la medida en que exista amenaza contra sus derechos fundamentales a la vida, la integridad física, la libertad y la seguridad personal, atendiendo a la jurisprudencia y normatividad existente sobre la materia.*"

7. RECOMMENDATIONS

The Colombian government should:

- Meet with non-governmental human rights and victims' organizations in Colombia to review any concerns they may have regarding the Victims and Land Restitution Law and its implementation. This would include Afro-descendent and Indigenous community representatives. Although the Law does not include Indigenous or Afro-descendent communities in its remit, its provisions may impact on these communities.
- Fully respect the right of Afro-descendant and Indigenous communities to free, prior and informed consultation over the process of implementing Victims and Land Restitution Law and the decrees regulating reparation for Indigenous and Afro-descendent communities.³⁵
- Fully address concerns outlined in this document that could block the restitution of lands misappropriated through human rights abuses and violations, including provisions of the Victims and Land Restitution Law that may result in legalizing ownership of land in favour of those who misappropriated it through human rights abuses or human rights violations or allowing those responsible to benefit from crops and other products produced on stolen land.
- Take decisive action to guarantee the safety of those campaigning for land restitution and the rights of forcibly displaced people.

The international community should:

- Call on the Colombian government to take the actions outlined above and provide the government with any assistance it may require to do so.
- Guarantee that it is not providing funds to economic projects on lands stolen through human rights abuses and violations that allow the perpetrators of these crimes to benefit from them.
- Ensure that companies based abroad investing in Colombia do not benefit from land stolen through war crimes and crimes against humanity.

³⁵ On 13 May 2011, Colombia's Constitutional Court issued ruling C-366 on Law 1382 of 2010 modifying Colombia's mining law. The Court ruled that Indigenous and Afro-descendent communities had a right to free, prior and informed consultation with regards to legislation that could impact on their rights.

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