

Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?

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INTRODUCTION

In June 2011, Colombia passed the most ambitious reparations law in its history, formally recognizing the consequences of the ongoing internal conflict. This law marks a significant re-thinking of transitional justice – the processes by which countries strive to achieve truth, justice, and reconciliation after periods of prolonged conflict and marginalization.¹ Transitional justice processes traditionally begin after a profound political shift has already taken place.² For example, in South Africa, the process started when apartheid ended and the African National Congress came to power.³ In East Timor, it began with independence.⁴ In contrast, in Colombia, the conflict and its effects are still ongoing, presenting a new model of implementation.⁵

Over the past forty years in Colombia, guerrillas, paramilitaries, and state security forces have been fighting for economic and political control over resource-rich areas of the country and land critical to drug trafficking rings.⁶ Though the conflict is longstanding, in the past two decades violence and displacements have increased significantly.⁷ In the last fifteen to twenty-five years alone, 1.8 million hectares of land have been abandoned

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1. See, e.g., Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 768 (2004); Zinaida Miller, *Effects of Invisibility: In Search of the Economic in Transitional Justice*, 2 INT'L J. TRANSITIONAL JUSTICE 266, 266 (2008); Aeyal M. Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT'L L. 47, 48–49 (2004).

2. See, e.g., Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (2003).

3. See Gross, *supra* note 1, at 55–56.

4. Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 24 (2006).

5. See Ana María Ibáñez & Juan Carlos Muñoz, *The Persistence of Land Concentration in Colombia: What Happened Between 2000 and 2010?* in DISTRIBUTIVE JUSTICE IN TRANSITIONS 279, 295 (Morten Bergsmo et al. eds., 2010).

6. See Inter-American Commission on Human Rights, *Report on the Demobilization Process in Colombia*, OEA/Ser.L/V/II.120 Doc. 60 §§ 34–44 (Dec. 13, 2004).

7. See CÉSAR RODRÍGUEZ GARAVITO & DIANA RODRÍGUEZ FRANCO, CORTES Y CAMBIO SOCIAL: CÓMO LA CORTE CONSTITUCIONAL TRANSFORMÓ EL DESPLAZAMIENTO FORZADO EN COLOMBIA 69–71, 78 (2010).

or seized⁸ and an estimated 5.2 million people have been displaced,⁹ making Colombia the country with the second most internally displaced persons (“IDPs”) in the world, behind only Sudan.¹⁰ The so-called Victims’ Law (“Ley de Víctimas”) is the government’s first serious attempt to address the conflict and its effects through legal mechanisms. It provides a series of rights for victims—rights to reparation, truth, and justice—and also establishes accountability for the various perpetrators involved.¹¹ Most significantly, the Victim’s Law declares a right of restitution for those who have been dispossessed of their land or who have been forced to abandon it.¹²

This Recent Development aims to explore the Victims’ Law as an innovative beginning to a process of transitional justice within a context where no significant political or social change has occurred.¹³ Colombia finds itself in a unique position in trying to reverse the damages caused by a conflict that has not only not ended, but is in fact intensifying and increasing in complexity. While the context poses distinctive obstacles to a successful reparations process in Colombia, the Victims’ Law also has limitations. This Recent Development will discuss the law and highlight several of its groundbreaking features. It will also identify some of the challenges its implementation will likely entail.

I. HISTORY OF THE COLOMBIAN CONFLICT AND DISPLACEMENT

The Colombian conflict is one of the longest ongoing conflicts in the world, on par with those between Israel and Palestine and between India and Pakistan.¹⁴ The involvement of a variety of actors complicates any neat categorization of it. While the political leanings of the various groups have grown less relevant as the fighting has increasingly focused on control over

8. Ibáñez & Muñoz, *supra* note 5, at 292.

9. *Colombia, Current IDP Figures*, INTERNAL DISPLACEMENT MONITORING CTR., (Sept. 5, 2011), <http://www.internal-displacement.org/idmc/website/countries.nsf/%28httpEnvelopes%29/A7E1B7BD7528B329C12575E500525165?OpenDocument#expand>.

10. *Global Statistics*, INTERNAL DISPLACEMENT MONITORING CTR., <http://www.internal-displacement.org/8025708F004CE90B/%28httpPages%29/22FB1D4E2B196DAA802570BB005E787C?OpenDocument> (last visited Jan. 11, 2012).

11. Ley [L.] 1448 DIARIO OFICIAL [D.O.] art. 1, 16 (Colom.).

12. *Id.* arts. 71–72.

13. The Victims’ Law declares that it is founded on a principle of transitional justice. It defines transitional justice as “the various processes and judicial and extra-judicial mechanisms associated with the aims of society to guarantee that those responsible for the violations contemplated in Article 3 [violations of human rights and international humanitarian law] are held responsible for their acts; that rights to truth, justice, and integral reparations are satisfied, that institutional reforms are made to guarantee the no-repetition for victims, and the dissolution of illegal armed structures, with the ultimate goal of national reconciliation and lasting and sustainable peace.” *Id.* art. 8 (author’s translation).

14. Diana Esther Guzmán et al., *Colombia, in LAS VÍCTIMAS Y LA JUSTICIA TRANSICIONAL: ESTÁN CUMPLIENDO LOS ESTADOS LATINO AMERICANOS CON LOS ESTÁNDARES INTERNACIONALES?* 95, 99 (Fundación para el Debido Proceso Legal ed., 2010). The Colombian conflict has persisted for over 40 years. See Inter-American Commission on Human Rights, *supra* note 6.

and access to resources, the actors involved represent a wide range of political commitments. Guerrilla forces traditionally associated with the left, a number of paramilitary groups generally aligned with the protection of elite landowning interests, and state security forces are all major participants.¹⁵ Each group is competing for political, economic, and military control over resource-rich and drug-producing areas of the country, where the State's grasp on power is profoundly weak.¹⁶ That competition has produced massive displacements, disappearances, and kidnappings.¹⁷

While the conflict is by no means a new development, its scope and effects have intensified significantly in recent years.¹⁸ Though groups have always fought for control over the drug trade, they have more recently become involved in the control of legal business interests as well.¹⁹ There is mounting evidence that palm oil companies, mining corporations, fruit producers, and others have relied on paramilitary groups to help expand and secure their operations in the country.²⁰ During the past decade, Colombia has also aimed to enhance its position as a natural resource exporter, leading to increased extractive industry exploitation.²¹ As business interests have strengthened in mineral- and metal-rich regions, armed groups have become involved in the control of these areas as well.²² Furthermore, the government decentralization process implemented by the new Constitution of 1991 allowed armed groups to capture local institutions, which further weakened the State and added incentive for conflict.²³

These factors have combined to produce heightened violent conflict and massive systematic displacement.²⁴ According to the Inter-American Court of Human Rights, the violence has affected the country's most vulnerable populations: indigenous communities, groups of African descent, and the

15. See Guzmán et al., *supra* note 14, at 97, 99–100. See also Inter-American Commission on Human Rights, *supra* note 6.

16. See Yamile Salinas Abdala, *Colombian Legislation and the Seizure of Lands and Territories*, in *DISTRIBUTIVE JUSTICE IN TRANSITIONS*, *supra* note 5, at 311; Ibáñez & Muñoz, *supra* note 5, at 295.

17. The Colombian Constitutional Court has declared that forced displacement is a systematic and massive practice, for which groups interested in controlling territories for military, political or economic reasons, some armed and illegal, are responsible. See Abdala, *supra* note 16, at 311.

18. See Ibáñez & Muñoz, *supra* note 5, at 295.

19. See Inter-American Commission on Human Rights, *supra* note 6, §§ 34–44; Vilma Liliana Franco R. & Juan Diego Restrepo E., *Empresarios Palmeros, Poderes de Facto y Despojo de Tierras en el Bajo Atrato*, in *LA ECONOMÍA DE LOS PARAMILITARES* 269, 269–70 (Mauricio Romero Vidal ed., 2011).

20. The expansion of palm oil company operations is a primary example. When farmers began to abandon their land due to increased violence, palm oil companies, financed largely by the State, set up operations. Soon after, they sought to expand operations throughout the region. Paramilitaries, many of whom had direct interests in the companies, took charge of “clearing” the land by removing existing landowners. See Franco R. & Restrepo E., *supra* note 19, at 280.

21. See Ibáñez & Muñoz, *supra* note 5, at 306–07.

22. See Knut Andreas O. Lid, *Land Restitution in Transitional Justice: Challenges and Experiences – The Case of Colombia*, in *DISTRIBUTIVE JUSTICE IN TRANSITIONS*, *supra* note 5, at 188.

23. *Id.* at 189; see also MAURICIO GARCÍA VILLEGAS & JAVIER EDUARDO REVELO REBOLLEDO, *ESTADO ALTERADO: CLIENTELISMO, MAFIAS Y DEBILIDAD INSTITUCIONAL EN COLOMBIA* 71–76 (2010).

24. See Salinas Abdala, *supra* note 16, at 311.

poorest peasant population.²⁵ It is estimated that in the last twenty years alone 70,000 people have lost their lives to the conflict,²⁶ between 15,000 and 50,000 people have disappeared,²⁷ and since 1963, over 25,000 people have been kidnapped.²⁸ Displacement has been widespread—by 2008, an estimated 4.6 million people, or 10% of the population, had been dispossessed of or forced to abandon their land.²⁹ Put another way, in the past thirty years, an estimated 6.6 million hectares (13.3 million acres), or 12.6% of Colombia's agricultural land, has wrongfully changed hands.³⁰

The displacement is largely concentrated in ten of the country's thirty-two departments, where activities such as mining and agro-industries are widespread.³¹ Though direct attacks by armed groups are cited as the primary reason for displacement, paramilitaries have also used a variety of quasi-legal strategies to remove people from their land. According to a 2008 survey of eight hundred displaced persons conducted by the Ministry of Agriculture, paramilitaries commonly use one of five tactics to seize land: 1) exerting undue pressure on peasants to sell their land at extremely low prices and/or paying with void checks; 2) making death threats, thereby giving owners the choice of selling or being killed; 3) forcing owners without property titles to sign a document ceding their rights to the land; 4) irregularly possessing the land, forcing the owners to move out in order for others to move in, and 5) forging signatures so that the land is "sold" without the owner's consent.³² The majority of those who have been displaced are from rural areas where protection of property rights is weak.³³ Of the households that have been displaced, it is estimated that only about 31% had formal property titles.³⁴

This irregularly obtained land is utilized in a number of ways. In some cases, it is given to peasant supporters of the dominant armed group in the region.³⁵ In others, it remains in the hands of paramilitary leaders and/or is used for drug trafficking.³⁶ An increasingly common practice is that the land is bought by multinational agribusinesses and converted to commercial crop production such as bio-combustibles.³⁷ The macro-result is a deep concentration of land ownership: Colombia now has the most unequal land

25. See Guzmán et al., *supra* note 14, at 103.

26. *Id.*

27. *Id.*

28. *Id.*

29. See Lid, *supra* note 22, at 190.

30. Adam Isacson, *Sunday's Local Elections in Colombia*, THE WASHINGTON OFFICE ON LATIN AMERICA (Oct. 27, 2011), http://www.wola.org/commentary/sundays_local_elections_in_colombia.

31. See Lid, *supra* note 22, at 191.

32. *Id.* at 192.

33. See Ibáñez & Muñoz, *supra* note 5, at 279, 292.

34. *Id.* at 292.

35. *Id.*

36. See Lid, *supra* note 22, at 188.

37. *Id.*

tenure system in Latin America, with 1.15% of landowners owning 52.2% of all cultivable land.³⁸

The consequences for displaced people have been profound. Unlike in other countries that have experienced massive displacement, such as Rwanda and Sudan, those affected have not migrated in groups to the border or settled in camps.³⁹ Instead, they have moved largely on an individual basis into the cities, settling in slums and struggling to find work in urban employment sectors—a major challenge given that most migrants were previously subsistence farmers.⁴⁰ It is within this present context that Colombia has embarked on a reparations process, seeking to permanently restore land and provide justice and truth to an estimated three to more than five million victims amidst a worsening and increasingly complex conflict.⁴¹

II. PRIOR LEGISLATION AND JUDICIAL DECISIONS TO ADDRESS THE CONFLICT AND DISPLACEMENTS

While the Victims' Law marks a serious turning point in Colombia's legislative history, it is not the first time the Congress has addressed issues related to the conflict and displacement. For years prior to the recent passage of the Victims' Law, legislation vacillated between acknowledging displaced victims' rights and facilitating processes of victimization, at most granting weak protections to the injured.⁴² For example, in 1997, the Congress passed Law 387, declaring the State's responsibility to care for displaced persons.⁴³ However, the law did not establish a principle of victims' rights to be free from displacement, nor did it create a State responsibility to impose protective mechanisms.⁴⁴ In the late 1990s and early 2000s, the Congress passed a series of laws that legalized expropriation without man-

38. See Isacson, *supra* note 30 (citing United Nations Development Program report)

39. GARAVITO & FRANCO, *supra* note 7, at 70.

40. See Ibáñez & Muñoz, *supra* note 5, at 293.

41. See *Global Statistics*, *supra* note 10.

42. For a more complete history of land and victims' rights legislation this time period, see Salinas Abdala, *supra* note 16, at 315–20. Law 387 of 1997 established the principle of caring for internally displaced people, but did not provide reparations. Law 812 (2003) and Law 1151 (2007) created new subsidies for the purchasing of land, which has been noted to have increased displacement. Law 791 (2002) shortened the term of prescription for bringing restitution land claims, and then Law 1182 (2008) established a special process for legally acquiring properties smaller than ten hectares, allowing property rights to transfer without the transferring of title. It has been noted that Law 1182 has facilitated the legalization of property acquisition made through force and fraud. In 1996 and 2002, the Congress passed two sets of expropriation laws, Law 336 (1996) and Laws 765 and 793 (2002), which allowed expropriation without any forms of restitution. Finally, in 2004, the Constitutional Court issued the decision T-025, for the first time explicitly granting rights to displaced victims. *Id.*

43. See Salinas Abdala, *supra* note 16, at 318.

44. *Id.*

dating compensation, thereby enabling some of the paramilitary dispossession practices.⁴⁵

The tide turned in the mid-2000s, when the Colombian Congress and Constitutional Court began to support legislation that reflected a more serious commitment to conflict reduction and protection of victims' rights.⁴⁶ The most significant among them, the 2005 Law of Peace and Justice, aimed to move forward the processes of armed group demobilization and awarding of victims' reparations.⁴⁷ The law declared perpetrators responsible for providing reparations and offered reduced penalties in exchange for their assumption of these and other obligations.⁴⁸ In order to receive reparations, victims first had to come forward and report the crime, and then go through a legal proceeding to establish the legal culpability of that particular crime's perpetrator.⁴⁹ Once these steps were completed, the victim could subsequently seek damages and restitution from the guilty party.⁵⁰

Nonetheless, effective implementation of the Law of Peace and Justice faced a number of problems. Most victims did not fulfill the requirement of formally reporting the crimes committed against them because of logistical barriers and fear of paramilitary retaliation. This severely limited the number of beneficiaries,⁵¹ and relatively few victims came forward—by 2008, only 235,000 individuals had reported crimes to claim reparations.⁵² Additionally, the legal processes proved excessively time-consuming and complex, and the institutional mechanisms weak.⁵³ By 2008, only 24 victims had received damage payments.⁵⁴ While demobilization of paramilitary groups achieved partial success, several new paramilitary structures emerged in their place. It is estimated that about 10,000 men have joined the new groups, 5,000 of whom are demobilized members of the former organizations.⁵⁵ Needless to say, the conflict and its effects did not dissipate.⁵⁶

Pressure to reform the law mounted from domestic and international human rights groups, as well as from the Colombian Constitutional Court. Local civil society criticized the systematic violation of human rights. In particular, NGOs criticized the lack of a comprehensive reparations process, the privileging of amnesty over victims' rights, and the failure to effectively

45. *Id.* at 320. See L. 336/96, diciembre 20, 1996, DIARIO OFICIAL [D.O.]; L. 765/02, julio 31, 2002, D.O.; L. 793/02, diciembre 27, 2002, D.O.

46. See, e.g., Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-024/04 (Constitutional Court granted victim status to displaced population); see also L. 975 D.O. (legislation aimed at demobilization and victims' reparation).

47. L. 975 D.O. art. 1.

48. *Id.* arts. 29, 42, 44, 70; see also Lid, *supra* note 22, at 193, 200–01.

49. L. 975 D.O. art. 42; see Lid, *supra* note 22, at 195, 200–01.

50. *Id.*

51. See Lid, *supra* note 22, at 200.

52. *Id.* at 200–01.

53. See Guzmán et al., *supra* note 14, at 109.

54. *Id.* at 111.

55. See Lid, *supra* note 22, at 202.

56. See Guzmán et al., *supra* note 14, at 101.

implement pro-human rights legislation fueled NGO critiques.⁵⁷ International scrutiny further bolstered their claims. The UN High Commission for Refugees condemned the government's inertia regarding the displacement problem, and the agency pushed for the adoption of a national land restitution program.⁵⁸ The Constitutional Court also became a persistent critic. In 2004, the Court declared the current situation of IDPs an unconstitutional state of affairs and ordered the government to adopt a land restitution program.⁵⁹ In 2009, the Court issued a second demand that the government implement a comprehensive land reform policy, emphasizing that the unconstitutional state of affairs persisted.⁶⁰ The Court reiterated its point again in 2010, criticizing local and national governmental bodies for taking inadequate action to respond to displacement. It issued an additional mandate that the government more closely oversee local governmental processes for protection and restitution.⁶¹

III. THE 2011 VICTIMS' LAW

The Victims' Law ("the Law") was approved and signed by President Juan Manuel Santos Calderón on June 10, 2011 amidst mounting pressure from domestic and international human rights groups as well as from the Colombian Constitutional Court. Announcing the beginning of a process of transitional justice, the Victims' Law aims to facilitate truth, justice, and integral reparations for victims, with a "guarantee of no repetition."⁶² The Law deals both broadly with the rights of all victims, including those who have been disappeared, murdered, or have suffered other serious violations of human rights, as well as specifically with the rights of those who have been displaced. All victims are granted rights to damages,⁶³ restitution of prior living conditions,⁶⁴ a range of social services,⁶⁵ and special protections in legal proceedings.⁶⁶ Those who have been displaced are entitled to the return of their land or, in certain circumstances, to an equivalent plot of

57. See, e.g., Nelson Camilo Sánchez & Rodrigo Uprimny Yepes, *Propuestas Para Una Restitución de Tierras Transformadora*, in TAREAS PENDIENTES: PROPUESTAS PARA LA FORMULACIÓN DE POLÍTICAS PÚBLICAS DE REPARACIÓN EN COLOMBIA (Int'l Ctr. for Transitional Justice, ed., 2010).

58. Concluding observations of the U.N. Human Rights Comm., Colombia, ¶¶ 10, 23, U.N. Doc. CCPR/C/COL/CO/6 (Aug. 4, 2010); see also U.N. Hum. Rts. Council, *Report of the Representative of the Secretary-General on the human rights of internally displaced persons*, ¶¶ 71–86, U.N. Doc. A/HRC/4/38/Add.3 (Jan. 24, 2007); Guzmán et al., *supra* note 14, at 101 (describing how the development of new international norms, public opinion pressure, mobilization of civil society, and actions by judges and the international community have encouraged a process of transitional justice).

59. See C.C. Sentencia T-025, enero 22, 2004, ¶ 2.2.

60. See C.C. Auto 008, enero 26, 2009, Resuelve Segundo.

61. See C.C. T-025 de 2004, Auto 383, diciembre 10, 2010, part V, §§ 6(3); 9(1)–9(6), Resuelve.

62. L. 1448 D.O. arts. 1, 8.

63. *Id.* arts. 132–33.

64. *Id.* art. 28(9).

65. *Id.* arts. 28(4), 49, 51–54.

66. *Id.* art. 31.

land or monetary compensation.⁶⁷ The Law also includes symbolic reparations measures,⁶⁸ such as the creation of a national day of memory⁶⁹ and the collection of oral testimonies to preserve historical memory.⁷⁰

The Victims' Law provides sweeping rights and protections that depart sharply from legislative precedent in a number of ways. First, it defines "victim" broadly and detaches the process of earning legal "victimhood" status from that of determining perpetrator responsibility.⁷¹ Second, it establishes a clear, more highly context-specific, and more extensive right to land restitution than that which existed previously.⁷² Third, it shifts legal presumptions and the burden of proof regarding land ownership distinctly in favor of victims.⁷³ Fourth, it establishes a robust institutional structure to manage, administer, and adjudicate claims to restitution of land.⁷⁴ Fifth, it adopts a series of measures to hold businesses accountable for directly contributing to and/or fueling displacement.⁷⁵ These features of the Victims' Law will each be discussed in turn.

A. *Definition of "Victim" and Establishment of Legal Victimhood Status*

The Victims' Law defines as a victim any person who has suffered grave violations of human rights or international humanitarian law ("IHL") as a result of the conflict since 1985.⁷⁶ Human rights and IHL norms are defined as the standards elaborated in all international conventions signed by Colombia, in particular the Geneva Conventions of 1949.⁷⁷ Spouses, permanent partners, and first-degree family members of disappeared or murdered victims are also considered victims.⁷⁸ Additionally, people who have suffered injuries prior to 1985 may be considered victims for the purposes of seeking rights to truth and justice, but are not entitled to damages or restitution.⁷⁹

Significantly, the process of acquiring victim status is explicitly divorced from the process of condemning the person responsible for victimization.⁸⁰ This provision of the law overturns the Law of Peace and Justice, which made the establishment of perpetrator culpability a primary pathway for

67. *Id.* art. 105(7).

68. *Id.* art. 141.

69. *Id.* art. 142.

70. *Id.* art. 145.

71. *Id.* art. 3.

72. *Id.* art. 75; *see also supra* notes 47–50 and accompanying text (describing the Law of Peace and Justice, which was previously the primary law dealing with restitution).

73. *Id.* arts. 77–78.

74. *Id.* arts. 105, 165, 168.

75. *Id.* arts. 99, 178.

76. *Id.* art. 3.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* arts. 3–4.

exercising victim rights.⁸¹ Under the Victims' Law, victims need only present a written declaration and supporting evidence of the events that occurred and the damages suffered in order to earn legal status.⁸² A special institution⁸³ set up for the "support and comprehensive reparation of victims" reviews the declaration and verifies the facts stated, and then makes a final decision whether to grant victimhood status, independent of any proceedings relating to the perpetrator.⁸⁴ Once an individual is legally recognized as a victim, she is entitled to all the social services provided in the legislation,⁸⁵ including education,⁸⁶ healthcare,⁸⁷ and psychological support programs.⁸⁸ She also gains preferential rights to housing subsidies and job training programs, and has special access to certain governmental jobs. Perhaps most importantly, she is allowed to initiate administrative or legal actions for damages and has a right to be assisted by counsel.⁸⁹

The simplified process for acquiring victimhood status is likely to facilitate a major increase in the number of victims who have a right to damages and other forms of reparations. In addition to being excessively complex, the previous requirement of establishing perpetrator culpability had resulted in threats and violence to victims who attempted to initiate proceedings, thereby deterring claims.⁹⁰ The requirement became a major barrier to victims' exercising of rights, and, as mentioned above, is considered one of the primary reasons why only twenty-four victims had received damages by 2008.⁹¹

B. Right to Land Restitution

While the Victims' Law grants broad rights to all victims of the conflict, it is particularly recognized for advancing the rights and protections of displaced victims in particular. In general, the law provides an extensive right of restitution to owners, possessors, and other users of land who were dispossessed or were forced to abandon their land since 1991, either directly or indirectly because of the conflict.⁹² The terms "dispossession" and "forced abandonment" reflect the forms displacement has taken in the current context. According to the legislation, "dispossession" refers to situations in which individuals are deprived of their land ownership, possession, or occu-

81. L. 975 D.O. art. 42.

82. L. 1448 D.O. arts. 154–56.

83. In Spanish, "La Unidad Administrativa Especial para la Atención y Reparación Integral a las Víctimas." *Id.* art. 166.

84. *Id.* art. 156.

85. *Id.* art. 49.

86. *Id.* art. 51.

87. *Id.* art. 52.

88. *Id.* art. 49.

89. *Id.* arts. 132–33.

90. See *Lid*, *supra* note 22, at 204.

91. *Id.*

92. L. 1448, D.O. art. 75.

pation through acts that “take advantage of the violent situation.”⁹³ Disposition can occur through a “legal” business transaction, an administrative act, a court decision, or through commission of any of the violent crimes associated with the conflict.⁹⁴ “Forced abandonment” refers to temporary or permanent situations in which a person is forced to flee her land such that she is prevented from “administering, exploiting, and having any direct contact [with it].”⁹⁵ Violations of international human rights and international humanitarian law are considered “consequences of the conflict” for the purpose of determining the reason for displacement.⁹⁶

The Law stipulates both material and judicial restitution of land—victims are granted the right to the physical return of their land, as well as to the legal title.⁹⁷ Because the majority of displaced victims did not hold formal title to their land, most who succeed in restitution claims will be granted titles for the first time.⁹⁸ On the other hand, many of the victims who had held legal titles were forced to turn these titles over to businesses and/or paramilitaries through pseudo-legal transactions.⁹⁹ Under the Law, these titles will be rewritten in the restored owners’ names.¹⁰⁰

Material restitution of land can occur in a variety of ways. First and foremost, victims are entitled to the return of their previously owned, used, or occupied land.¹⁰¹ However, the Law acknowledges that in some cases, return of the same land may not be possible or desired.¹⁰² Restitution is deemed impossible when: the original land is located in an area of high natural disaster risk; when the land has been the object of multiple disposessions and has already been returned to another victim; when restitution would result in a risk to the life or personal integrity of the victim; or when the land has been fully or partially destroyed such that it is impossible to reconstruct conditions similar to the original ones.¹⁰³ In any of these cases, the victim is entitled to an equivalent plot of land with like characteristics.¹⁰⁴ When neither the exact nor equivalent land restitution is possible, the victim is entitled to monetary compensation for her land.¹⁰⁵

The Law also adopts special restitution measures for displaced victims whose living spaces, such as homes and farmland, have been physically affected by displacement.¹⁰⁶ While the Law does not stipulate that the State

93. *Id.* art. 74.

94. *Id.*

95. *Id.*

96. *Id.* art. 75.

97. *Id.* art. 72.

98. See Ibanez & Munoz, *supra* note 5, at 292.

99. See Lid, *supra* note 22, at 192.

100. L. 1448, D.O. art. 72.

101. *Id.*

102. *Id.*

103. *Id.* art. 97.

104. *Id.* art. 72.

105. *Id.*

106. *Id.* art. 123.

or those responsible for displacement will cover the cost of restoring previous conditions, it mandates that victims have preferential access to state subsidy programs for land improvements and home construction.¹⁰⁷ Within the group of eligible victims, female-headed households, the elderly, and handicapped persons have priority.¹⁰⁸

The land restitution measures included in the legislation are by far the most extensive, specific, and context-appropriate in Colombia's history. The Victims' Law accounts for the range of causes and types of displacement and makes explicit that displaced victims of all forms are entitled to restitution. It also recognizes the circumstances surrounding displacement, such as associated security risks and changes in property conditions, and thus for the first time creates restitution measures that respond to contextual particularities.

C. *Creation of Legal Presumptions and Shifting the Burden of Proof*

In addition to substantively expanding displaced victims' rights, the Victims' Law increases access to restitution by altering legal presumptions in ways that distinctly favor those injured by the conflict.¹⁰⁹ Restitution claims may proceed through one of two judicial paths depending on whether restitution is opposed.¹¹⁰ When there is a party who objects to the return of land to a recognized victim, i.e. a current holder of the land who believes she is the rightful owner, an administrative magistrate decides the case.¹¹¹ When the claim is unopposed, however, a civil judge adjudicates.¹¹² The Law alters legal assumptions in favor of the victim regardless of whether the case is in administrative or judicial court.

First, the Law explicitly "inverts" the burden of proof such that the present owner, occupier, or possessor of land has the initial burden to prove that she has acquired the land lawfully.¹¹³ Only if the opposing party has met this burden must the victim present evidence in her own favor.¹¹⁴ Thus, the Law effectively presumes illegitimate dispossession. The inversion of the burden of proof is widely considered a major achievement of the Victims' Law and one that will significantly advance the right to restitution.¹¹⁵

107. *Id.*

108. *Id.*

109. *See id.* arts. 78–79.

110. *Id.* art. 79.

111. *Id.*

112. *Id.*

113. *Id.* art. 78.

114. *Id.*

115. *Cf.* David L. Attanasio & N. Camilo Sánchez, *Return Within the Bounds of the Pinbeiro Principles: The Colombian Land Restitution Experience*, 11 WASH. U. GLOB. STUD. L. REV. (forthcoming Winter 2012) (manuscript at 40–41) (on file with author).

The Victims' Law also establishes legal assumptions regarding five specific situations that have surrounded instances of displacement.¹¹⁶ First, the court¹¹⁷ will presume that business contracts for the sale or other transfer of land lacked consent or were entered into through illicit means.¹¹⁸ Second, in the absence of evidence showing otherwise, for the purposes of restitution proceedings, the court will assume that certain business transactions were made without consent or through illicit means.¹¹⁹ This applies to business transactions such as those made: in areas of widespread violence, massive displacement, or grave violations of human rights; in areas where land has become increasingly concentrated and/or where crop production has significantly changed; by community businesses or farming cooperatives where the leadership of the cooperative organization has changed post-displacement; and where the value of the land stipulated in the contract is less than fifty percent of its actual market value.¹²⁰ Third and fourth, the Law declares that once restitution has been granted, all administrative actions and judicial decisions previously authorizing the legal transfer of land are null.¹²¹ This means that prior administrative and judicial court decisions cannot be used to negate restitution once the present court has found in the victims' favor.¹²² Fifth, all possessors of restituted land, who gain possession after 1991, will have their possession declared void "as if it never occurred."¹²³

Again, like the restitution measures provided, the legal presumptions and burden of proof provisions of the Victims' Law shape transitional justice to fit the current context. Both reflect the knowledge that the millions of individuals likely to exercise restitution rights have unwillingly left their land as a result of deliberate, systematic, and wrongful practices. Through the establishment of a series of legal presumptions, the Law protects victims against the range of pseudo-legal, as well as blatantly illegal, tactics used by paramilitaries and corporations to acquire land.

D. Institutional Structure

As can be seen from the discussion above, the Victims' Law makes strong demands of courts and governmental agencies. To respond to these heightened requirements, the Law establishes three new institutions to administer and oversee the judicial and material processes for the return of lands.¹²⁴

116. L. 1448, D.O. art. 77.

117. In this section, *Creation of Legal Presumptions and Shifting the Burden of Proof*, "court" refers to both the judicial and administrative courts in which restitution proceedings take place.

118. L. 1448, D.O. art. 77(1).

119. *Id.* art. 77(2).

120. *Id.*

121. *Id.*

122. *Id.* arts. 77(3), 77(4).

123. *Id.* art. 77(5).

124. *See id.* arts. 103, 164, 166.

The first body, the Special Administrative Unit for the Restitution of Dispossessed and Forcibly Abandoned Land (“Administrative Unit”), is charged primarily with managing a Registry of Dispossessed and Forcibly Abandoned Lands (“Registry”), also created by the Law.¹²⁵ The Registry serves as a gateway to the restitution process—in order to initiate legal action for restitution, victims’ land must first be “registered,” meaning that they must receive certification from the Administrative Unit that their land has been wrongfully possessed.¹²⁶ Once the land is registered, the Administrative Unit is also responsible for overseeing that the case’s adjudication and gathering evidence for trial.¹²⁷

Next, to facilitate victim support and the realization of material rights, the Victims’ Law establishes an Executive Committee for the Support and Reparation of Victims (“Committee”). The Committee is charged with developing a National Plan of Victim Attention and Integral Reparation, which will contain the main programs for victim support.¹²⁸ The Committee is also responsible for monitoring implementation of the Law and ensuring that the victims’ rights to justice, truth, and reparation are being realized.

Finally, the Law creates a Special Administrative Unit for Victim Support and Reparations (“Special Unit”) to coordinate the entire National System of Victim Support and Reparations.¹²⁹ This entails coordinating victim services at the local levels and among the various governmental agencies that will be involved.¹³⁰ Additionally, the Special Unit is responsible for managing the resources for restitution, including the Fund for Victim Reparations.¹³¹

While the institutional structure is arguably excessively complex and has been criticized for failing to assign clear lines of authority and responsibility,¹³² it is commendable that the Law creates such a robust institutional structure in the first place. Though previous laws have established some institutional responsibilities for ensuring victims’ rights, never before have so many bodies been dedicated exclusively to land restitution and victim reparations.¹³³

125. *Id.* arts. 103 (creating Administrative Unit), 76 (creating Registry).

126. L. 1448, D.O. art. 76.

127. *Id.* art. 105.

128. *Id.* art. 165.

129. *Id.* art. 168.

130. *Id.*

131. *Id.*

132. Attanasio & Camilo Sánchez, *supra* note 115 (manuscript at 75).

133. *See, e.g.*, L. 975, D.O. arts. 32–36 (establishing prior institutional structure for victims’ reparations).

E. Business Accountability

Finally, the Victims' Law represents a significant advance in Colombian victims' rights law because it imposes new mechanisms to address the corporate involvement that often fuels displacement. It attempts to regulate corporate purchases of land rights and also to hold businesses accountable for contributing to victimization.

First, the Law bans all sales of restituted land for the two-year period post-restitution.¹³⁴ Additionally, it requires judicial authorization of all contracts for the use of restituted land.¹³⁵ This means that corporations that have purchased land that has been illegitimately possessed, and now restituted, must receive authorization from an administrative Magistrate to create new contracts with the restored owner. The provision applies specifically to businesses that wish to continue large agro-industrial projects on previously purchased or leased land.¹³⁶ To be considered for authorization, companies wishing to re-contract must prove that they acted in good faith when creating the original contract (pre-restitution). When corporations fail to prove good faith, the agro-industrial project is turned over to the Administrative Unit, which will pass it on to a third party that will manage production. Profits then will be put towards local victims' reparations programs and will be given partially to the intended beneficiary of restitution.

Second, the Victims' Law stipulates that corporations may be held financially liable for their involvement in the conflict.¹³⁷ Judges in individual reparations cases may now require businesses, when found responsible for contributing to victimization, to make payments to the Victims' Reparations Fund.¹³⁸ The Law of Peace and Justice established the fund in 2005 as a financing mechanism for victims' reparations, including restitution and civil damages.¹³⁹ Until the Victims' Law was passed, judges were only allowed to mandate payments from paramilitary groups themselves.¹⁴⁰ Under the present Law, however, judges may declare that companies bear partial responsibility for displacement or other damages and, accordingly, may impose financial penalties on them.¹⁴¹ The amount of the penalty must be determined based on the extent to which the company's actions have caused victimization, as measured by the financial support it has provided to paramilitary groups.¹⁴²

134. L. 1448, D.O. art. 101.

135. *Id.* arts. 99, 101.

136. *Id.*

137. *Id.* art. 177.

138. *Id.*

139. L. 975, D.O. art. 54.

140. *Id.*

141. L. 1448, D.O. art. 177.

142. *Id.*

IV. LIMITATIONS AND CHALLENGES

Despite the many advances made by the Victims' Law, its effectiveness as a transitional justice mechanism is likely to face serious challenges, both because of the social context as well as limitations in the Law itself. Arguably the most difficult obstacle the Law is likely to confront is guaranteeing the security of the returned victims and the prevention of re-victimization. The Law does, however, promise to deploy security forces to protect returned victims and adopts a series of "no repetition" measures.¹⁴³ These include the demobilization and dismantlement of illegally armed groups,¹⁴⁴ prosecution of perpetrators, and prevention programs for social groups at high risk of victimization (women, social leaders, activists, union members, etc.), among others.¹⁴⁵

Nonetheless, the reality of the illegally armed groups that have controlled the areas of conflict, and now displacement, for over forty years, make it difficult to imagine how the State will be able to ensure victims' security.¹⁴⁶ State control is profoundly weak or even entirely absent in these areas, allowing paramilitaries to gain control over any existing institutions.¹⁴⁷ Previous attempts to demobilize armed groups, such as those included in the 2005 Law of Peace and Justice, have experienced limited success.¹⁴⁸ The 2005 effort succeeded at demobilizing portions of the notoriously active Autodefensas Unidas de Colombia ("AUC"), but was also followed by the emergence of new groups made up of "demobilized" AUC members.¹⁴⁹ Whether the Victims' Law will succeed in wresting control of the conflict regions from illegally armed groups in order to guarantee safe and permanent restitution remains to be seen.

Additionally, the Law likely does not go far enough in regulating business conduct and protecting victims from allied business/paramilitary groups. But in granting local judges complete discretion in determining whether businesses contracted for land use in "good faith,"¹⁵⁰ the Law creates a strong likelihood of corruption. Historically, armed groups have controlled courts in conflict regions, and the Law does not provide any additional mechanisms for oversight.¹⁵¹ The consequence may be improper authorizations of contracts for restituted land and the continuance of pseudo-legal or illegal displacement tactics.

143. *Id.* art. 149.

144. *Id.* art. 150.

145. *Id.* art. 149.

146. See *Report on the Demobilization Process in Colombia*, *supra* note 6.

147. See Ibáñez & Muñoz, *supra* note 5, at 295.

148. See Lid, *supra* note 22 at 202.

149. *Id.*

150. See L. 1448, D.O. art. 79 (granting judges discretion to determine "good faith").

151. See Lid, *supra* note 22, at 204 (describing obstruction of the judicial process by paramilitary groups).

Decentralization—of legal processes and of the institutions that provide victim support—is likely to become an extensive barrier to victims’ exercise of rights. The Law stipulates that general reparations and restitution claims will proceed through local courts,¹⁵² which, as described above, do not have a record of administering justice fairly.¹⁵³ The Victims’ Law also makes restitution judgments particularly susceptible to inconsistencies because it does not establish a standard for finding “good faith ownership” on the part of the opposing party, thereby allowing courts to apply the rule with varying degrees of strictness.¹⁵⁴ The decentralization of victims’ social services is also likely to prove problematic because local governmental bodies have consistently been slow to respond to victims’ needs.¹⁵⁵ This institutional inertia has been recognized by the Constitutional Court as a persistent problem in coordinating and providing services for displaced victims, and the Law does not create any new mechanisms for oversight or support.¹⁵⁶

Finally, the Victims’ Law falls short on its objective to seek truth as part of the transitional justice process.¹⁵⁷ It does not include measures aimed at truth-seeking, nor does it recognize the importance of establishing truth for the present purposes of reparations.¹⁵⁸ As a result, not only will the “truth” element be left out of the transitional justice process, but victims and courts will also not be able to employ facts established through a truth-seeking mechanism to support their claims.¹⁵⁹ The consequences are likely to be more drawn-out legal transactions and inadequate reparations—both material and symbolic—for victims.¹⁶⁰

V. THE VICTIMS’ LAW AS A PROMISING MECHANISM FOR TRANSITIONAL JUSTICE?

Historically, the best transitional justice processes have been those that look simultaneously backwards to repair the past and forwards to establish a more just and peaceful future.¹⁶¹ The Victims’ Law certainly glances in both directions, yet the ongoing conflict may unfortunately impede deep engagement with either. Success will depend almost entirely on whether the Colombian State will be able to gain control over the resource-rich and

152. L. 1448, D.O. art. 80 (declaring local judicial authorities competent to try reparations cases).

153. See Lid, *supra* note 22, at 204.

154. Attanasio & Camilo Sánchez, *supra* note 115 (manuscript at 77).

155. *Id.* (manuscript at 81).

156. See C.C., Sala Especial de Seguimiento a la Sentencia T-025 de 2004, diciembre 10, 2010, Auto 383, part V, § 1.4.

157. Rodrigo Uprimny Yepes & Nelson Camilo Sanchez, *Ley de Víctimas: Avances, Limitaciones, y Retos*, DEJUSTICIA (Aug. 14, 2011), http://www.dejusticia.org/index.php?modo=interna&tema=justicia_transicional&publicacion=1006.

158. *Id.*

159. *Id.*

160. *Id.*

161. See Waldorf, *supra* note 4, at 86–87.

conflict-ridden areas of its territory for the first time in at least forty years, if not its entire history. If it does so, the Law may produce the political change necessary for transition, altering the way we think about transitional justice and the use of legislation as a tool in the process. Let us hope Colombia and the Victims' Law may serve as that example.

