



Noref Report

Land restitution as a key element in preventing forced displacement in Colombia

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Summary

The armed conflict in Colombia, which has generated over three million internally displaced persons, has dramatic humanitarian consequences and raises serious issues regarding the protection of the displaced persons' rights. The underlying reasons for the displacement often lie in the dynamics associated with territorial control and land seizures undertaken for strategic, military or purely economic purposes. Domestic and international legal provisions have established

the victims' right to the restitution of their homes and property as the "preferred remedy" in cases of displacement. However, policies dealing with displacement, both those of the Colombian government and of several international institutions, fail to take this sufficiently into account. An integral reparation policy for victims must necessarily entail the reversion of lands, territories and goods seized in Colombia under the pretext of the internal armed conflict.

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The plunder of lands and property

As has occurred in other conflicts, such as the Israeli-Palestinian conflict and in the former Yugoslavia among others, armed conflict in Colombia undeniably involves territorial control and appropriation. Forced displacement of the population for “territorial cleansing” has been used as a widespread, systematic strategy. This has led to the forced displacement and plundering of thousands of peasants, indigenous people and Afro-descendants, in an undisputed process of “de-territorialisation”. Drug-trafficking, which is essential to understanding the Colombian conflict, has also played a role in the dynamics of appropriation and strategic control of territory; and it has also accelerated the concentration of farmland ownership.

Although existing data are not totally reliable, estimates of the area impacted by plundering vary between the 4 million hectares mentioned by the United Nations World Food Programme (UNWFP) or the 6.8 million accepted by the government agency, Acción Social, and the 10 million hectares declared by the Movimiento de Víctimas de Crímenes de Estado (the victims’ association, MOVICE). By any reckoning, the data point to an agrarian counter-reform.

Plundering has become increasingly sophisticated and varied. It combines the use of violence and threats with the legal instruments related to property rights (for example, forced sales) and the institutions responsible for property transfers (land registration and notarising processes, the cadastre, and the judiciary).

Rights affected by plundering

The motivations behind the plundering reveal a complex mesh of the incentives and means used to exploit the plundered property: they include strategic and military control; economic profit (extensive livestock farming, laundering of proceeds from drug trafficking, mega-projects, and industrial-scale monoculture crops such as African palm); and also goals related to political and electoral control.

The following are the principal rights undermined by plundering and displacement: rights of ownership and possession; the right not to be displaced or plundered; the right to a home; economic, social and cultural rights linked to the greater vulnerability caused by displacement (education, health, increased poverty and indigence).

Laws for displacement and reparation

International human rights law and international humanitarian law protect rights affected by territorial plundering and forced displacement. The “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”¹ (2005) establish five basic forms of reparation: first and foremost, restitution, followed by compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Restitution, whenever possible, should return victims to the situation prior to the manifest breach of international human rights law or serious breach of international humanitarian law. Depending on the situation, restitution may re-establish freedom, human rights, identity, family life, citizenship, return to place of residence, return to previous job and return of property.

Both the “Guiding principles on internal displacement”, known as the Deng Principles² (1998) and, above all, the “Principles on housing and property restitution for refugees and displaced persons” (2005), better known as

1 UN General Assembly Resolution, “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law”, 16 December 2005, A/Res/60/147, <http://www.unhcr.org/refworld/docid/4721cb942.html>, accessed 12 July 2010.

2 UN Economic and Social Council, Commission on Human Rights, “Guiding Principles on Internal Displacement”, report of the Representative of the Secretary-General, Mr. Francis M. Deng, E/CN.4/1998/53/Add.2, 11th February 1998, principles 28-29, <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/d2e008c61b70263ec125661e0036f36e?Opendocument>, accessed 12 July 2010.

the Pinheiro Principles³, establish the right of victims to the restitution of their home and property as the “preferred remedy” in cases of displacement. The right to restitution is also a right in itself and is independent of whether or not the displaced persons entitled to it actually return. This aspect has very relevant implications for public policies aimed at assisting the displaced population and the restitution of plundered property.

Compensation v restitution

Compensation or the provision of other lands is an alternative means of reparation which requires the explicit consent of the victims. But priority must always be given to restitution or the reversion of the plunder. Otherwise, the process may become a legitimization of the seizure. This also has very important consequences with respect to preventing forced displacement and establishing guarantees of non-repetition.

It also means that under the process for the demobilisation of paramilitary groups initiated in 2003, the paramilitary groups have the obligation to return all the goods acquired illegally and, finally, to compensate victims, should the courts deem they should. In any case, the return of displaced persons and communities must be informed by the principles of voluntariness, safety and dignity, as both the Deng and the Pinheiro Principles affirm.

Domestic legal standards

The Colombian Constitutional Court considers the Deng and Pinheiro Principles to form part of the “constitutionality block”⁴. This is unparalleled anywhere else in the world, and should be exploited in order to establish public policies focusing more clearly on guaranteeing the return of displaced persons and the restitution of their goods and properties.

3 UN Economic and Social Council, Commission on Human Rights, Economic, Social and Cultural Rights, “Principles on housing and property restitution for refugees and displaced persons”, final report of the Special Rapporteur, Paulo Sérgio Pinheiro, E/CN.4/Sub.2/2005/17, 28 June 2005, principle 2, <http://www.unhcr.org/refworld/category,LEGAL,UNSUBCOM,,,41640c874,0.html>, accessed 12 July 2010.

4 The “constitutionality block” is the set of norms, including international treaties ratified by Colombia, that determine if a law is constitutional or not.

Nonetheless, despite the profusion of laws and institutional measures in relation to displacement (in particular Law 387 passed in 1997), the Constitutional Court has declared that the current situation faced by displaced persons reveals “an unconstitutional state of things” (SS-T-025, 2004). This is still the case today (Decree 008, 2009). The legal shortcomings are especially acute in the protection of the goods of displaced persons and the restitution of such goods. The Inter-American Court of Human Rights in its rulings against Colombia has reiterated the right of victims to full reparation for violations of their human rights.

Obstacles to restitution and non-repetition

The obstacles facing the restitution of plundered goods to the displaced population are enormous, as they involve the Gordian knot in the dynamics of the Colombian armed conflict – the territorial, political and economic dimensions. The obstacles relate both to the de facto situation and normative and institutional issues.

These obstacles are linked to the enormous informality of landholding, which makes it easier to use violence and other more indirect means of plunder to compel people to leave their homes and goods. Only ownership enjoys a degree of legal protection. Other forms of landholding (possession, tenancy, occupation, collective ownership by indigenous peoples and Afro-descendants) are far more precarious. The return of the displaced population is hugely conditioned by fears for physical and economic security: only 3.1% of the displaced population expressly wish to return, while the economic sustainability of the return and the productive processes are a serious concern.

Legal and institutional obstacles

Legal obstacles involve a whole set of norms and procedures under civil law, related to property law, which have abetted the plunder. They also impose many hurdles in the process of instituting the right to restitution, such as providing proof, access to courts, and access to information, among others.

Institutional obstacles refer to the constraints imposed by all the institutions participating in the process of recognising and transferring property rights to land,

such as the land registry and notarial system, the cadastral system, and the judiciary. These institutions require a thorough overhaul so that their priority is to effectively enforce the right of restitution for goods illegally seized from the displaced population.

Emergency assistance versus rights

The process of paramilitary demobilisation undertaken in 2003 could have been a window of opportunity for restitution, but to date, there are no indications that this is a priority in public policy. An integral reparation policy is necessary, in which the material dimensions are combined with more symbolic dimensions, relating to recognition and memory. Likewise, a differential approach is required to distinguish between different kinds of reparative actions for different displaced populations, focussing on factors such as gender, ethnicity, degree of vulnerability, and disablement.

We should not confuse emergency assistance to displacement victims with the enforcement of all citizens' socio-economic rights, let alone victims' right to reparation. These actions are mutually complementary but the distinguishing line must be clearly drawn. The process of returning lands and territories to the displaced population must go beyond restitution and address the re-organisation of the population's landholding patterns within the territory. The historic debt still owed to the rural population from the never-concluded agrarian reform must also be taken into account.

Towards a Truth Commission?

Finally, there must be a serious, rigorous discussion of the proposal to create an institution specifically to extract the truth about the plundering and restitution. The public policy monitoring committee for displacement (Comisión de Seguimiento a la Política Pública sobre Desplazamiento) proposes a Truth Commission and an ad hoc tribunal to deal solely with restitution. This proposal is worthy of consideration, given the magnitude and the exceptional nature of the plundering over the last few decades of armed conflict in Colombia.

Recommendations

- International cooperation policies for Colombia should be aware of the complex dynamics associated with the internal armed conflict and the many actors involved (guerrilla groups, paramilitaries, drug traffickers, transnational companies).
- Cooperation on displacement must take into account both the causes and the consequences of displacement, requiring the Colombian government to deal with both. Colombia is not a fragile state lacking the capacity to cope with the humanitarian emergency related to displacement. The Government must be required to comply with its domestic and international obligations.
- Dialogue is needed with the different international cooperation actors in Colombia, starting with the active network of grassroots associations inside the country. Colombian institutions such as the Constitutional Court and the Supreme Court, and international organisations such as the United Nations, the European Union and the Organisation of American States must also be involved.
- A clear-cut distinction must be drawn between emergency aid to displaced persons and an integral, differentiated policy of assistance to the displaced population.
- Any policy to assist the displaced population must take the victims' right to reparation into account, including the preferential right to restitution of the lands and goods that have been plundered.