



**A Human Rights Based Approach to Victims
and Land Restitution Law in Colombia**
Lessons from the Displacement in Chocó, Colombia.

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List of Acronyms

AFRODES	Association of Displaced Afro-Colombians
COHDES	Consultancy on Human Rights and Displacement
CCJ	Colombian Commission of Jurists
COHRE	Centre on Housing Rights and Evictions
DDHH	Human Rights
DANE	National Administrative Department of Statistics
DNP	National Planning Department
FARC	Colombian Revolutionary Armed Forces
HRW	Human Rights Watch
ICTJ	International Centre of Transitional Justice
IDMC	International Displacement Monitoring Centre
IDPs	Internally Displaced People
ILO	International Labour Organization
MOA	Board of Afro-Colombian Organizations
PBI	Peace Brigades International;
UN	United Nations
UBN	Unsatisfied basic needs
UNFPA	United Nations Popular Fund
UNDP	United Nations Development Programme

Abstract

This research brings an innovative perspective for the analysis of land restitution from the Human Rights Based Approach (HRBA). The Victims and Land Restitution Law 1448, of 2011 is expected to have a profound impact on Colombian society, under the transitional justice framework in which the government's responsibility and victims' opportunity to claim their rights is embedded.

The Constitutional Court ruling about the problem, and its aftermath provide the lessons from the HRBA about indivisibility of rights, participation, land restitution and accountability of the state. This knowledge revealed the on-going armed conflict and social exclusion as the structural causes of the continuing violations of the rights of afro-Colombian victims of displacement and dispossession. As well, the lack of effective response of the state to address the problem is not helped by the enabling environment of the Law 1448. In this sense this study contributes to analyse if the Law 1448 represents a HRBA to the land restitution for the afro-Colombian communities and what policy recommendations should take from the HRBA to comply with its human rights obligations.

Relevance to Development Studies

This paper is a contribution to understand the relevance of human rights in Colombia for development studies. Law 1448 of 2011 addresses a critical issue for development such as land restitution for the afro-Colombian population in Chocó.

In Colombia, the Constitutional Court has assumed a main role in the defence of the victims' rights of displacement and land dispossession. The response of the state and the situation of the Afro-descendent communities in Chocó, are evidence of the need to a HRBA in the national legislation and implementation to stop human rights violations in Curvaradó and Jiguamiandó such as murders, threatens and forced displacement in their ancestral territories. Excluded communities are not part of development if their security and dignity is not involved in the development strategies of the government. Development projects tend to be more successful with the participation of the communities and the harmonization with other policies that can provide an integral response to the victims. In this sense, the state's responsibility to promote, protect and fulfil human rights is a key element to present and future land restitution and development.

Keywords

Human Rights Based Approach, Transitional Justice, Land restitution, Social Exclusion, Displacement, Afro-Colombians, Curvaradó and Jiguamiandó, Colombia

Chapter 1

Introduction

1.1. Problem statement

The recently approved Law 1448 in Colombia is expected to address one of the long-standing claims of the victims of displacement during the past century: land restitution. According to various scholars and NGOs, the unjust land distribution has been one of the continuous and common reasons for the conflict in Colombia's history until today (Saffon, 2010: 117; Suescun, 2011: 20; Thompson, 2011: 321; Grajales, 2011: 772; Comisión Colombiana de Jurista, 2011: 5). The land distribution problem in Colombia has tended to worsen through the dynamics of the internal conflict and drug trafficking (UNDP, 2011:226).

The effects of the armed confrontation on the civil population are devastating, including approximately 4.915.579 million internally displaced people (IDPs) that came about in the last 25 years (COHDES, 2010; 1). The figures show that this situation worsened over time. Between 2002 and 2009, 'over 2.5 million people were forcibly displaced.' (Acción Social, 2010 as referred to in Thompson, 2011: 344). Indeed, according to data collected by the NGO Comisión Colombiana de Juristas, between June 2008 and December 2011 at least 246 massive displacement actions took place. Consequently, according to government data, about 4 million hectares of land were usurped by the paramilitary and guerrilla groups (ABColumbia, 2012: 2).

Among the IDPs, vulnerable groups such as indigenous and afro-Colombian¹ communities are the most affected since the majority of their land is part of smallholdings or part of collective territories that have been taken by illegal forces (Thompson, 2011: 344; CCJ, 2012: 7). As the Internal Displacement Monitoring Centre IDMC, explained the special attachment of afro-Colombians' to their land, and the ongoing violence in their ancestral territories has created particular risks for their security specially for their leaders through threatens, attacks, or murders (IDMC, 2011: 53).

Land dispossession has put at stake the protection of the IDPs' rights, especially the rights of the land restitution leaders. According to Colombian Ombudsman Office reports, between 2006 and 2011 at least 71 local leaders in

¹ In this paper the terms afro-Colombian and afro-descendent are used indiscriminately and have the same meaning as Black communities in the Colombian legislation. According to Law 70 of 1993, Black communities are considered to be the 'group of afro-Colombian families who have their own culture, share a history and have their own traditions and customs within the relationship with their land, they preserve their consciousness and identity that distinguishes them from other ethnic groups' (Article 2, numeral 5, Law 70 of 1993 as referred in UNDP, 2011: 156).

the land restitution processes were killed (ABColumbia, 2012: 9), and so far there is only one conviction for these murders. In this sense impunity has also become a significant limitation for social justice. Recent evidence of the risk that this population faces was the torture and murder of Manuel Ruiz and his 15 year old son Samir de Jesús Ruiz by paramilitaries on 28 March 2012 (Revista Semana, 2012). Ruiz, an afro-descendent land restitution leader of the Curvaradó and Juamindo communities in Chocó department, had protection measures from the Interamerican Commission for Human Rights. However, the protection measures provided by the Colombian government were not enough to protect his life and his family.

This case is only one example of the government's ineffective response to the security and protection problems of the IDPs. This has been a constant concern for the Constitutional Court in the last eight years. In 2004 the Court stated that the situation of the IDPs was unconstitutional according to international standards (Sentence T025/04)². Intervention by the state was required to stop the recurrent violation of rights (Attanasio, 2012: 26). Until October 2012 the Court declared at least 54 follow up decisions ('Autos' in Spanish) and 22 sentences ruling on the obligation of the state relating to IDPs. Some of these related to the protection and security of afro-descendent communities, and to ending the continuous violation of their rights (UNHCR database). Indeed, the circumstances of the minority communities gradually worsened as the Constitutional Court noted in Autos 004 and 005 of 2009 (CCJ, 2012: 13).

In this sense, the expectations about Law 1448 and its impact on land restitution for afro-Colombian communities are high, especially in emblematic cases such as Curvaradó and Jiguamiandó in Chocó department. The displacement of about 4.000 afro-Colombians (Salinas, 2012: 2) and dispossession of their land took place in 1997 as the result of the interaction of local powers such as paramilitary groups, palm oil companies, the National Army and government institutions (Thompson, 2011: 347; Grajales, 2011: 786). According to the government's Human Rights report: "The Ministry of Agriculture recognized that a good part of the palm oil crops were based on irregular land titles "out of 33.000 cultivated in the afro-Colombian territories of Curbaradó and Jiguamiandó, at least 27.000 have a questionable land title" ' (Observatorio DDHH: 48 translated from Spanish).

The massive displacement and the continuing violations of the human rights of the afro-descendent communities have been well documented and were taken to the Interamerican Court of Human Rights (ICHR) (ABColum-

² The IDPs unconstitutional state of affairs declared by the Constitutional Court meant that a continued violation of the fundamental rights of IDPs has taken place and the solution required the coordinated intervention of different state institutions. The Court ordered in 2004 the Colombian government to address the unconstitutional state of affairs in accordance with international standards, including the Pinheiro Principles and Guiding Principles on Internal Displacement (Attanasio and Sanchez, 2012: 26).

bia, 2012: 7). After their displacement, community members returned by themselves to their territory and found palm oil cultivations going on. In response to this situation, in 2003 the ICHR adopted a resolution 'requiring the Colombian state to implement immediate measures in favour of the displaced communities. The Court manifested a particular concern about agribusiness development taking place in the collective lands of Jiguamiandó and Curvaradó' (Grajales, 2011: 787).

The Constitutional Court ruled on the situation of the afro-Colombian displaced communities of Cruvardadó and Jiguamiandó in 2009, and asked the state for urgent interim measures for some members of these communities that were at risk. Also, the Court insisted on the need for government protection of the communities. In the same year, the Superior Administrative Court of Chocó ordered the return of 29.000 hectares occupied by the palm oil companies to the afro-Colombian communities in collective titles (sentence 0073/2009). However, there were irregularities in the land restitution process, associated with corruption on the part of the owners of the palm oil companies. The Constitutional Court then stopped the process due to the lack of guarantees for the community. At present, the land has still not been returned to the afro-Colombian communities and the palm oil companies continue operating there, in spite of several legal actions taken by the community (Lemaitre, 2011: 50).

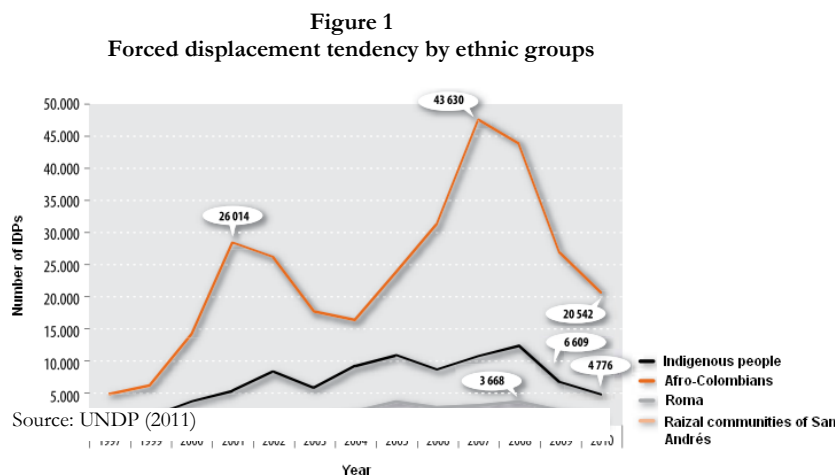
1.2. A Background to the Specific Situation of Afro-descendants in Colombia: Structural Exclusion and Displacement

Social exclusion and marginalization of the afro-Colombian communities started in colonial times. It has not yet ended, due in part to the ineffective response by the state and the weak policies to protect them. Originally, the Spanish conquerors brought an afro-descendent population into Cartagena, Colombia, for labour exploitation (Observatorio DDHH, 2010: 2). They started to be marginalized in their social conditions as slaves. The afro-descendant communities fought for their freedom, which they achieved in 1893 (Ibid.: 2). However, their social conditions have never been close to the rest of the Colombian population. Indeed, in 1998 the Colombian government 'recognized that indigenous and Afro-Colombian populations were the victims of systematic racial discrimination and that this gave rise to marginalization, poverty and vulnerability to violence' (ODC et al, 2009a: 5).

According to the latest data (2005) from the Colombian National Statistics Department (DANE), the afro-descendent population consists of at least 4.311.75 people, which is about 10,62% of the Colombian population (DANE, n.d.: 15). The afro-Colombian population is a majority in Chocó department as it constitutes no less than 82.1% of the total population of the department (Ibid.: 26).

The precarious conditions of the afro-descendent population continue and have deepened. This can be observed in the low standards of life quality indicators such as poverty and the index of unsatisfied basic needs (UBN), compared to the rest of the Colombian population. In 2005, 78.5% of the afro-Colombians in Chocó were under the poverty line.³ This is a high statistic percentage compared to the national total of 49.2%. The index of unsatisfied basic needs has showed that since the 1970s on average 85% of the afro-descendants households live in a situation of exclusion (AFRODES, 2009:3). In fact in 2011, the living conditions of afro-Colombians were generally more precarious than those of the rest of the population, the UBN of the poor afro-Colombians was 43.1%, almost double that of the national average (UNDP, 2011 as referred to in MOA, 2012: 7). While the UNB in Bogotá corresponds to 9.2%, in Chocó this index was 79,2% (Ibid.:7). Furthermore, according to the data from the National Development Plan 2010-2014, Chocó has the lowest income per capita in the country, and it is 1.6 times less than in Bogotá, the capital city (DNP, 2011: 37).

The afro-Colombians have been the most numerous minority group displaced in Colombia. (See figure 1) According to CODHES, they are about 22,5% of the total displaced population. The situation is especially dramatic in the collective territories on the pacific coast, where Chocó is located. About 252.541 persons have been displaced from these territories. They represent 79% of the population that has the legal right to these lands (ODC et al, 2009b: 5).



The attachment that afro-Colombians have to the land in the ancestral territories they inhabited has increased the security risks within the context of ongoing violence. The recognition of the collective territories⁴ for afro-

³ The poverty line in Colombia refers to minimum decent life standards per family and stress the differences among workers between those in the urban and those in the rural sector (DANE, 2012: 5)

⁴ The regulation and legal aspects of collective territories traditional inhabited by afro-descendants communities were created within Law 70 of 1993. The population of these territories in 2010 was 448,979 persons. (DANE, n.d.: 32)

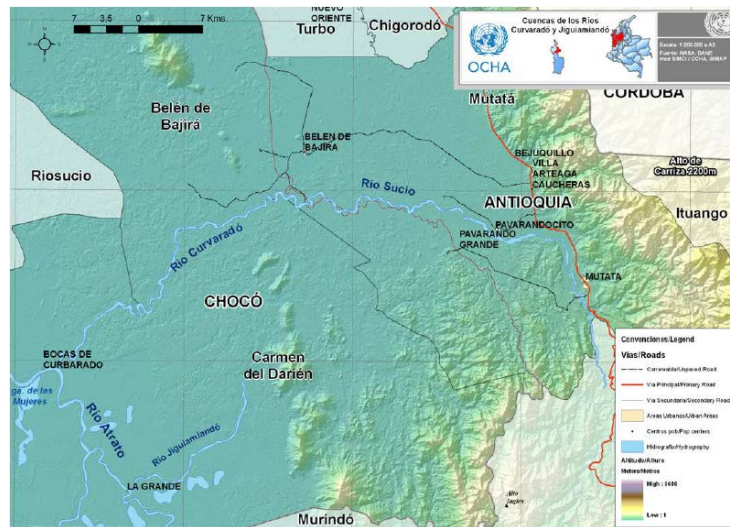
Colombians has taken place just in the last 20 years, but this has not been reflected in actual respect of their land or relieved the displacement risks. The Colombian Constitution of 1991 established collective territories for afro-Colombians (Provisional article 55). However, the battle between the guerrilla and paramilitary groups mostly for territorial control has not respected their rights (UNDP, 2011: 166).

Land Dispossession, Violence and Agribusiness

In Colombian history afro-descendent communities have traditionally been victimized by the violent interaction between different agro-industrial and mining companies, illegal armed actors and the government. According to Thompson (2011:333): ‘it is possible to identify a broad tendency [in Colombia] in which capitalist development and new opportunities for accumulation have provoked social conflicts articulated through violence’.

Cases of human rights violations concerning displaced afro-descendent communities have been well documented and taken to the Inter-American Court for Human Rights (ICHR) by local communities supported by NGOs (ABColumbia, 2012: 7). In 2003 the Court required the Colombian state to protect the displaced communities of Jiguamiandó with immediate measures in favour of the Curvaradó. The Court was concerned about the agribusiness development projects installed in the collective lands of the afro-Colombians (Grajales, 2011: 787). See Map 1.

Map 1
Curvaradó and Jiguamiandó River Basins in Chocó Department



Source: Peace Brigades International Colombia (2011)

The human rights violations to the displaced afro-descendent communities have systematically occurred for a considerable period of time. The Colombian Constitutional Court has demanded an effective response by the state regarding the prevention of displacement, protection of the afro-Colombian

communities and the land restitution process for the Curvaradó and Jiguamiandó communities. However, the state has not fully achieved these requests yet.

1.3. Research Objectives and Questions

This study will critically analyse the lessons learned from the Constitutional Court ruling. It will approach land restitution issues in Colombia by a Human Rights Based Approach (HRBA). The focus will be especially on the security and protection of displaced afro-descendent communities in Curvaradó and Jiguamiandó between 2004 – when the Constitutional Court declared the situation of the IDPs unconstitutional – and 2011, when Law 1448 was approved.

Furthermore, the study aims to establish first whether the measures needed to comply with security and protection are reflected or not in the Law 1448. Second, to establish to what extent Law 1448 represents a HRBA to land restitution, based on notions of security and protection obligations of the state in relation to the afro-descendent population in Chocó. Third, the study seeks to identify the roots of the ineffective response of the government to the Constitutional Court requirements, in order to establish whether Law 1448 is equipped to respond fully to the security and protection problems of the afro-Colombian communities that are claiming land restitution.

At the end of the study, policy recommendations will be formulated for the government in order to shape up a human rights-based approach to land restitution issues in law and policy and implementation practice in Colombia.

The main research question that guides this paper is: Does Law 1448 represent a HRBA to land restitution issues for the afro-Colombian population in Chocó?

The sub-questions are:

- 1) What problems have affected the implementation of land restitution for afro-Colombian communities in Chocó?
- 2) What would represent a HRBA to the problem?
- 3) What were the requirements of the Constitutional Court to the government in its interventions about the situation of IDPs, afro-descendent communities in Curvaradó and Jiguamidó and what was the state's answer to these obligations?
- 4) How does Law 1448 address the Constitutional Court ruling about the problem? Does the environment enable the implementation of the Law 1448?
- 5) How the government could move closer for taking a full HRBA to the problem?

1.4. Historical Background: Land Restitution Initiatives by the Colombian State before Law 1448

The Colombian government's initiatives to address land restitution have been characterized by weak legislation that failed to provide restitution to the dispossessed and benefited the landowners and elites. The failure or unwillingness of the state to provide an effective response to the land problem in Colombia has helped to intensify the internal armed conflict and the displacement and dispossession that have been present in the country to date (Saffon, 2010:117).

The unfair distribution of land in Colombia has been linked to the internal conflict since the nineteenth century. The first serious effort to mediate in the confrontations between landowners and settlers were addressed by the government in 1936 with a land reform proposal called Law 200. However, the result of this law mainly benefitted the landowners since the land's economic use was the basis of determining ownership. As Saffon explained:

it eliminated the requirement of proving legal titles over the land and, consequently, it enabled the legalization of appropriated vacant land, and even encouraged further appropriations by big landowners...the law created an incentive for landowners to evict sharecroppers and tenants, in order to avoid property claims on their behalf (Ibid.: 118).

In 1944 Law 100 was approved, aiming to secure the control of landlords over the land through limitations for the tenants to cultivate and stopping them from independent participation in the market. As Thompson argued, Law 100 affected directly the peasantry:

By prohibiting the planting of perennials by a tenant or a sharecropper without permission from the landlord, the potential for land redistribution was undermined, since this demonstrated the long-term activity required to apply for a title. (Thompson, 2011:335).

Law 100 made the conflict between landowners and peasants even deeper and became an important precedent that contributed years later to La Violencia (The Violence). The conservative party that was ruling the country at the time was challenged by the leader of the liberal party, Jorge Eliecer Gaitán, with a populist discourse supported by the working class and peasantry. Gaitán was killed on 9 April 1948. That day is cited as the starting point of La Violencia. This confrontation between irregular armed groups from the liberal and conservative parties led to massive riots in the cities, violent land dispossession and increased privatization of land. As Thompson indicated, many of the displaced peasants fled and joined existing and newly formed armed resistance communities. According to Reyes Posada (2009:24 as referred to in Ibid.:335) : Gradually the violence became increasingly class based, pitting landlords

against peasants. The conflict was responsible for over 200,000 deaths and the displacement of approximately 2 million people.

The official end of La Violencia was in 1958, with an agreement by the leaders of the two parties to alternate the presidency of the government every four years. This became known as Frente Nacional (National Front). After La Violencia, land concentration increased and the use of the land was mostly for cattle ranches, instead of agriculture in which the majority of the people made a living. Moreover, due to the precarious registry system the landowners acquired more land and under-valued it in their tax statements (Saffon, 2010; 119).

In 1960 a new reform attempt emerged aiming to restructure the landholdings affected by La Violencia. However, pressure from the landlords made the Law have just a marginal effect on redistribution and led to colonization of agricultural frontiers, taking land from the forest for private use. In fact, as Saffon argued, the Law could have contributed to the increase of land concentration (Ibid.:120).

In response to this peasants organized and invaded hundreds of hectares of land, to which the Government reacted with harsh oppression and politically responded by forming an alliance with political leaders and agricultural businessmen to defend property rights in the 1972 Chicoral pact (Ibid). The agreement aimed to 'block the land reform, and to replace it with a settlement policy intended to colonize the unexploited Southern regions' (Grajales, 2011:776). The peasants were left out of this political agreement.

The Government efforts were no longer in agrarian reform, but now were focused on development projects aimed to benefit small landowners. These projects led to more inequality among them. According to Saffon (2010:121):

The failed attempts to bring about a meaningful land reform in Colombia resulted in an alarming unequal distribution of land ownership, and especially in very high levels of concentration of ownership in the hands of a very few.

As a result, the first self-defence groups counter-attacked the demand of the land redistribution of the leftist guerrilla groups⁵. The guerrillas' common ideological foundation was the demand for real agrarian reform during the 1970s and 1980s. On the other hand, the military and the landowner elites felt

⁵ In Colombia, Guerrilla groups started during the 1960s as armed groups of peasants who rose against land concentration (Lemaitre, 2011: 19). Traditionally guerrilla groups have been associated with the left while self-defence with the protection of landowners' interests (Summers, 2012: 221).

threatened by the peace negotiations that President Belisario Betancur (1982-1986) started with the guerrillas, due to the land distribution claims of the rebel groups. In this scenario, paramilitary groups were created with the support of the military and local elites (Grajales, 2011:777).

The drug trafficking boom increased violent confrontations and land appropriation in a context where state presence was poor. The illegal armed groups benefited from drugs activities, expanding their territory towards getting strategic locations and financial resources to finance their armed activity. As Saffon argued (2010:123): land control offers a means for establishing a monopoly of violence in territories where the State is absent and, on that basis, for exercising control over economic and political activities’.

By the 1990s the growth of the paramilitary groups was stimulated by the Law, when the Government allowed the use of arms by security firms in rural areas and for them to be trained by the military. Under decree 356 of 1994 these firms were called Convivir (live together). According to Gracia-Godos and Lid (2010:492), the differences ‘were more a matter of definition than practice. Convivir groups were legal and paramilitaries were considered illegal’. In fact both used the same violent techniques to displace the guerrilla groups and the civilian population was caught in the middle of the confrontation. Numerous paramilitary groups were formed around the country with military structures and they got involved in the control of drug trafficking business.

In addition, the relations of the paramilitaries with local elites, businessmen, companies and politicians became stronger in order to serve private economic and political interests even at the national level. Land concentration, territorial and social mobilization control were obtained by subordinating the rights of the population (Grajales, 2011:782). Furthermore, the paramilitary influence was evident in a scandal known as “parapolitica” in 2002, when the paramilitaries ‘claimed to control 35 per cent of the Colombian national Congress, and one-third of Colombia’s municipalities’ (García-Godos and Lid, 2010: 492).

The systematic practice of violent dispossession of land by the paramilitaries and guerrillas of at least 5.5 million hectares has increased the unequal land distribution and the number of internally displaced people in the country. According to figures presented by Saffon (2010:123), of the 3 million displaced people by 2010:

‘75% of the family groups were expelled from rural areas and 55% were landholders before being displaced. Of the latter, 94% abandoned or transferred their land under pressure as a consequence of the displacement; however, only 18.7% of them held formal land titles.

In addition, the inefficient land registration system of the state facilitated the land appropriation because there were no accurate and up to date data on

land registration. This even helped to legalize land through corrupt and illegal activities in the official institutions in charge. Only in 2003 did legislation come into force to prevent land dispossession and the appropriation of lands abandoned by displaced people (Ibid.:127). The IDPs were in a quite vulnerable socioeconomic situation before being forced to flee, and their situation worsened exponentially after their displacement.

Finally, until very recently there were no special judicial or administrative procedures to guarantee the restitution of land or to provide compensation for its value to the victims of forced dispossession. This situation has started to change, as a result of the implementation of a transitional justice framework, which has put the issue of reparations for victims of atrocities at the centre of the political debate (Ibid.:129).

The displacement and dispossession in Colombia have been the result of decades without effective intervention by the government e.g. through land legislation that promoted justice to the landowners and peasants. As shown above, the power relations in rural areas were mediated by economic interests, political elites and violence, not by the state. This situation opened the door for private self-defence groups, drug traffickers and guerrilla groups to expand and appropriate land, and at the same time systematically violate the rights to land and security of the population with impunity.

1.5. Methodology: A Human Rights Based Approach

The present research aims to analyse the rulings of the Constitutional Court about displacement, security and protection of the displaced afro-colombian communities in Curvaradó and Jiguamiandó who claim their right to land, and the response of the government to the requirements set by the Constitutional Court. The paper will analyse the lessons learned and evaluate whether the environment of Law 1448 is adequately equipped to respond finally to the need for security and protection of afro-Colombian communities claiming land restitution.

The research methodology employed in this research is a Human Rights Based Approach (HRBA). This methodology is the analytical tool to study the problem of land restitution, IDPs, afro-Colombians, security, protection and development that traditionally have been approached mainly from conflict and agrarian studies perspectives. A HRBA can be understood, as Gready and Enzor argued (2005:7), as ‘a new form of social contract’ which provides for minimum performance standards, accountability and specification of the responsibilities of the actors involved. Furthermore, the authors also stressed the importance of HRBA as a framework for human relations in the political, social, economic and legal spheres (Ibid.: 10).

As will be explained more in depth later on in this section, the human rights-based nature of the Constitutional Court rulings and Law 1448 will be assessed on the basis of four main elements: indivisibility of rights, participa-

tion of the communities, restitution and accountability. Even though HRBA have different models, these four elements have been chosen first, for being common in the literature analysed about the response expected of the state to human rights problems under HRBA (Gready and Ensor, 2005; Clarke, 2011; Green, 2012; Merry, 2003; and the Office of the United Nations High Commissioner for Human Rights.) Second, to be common aspects as well founded in the transitional justice framework and the Constitutional Court rulings in the case of the afro-descendent displaced population.

To this end, the research paper will engage with a theoretical framework founded on the concepts of transitional justice, reparations, land restitution and social exclusion. These concepts are interrelated and derived from international human rights law. They are fundamental for understanding the context of Law 1448 and the elements that are incorporated in Colombian legislation to provide a response to the victims of human rights violations.

The elements chosen for shaping up the HRBA of this paper are the following four:

Indivisibility of Rights: Social, Political and Economic

The indivisibility of human rights is fundamental as was stated in paragraph five of the Vienna Declaration and Programme of Action, adopted at the Vienna World Conference on Human Rights in 1993:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms (Vienna Declaration, 1993: 3).

Economic, social, cultural, civil and political rights are all part of every human life and their realization would influence the quality of life of a person and community. As Clarke argued (2012:231): “The realization of one right often depends, wholly or in part, upon the realization of others’ .

The protection of the lives and security of the land restitution claimants is a constant requirement for the success of reparation measures and the return programmes. The state’s responsibility, presence and protection in Colombia is essential in order to guarantee not only judicial access to the disposed land, but *de facto* return without the influence of guerrilla or paramilitary groups. In this sense, the realization of the rest of the rights could be possible for their families and community.

The recognition of the indivisibility of rights in Law 1448 is thus essential for the afro-descendent communities who have been displaced from their land and are without basic protection from the state to secure their life, integrity and livelihood. Land restitution is interrelated with other social, political and cultural rights, especially for the afro-descendent communities that have an ancestral relation to their land.

Participation of Communities

Participation is a key element for the empowerment of communities to contribute to the decision making process (Gready and Ensor, 2005:23). Inclusion of the communities in the process and their effective participation helps to legitimize the process and the enjoyment of rights. Indeed as Green argued (2001:1071), it is the right 'to participate in the making of laws that will affect one's rights'.

In 1989 the International Labour Organization (ILO) adopted the Indigenous and Tribal Peoples Convention, No. 169, recognizing that indigenous and tribal peoples are holders of specific rights and that the state has the responsibility to protect them. The right to participation is stated in its article 2. The government shall guarantee the participation of the peoples concerned, including measures for:

- (a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population;
- (b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;
- (c) assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life (ILO, 1989).

The participation of the afro-descendent communities in the process of the creation of the Law 1448 is essential from a HRBA perspective. The Constitutional Court has asked the Government repeatedly about the participation and previous consultation of the afro-descendent communities. The United Nations (UN) High Commissioner for Human Rights made the following statement about Law 1448:

The regulation of the Law has raised some questions about the participation of victims and their organizations and their protection. Such participation is an essential condition of a human rights-based approach and for building a legitimate, sustainable and effective reparations process (UN High Commissioner, January 2012 as quoted in ABColombia, 2012: 4).

Restitution

As stated in 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', also known as the Pinheiro Principles:

Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property' (UN, 2006:7).

Also under the Pinheiro Principles, the rights to housing and restitution of property for refugees and displaced people are recognized, and states should act to guarantee the land restitution of the displaced people.

Restitution should not only restore the victim's situation as regards return, reparation and property, it is also relevant to consider the original situation of the afro-descendent communities and the future of their collective territories. As described in the historical context section above, their life quality, exclusion, marginalization and unjust social conditions are a challenge to the enjoyment of rights. In Curvaradó and Jiguamiandó, the land that the afro-descendent communities have the right to get back has been cultivated with monoculture in palm oil crops. The effects of the monoculture on the land involve ecological and practical consequences that will affect the afro-Colombians survival mode in the present and the future (Observatorio de Discriminación Racial et.al, 2009a: 16).

Accountability

The state's accountability is a basic aspect of any HRBA since from a human rights perspective the state is a primary duty bearer for realizing rights. Furthermore, De Greiff and Duthie et al. (2009:51) related the importance of the right to development to this perspective, arguing that 'Rights also determine development in the sense that they establish limits to what can be done to individuals in the pursuit of social goals ... rights play a crucial role in systematizing and institutionalizing obligations'. Under a HRBA the state is a primary duty bearer and is obliged to work towards promoting, respecting, fulfilling and protecting human rights in accordance with international human rights law that binds the state. According to the United Nations High Commissioner for Human Rights (2011:119):

States are responsible under international human rights law to guarantee the protection and preservation of human rights and fundamental freedoms at all times, in war and peace alike. The obligation of the State to refrain from any conduct that violates human rights, as well as the du-

ty to protect those living within its jurisdiction, is inherent in this principle.

In the words of Clarke (2012:231), if the state or other duty bearers ‘fail to do so, aggrieved rights holders are entitled to institute proceedings for appropriate redress before a competent court or other adjudicator in accordance with the rules and procedures provided by law’.

The Colombian state has been asked many times to comply with its obligations towards the IDPs, minorities and afro-descendent communities, among others, by both different national and international actors. Law 1448 emerged as the attempt to finally respond to these needs. However, the importance of the ruling of the Constitutional Court can give the highlights to understand the difficulties that the state have had to face in order to address effectively the problems.

1.6. Structure of the Research Paper, Scope and Limitations

This research paper is divided into three chapters and the conclusion. The present chapter covers the problem statement, the historical and contextual background, methodology, structure and limitations. Chapter 2 explores the theoretical framework of the research starting from the HRBA and its links to the key concepts of transitional justice, local legislation (i.e. Law 975 and Law 1448), reparation, land restitution and social exclusion. Chapter 3 presents and analyzes the lessons learned from the Constitutional Court ruling about the unconstitutional situation of IDPs (T025/04), the protection of afro-descendent communities (Auto 005 of 2009) and the lack of a national system to prevent displacement (Auto 008 of 2009). Contrasting the Law’s content and the enabling environment for the Law’s implementation seeks to identify what would still be needed for the realization of a HRBA to the land restitution, security and protection issues of the afro-Colombian communities in Jiguamiandó and Curvaradó.

Finally, the conclusion will identify the gaps to which government needs to respond and the pending state obligations involved. Policy and general recommendations for the government’s implementation of Law 1448 will also be formulated.

Scope and limitations

Firstly, the research is limited to only the land restitution aspect of Law 1448, since this is the most problematic issue that the Law deals with. Secondly, the analysis is limited to the Afro-Colombian communities’ victims of displacement in Curvarado and Jiguamiandó, Chocó. They would greatly benefit from land restitution by Law 1448. Even though the internal conflict has affected the population all over the country, Chocó Department has particular characteristics that make for a unique interaction of violence, development and human rights for a minority that is historically discriminated. As reported by

the human rights Observatory of the Colombian Vice-president's Office (2010), in the municipalities inhabited by afro-descendent communities in Chocó department, the economic and political conditions are socially unjust. According to the most recent census in Colombia, of 2005, the poverty level in Chocó is one of the highest compared to the rest of the country. 78.5% of the population live under the poverty line. The official authorities also recognize the influence of political and institutional weaknesses, embedded in high levels of corruption, on the limited economic development of the region. (Observatorio DDHH, 2010: 8).

Finally, the main focus is on the Constitutional Court rulings due to its continuous and strong role in advocating for victims' rights (Attanasio and Sanchez, 2012:2). Particularly significant are the rulings on the situation of the IDPs, afro-descendent communities and specific cases of land dispossession since 2004 to 2011, and the protection measures that the Court has asked the government to provide since 2004.

The three Constitutional Court sentences that are analysed in the research were chosen based on the relevance and impact of the state's response to the rights claimed by the afro-Colombians. Since there are at least 54 follow-up decisions (Autos) and 22 sentences, the amount of information exceeds the scope of this research paper. However, the four specific sentences chosen reflect the main statements of the Constitutional Court about the obligations of the state towards the IDPs for protection, security and ending the continuous violation of their rights.

Chapter 2

Theoretical Framework

2.1. Human Rights Based Approach (HRBA)

HRBAs to development started as part of an evolution in the UN system, during the process of rethinking development aid as more than capital and political resources (Clarke, 2012: 231). In this sense, programs, plans and projects became framed more according to the international human rights legal system and the main elements of human rights became more relevant than private sector interests. As Ikdahl et al. stated (2005:32): ‘HRBA constitutes a legal limitation to neo-liberal economic models’.

For this reason, as well as the sovereignty challenge that some states face, human rights have been politically sensitive and criticised (Clarke, 2012: 231). The new objectives of development opened an equally new agenda that includes strengthening local institutions, legal standards based on international legislation, and accountability.

A HRBA is based on notions of rights and obligations of citizens and the state under human rights instruments. As the UN explained (UNFPA, 2012), in the rights-based approach a person is a right-holder who can claim rights and the state is the duty-bearer who has the obligation to respect, protect and fulfil those rights. As a result, the state is expected to give a priority response to the creation of mechanisms to guarantee the exercise of rights for all, to allocate resources in their budget and to create institutions. Also, a HRBA focuses on the implementation of the human rights mechanisms for the most vulnerable and excluded sectors of the population.

The criticisms on HRBAs come fundamentally from two sides: western package and lack of understanding of power relations. First, some perceive human rights as a result of western cultural imperialism that can be used to condition development aid. This aspect suggests that national laws, programs and plans then are based on external discourses and not on national beliefs and processes. The possible result might be resistance from local leaders as e.g. Sally Merry argued (2006: 66), but also from the local minorities that have a particular ethnic identity and who can feel threatened through by the imposition of an external model.

Second, according to some, HRBA does not address the origins of the local problems and therefore the power relations are not affected (Clarke, 2012: 231). For instance, as Cousins explained, in analysing laws that are rights-based it is important to take into account the relationship between formal and informal institutions and the power relations defined by law and by practice in the real context. According to Cousins (1997:67): ‘Rights can only be operative as

constituents of a strategy of social transformation as they become part of an emergent 'common sense' and are articulated within social practices'.

Under a HRBA, the objective is to determine to what extent the government is complying with the responsibility of human rights law in objective terms (Green, 2001: 1091). The realization of rights can be seen through the obligations of the state to respect, protect and fulfil. This entails not only drafting new legislation but also institutional reform, and concrete action taken immediately to respond to its obligations. The state also has to commit to the implementation of mechanisms to regulate the relationship with non-state actors and to the allocation of money to guarantee implementation over time (Ibid:1087).

2.2. Transitional Justice

Transitional justice (hereafter TJ) aims to implement mechanisms that are intended to redress massive human rights violations through a series of actions aimed to bring justice to the victims. A set of measures under TJ usually implies a transition from war or authoritarian regimes to peace or more democratic governments and stronger judicial systems (Uprimny and Saffon, 2005: 5). These measures include criminal prosecutions, reparations programs, restitution programs, truth-seeking processes, justice and security reforms, institutional accountability and empowerment of citizens (ICTJ, 2012: 1).

According to the UN, TJ processes and mechanisms 'should further seek to take account of the root causes of conflicts and the related violations of all rights, including civil, political, economic, social and cultural rights' (UN, 2010: 3). These contribute to the objective of achieving the prevention of further conflict, as well as peace building and reconciliation.

In addition, the UN stressed the importance of the centrality of the victims within TJ mechanisms and processes in order to have a successful process (UN, 2010: 6). The inclusion of the victims, especially of the excluded groups, is fundamental to guarantee their dignity and safety and to achieve sustainable peace. In this sense the participation of the victims' minority groups in the formulation and implementation of the TJ process is a key contribution to social integration.

From the development side, the systematic violation of human rights affects the social structure where poverty, marginalization and, inequality can be worsened and institutions and governance can be weakened (De Greiff and Duthie et al., 2009: 30) In this sense, the social conditions of the victims stop them from exercising their rights and from fairly participating in the development model designed by their country. Disadvantaged communities cannot compete, for example, with large agribusinesses that have been protected by the state under legislation that benefits them. TJ provides to development the mechanisms to ensure institutional reforms and security for the implementation of development policies, projects and plans.

In the current debate about TJ, Pablo de Greiff, the first UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, in his first report submitted to the Human Rights Council argued the importance of four aspects under TJ: recognition of victims, trust in institutions, reconciliation and strengthening the rule of law (De Greiff, 2012: 9).

These aspects are important to the present analysis because they provide the elements that indicate the effective response of the government under TJ. As De Greiff explained: first, recognition of the victims implies treating the victims as holders of rights. Second, trust in institutions involves confidence in the state, this can be reflected in the significance of the government's responses to matters of budget and more specifically resource allocations to reparations, and judicial procedures that take seriously the demands of rights holders. Third, reconciliation means that the individuals can trust each other's commitments to norms and values. Fourth, strengthening justice is a guarantee for the victims that the violations are not left to impunity and that there is justice (Ibid.: 10-14).

2.2.1. Transitional Justice in Colombia

Under the transitional justice (TJ) framework, Colombia presents a specific scenario with respect to other countries as regards the application of the TJ mechanisms. In other Latin American countries, such as Argentina, Chile, Perú and Guatemala, TJ procedures were put into practice after the internal conflict and violations of human rights had finished and a transition to a peaceful environment had started. In Colombia, the transitional justice mechanisms have started to be implemented since 2005 with Law 975, known as the Justice and Peace Law, while the internal conflict was ongoing (García-Godos and Lid, 2010: 487-488).

Different scholars (Uprimny and Saffon, 2006b; Jaramillo, Giha, and Torres, 2009; García-Godos and Lid, 2010; Summers, 2012) have recognized that the implementation of TJ in Colombia is a challenging process since there is no factual transition from a conflict to a non-conflict situation. The Colombian situation can be called paradoxical, as Uprimny and Saffon stated (2006b: 3), due to the use of transitional language in the middle of the internal ongoing conflict. The interpretation of *transition* can lead to avoiding a deep analysis of the root causes of violation of human rights.

However, the authors mentioned above do not question the application of the TJ framework in Colombia. Indeed, on the lack of transition from one political and social scenario to another, Jaramillo, Giha, and Torres suggest 'that, if properly applied, transitional measures could help strengthen the constitutional order. More than 'justice for transition', Colombia appears to be in need of 'justice for consolidation' (Jaramillo, Giha, and Torres, 2009: 7). Indeed, impunity facing the massive abuse of human rights raises the claims for effective trials and the judicial capacity of the Colombian state.

Under the TJ framework, Laws 975 and 1448 are part of the answer Colombia's state obligation before the international community. They provide potentially effective remedies to victims, including reparation, in order to respect the principles and rights protected by international human rights law. In 2005, the General Assembly of the United Nations adopted 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." As Buyse (2008: 10) explained these Basic Principles are formal endorsements, however not-binding agreement. They have an important political weight provided by being adopted by the General Assembly, and are relevant in the international agenda, in a form of soft law.

The Basic Principles confirmed the obligation of states to provide effective remedies to victims, including reparation, and that states must show full respect for other principles and rights protected by international human rights law in meeting its obligations (HRW, 2011).

The Justice and Peace Law 975 of 2005

Law 975/05 was based on the negotiations of Alvaro Uribe's government (2002-2010) with the paramilitary groups aiming to contribute to peace and reconciliation in the country. In spite of this, the fact that only the paramilitary groups negotiated was a shortcoming for the TJ framework. Within the Colombian armed conflict also other relevant armed actors took part, such as the left wing guerrillas FARC and EPL. The known nexus between the Colombian Army and the paramilitary was one of the reasons to explain the nature of the Justice and Peace Law and the interest of the government in its implementation, as explained below (Andreu-Guzmán, 2012: 13).

The Justice and Peace Law aimed at dealing with the demobilization of combatants from illegal paramilitary groups and victims' rights under the same legislation. The result was a reintegration program and judicial benefits for the ex combatants and poor answers to the victims regarding justice, reparation and realization of their rights, as victims' organizations, such as the National Movement of State victims, MOVICE and Comisión Colombiana de Juristas established (García-Godos and Lid, 2010: 489). Moreover, the truth became an exchange asset for reduction of the prison time for the demobilized. The victims were not given guarantees to claim their rights and the impunity provoked by this law was challenged by NGOs before the Constitutional Court found, by 2006, the unconstitutionality of some of the dispositions of the Law (Uppimny and Saffon, 2006b: 12).

In spite of the collective demobilization between 2002 and 2006 of 31.671 members of paramilitary groups (Agencia Colombiana para la Reintegración, 2012), the violence in Colombia was not reduced. Indeed, between 2002 and 2009 the number of IDPs increased by 2.412.834 persons (CODHES, 2010: 1). The surrendering of weapons did not have an impact on the conflict dynamics

in the victims' situation. The political and economic structures continued working under different names, plus other armed groups continued combating and there was no solution for the human rights violations especially for the IDPs (Andreu-Guzmán, (2012: 8).

Academics and victim's organizations questioned and criticised the continuous human rights abuses. Indeed, human rights organizations, academic institutions and NGOs became recognized for their services and support to the victims organizations. An example is the Comisión Colombiana de Juristas, which has given legal support to the victims and has brought several cases to the international courts. Through its investigation, consultative and advocacy service for internally displaced people, the Consultoría para los Derechos Humanos y el Desplazamiento (CODHES) has become a leading NGO. Finally, the research institution Centro de Investigación y Educación Popular (CINEP) conducts research of conflict and human rights violations (García-Godos and Lid, 2010: 495).

The experience and data of these organizations were not taken into account in the government's TJ process at the time. According to Eduardo Pizarro, the director of the CNRR, the official institution created to address the issues regarding victims under Law 975, the victims' organizations were being 'too extreme' and had 'no desire for reconciliation' (García-Godos and Lid, 2010: 495). Pizarro argued that the position of the victim's organizations was based against Alvaro Uribe's government more than on the TJ process.

Finally, in the deliberations around the constitutionality of the Law 975, the Constitutional Court, through its Ruling C-370 in 2006, announced that the overall Law was constitutional, 'although particular aspects of it were considered unconstitutional and thus needed to be interpreted and implemented differently' (García-Godos and Lid, 2010: 497). Among the unconstitutional aspects were the lack of 'guarantees for the satisfaction of victims' rights, and which therefore violated international and constitutional legal standards on the subject' (Uprimny and Saffon, 2006b: 12).

The Victims' and Land Restitution Law 1448/2011

Colombia's obligation to provide effective remedies to victims, including reparation, was consolidated in the Victims and Land Restitution Law 1448 of 2011. After almost 60 years of conflict in Colombia and under the TJ framework the victims are the subjects of a specific law that aims to satisfy their rights to justice, truth and reparation. The objective of the Victims' and Land Restitution Law is:

to establish a set of judicial, administrative, social and economic individual and collective measures in benefit of the victims (...) within the transitional justice framework that make possible the effective enjoyment of the truth, justice and reparation rights with guarantees of no repetition, in the way that the victims condition is recognized and is dignified

through the materialization of their constitutional rights (Ministerio del Interior y de Justicia, 2011: 19).

In order to achieve the objective of Law 1448, five reparation measures have been established within the Law: land restitution, administrative reparation, rehabilitation, satisfaction and guarantees of no repetition (Ministerio del Interior y de Justicia, 2011). Land restitution is the core element of the process of reparation of victims since land dispossession has been a common element in the Colombian internal conflict, as explained in Chapter 1. Within this context it is crucial to have the institutional infrastructure for the implementation of the law for the victims to enjoy their rights (Sanchez, 2011: 16).

2.3. Reparations

The concept of reparations is fundamental in the transitional justice framework. Reparation starts from the states' responsibility for violations of human rights. According to the United Nations High Commissioner for Human Rights (2011:19):

States are responsible under international human rights law to guarantee the protection and preservation of human rights and fundamental freedoms at all times, in war and peace alike. The obligation of the State to refrain from any conduct that violates human rights, as well as the duty to protect those living within its jurisdiction, is inherent in this principle.

In this sense, and as it has been stated in 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, reparation is a state's responsibility: 'States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements' (UN, 2006:7).

Under these Principles the victims have the right to reparation:

(...) intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered (UN, 2006:7).

International treaties, conventions and instruments of human rights, such as the Rome Statute, are other parts of the international legislation (De Greiff and Duthie et al., 2009: 172).

The main objectives for reparation policies under TJ are: economic compensation, acknowledgement of the victims' suffering and prevention of the same violations in the future (Jaramillo, Giha and Torres, 2009:40). Moreover, these measures should be interrelated in order to be effective (De Greiff and Duthie et al., 2009:148). The state plays a fundamental role in implementing the international legislation on reparations and translates the mandates into local and feasible national legislation.

For scholars such as Casas-Casas and Herrera-Tolosa (2008:199), reparations in the transitional justice framework focused its interests mainly on the normative and judicial aspects. This priority is based on international treaties and principles, judicial processes, and programs for victims among others. However, the authors find this emphasis a trap to avoid addressing the political dynamics of the power relations between the actors involved in the process.

The implementation of reparation obligations can be limited according to the context. Nonetheless, the nature of international human rights instruments is universal. For instance, as De Greiff et al. explained (2005 as referred to in Jaramillo, Giha and Torres, 2009:8-9), in Colombia a guarantee of reparations in the ongoing conflict was impossible back in 2005, because only an armed group had demobilized and the number of victims continued growing. Furthermore, Law 975 was only seeking justice and truth for the victims of the paramilitary groups, which could deepen the injustice for the victims of other armed groups.

Another important aspect is the modality of collective reparations that includes reparation for a specific group or community that has suffered in their social, economic and cultural fabric. The difficulty of this type of restitution is the social alteration and displacement caused by the armed conflict (De Greiff and Duthie et al., 2009: 190). In the Colombian situation collective reparation is fundamental to the diverse minorities that inhabit the country such as the indigenous and afro-descendent communities.

On the other hand, among the possible positive effects that reparations can have on development the most important are: the strengthening of local governments, the creation and growth of civil society organizations, and alteration of power dynamics in local structures (Ibid.:184-194). A local rebalance of power is most likely to happen in conflicts that are over. The transition to a new democratic regime should guarantee land redistribution through restitution without any retaliation to the victims. Land restitution is a big challenge in countries such as Colombia.

Following the analyses of the International Center of Transitional Justice (ICTJ), one of the concepts that links TJ and land is the rule of law. According to one UN report on the rule of law and transitional justice in conflict and post-conflict societies the rule of law:

refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards (United Nations, 2004 as referred to in *ibid.*; 334).

The rule of law regarding land might be constrained due to the presence of armed groups or corruption in the local government institutions. Their influence on the practices in the state's institutions might perpetuate the human rights violations.

2.4. Land Restitution

The right to restitution of land is part of the reparation process in international law, under the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons, known as the Pinheiro Principles. These Principles are non-binding for states. Nevertheless, the Principles do have political weight since they were formally approved by the UN and are based in international, regional and national existing law. (COHRE, 2005: 19). According to Principle 2:

All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal (COHRE, 2005: 9).

Land restitution might be seen as a precondition for the return of IDPs (ICTJ, 2012: 4). Restitution of property provides the possibility of access to shelter, production activities and local integration. However, some studies show that if security conditions are not adequate the victims do not feel safe to return. According to Attanasio (2012:56), 'many victims do not want to return to their land for fear of being re-victimized again and/or the risk of losing the opportunities and social services obtained during the time they have been displaced'.

As well, Duthie (2011:45) stated that the presence of armed groups 'may create a serious obstacle to return and may be considered as a threat by potential returnees due to their past behavior, ethnic origin or lack of discipline. This is especially true where these forces have caused the displacement suffered by returnees, for example in Colombia'.

2.5. Social Exclusion

The definition of the term ‘social exclusion’ has a multidisciplinary approach depending on the uses of the term as Hilary Silver explained, from economic, social and class perspectives (Silver 1994, 532-535). According to the United Nations:

Social exclusion relates to a lack of access to social rights and prevents groups from receiving the benefits and protection to which all citizens should be entitled. Marginalization from social security derives from complex factors, including gender, ethnicity and the low status of groups within societies. This involves discrimination in education, employment practices, access to legal and medical services and access to information and social welfare (UNODC, 2009: 66).

The impact of social exclusion on development can be prolonged marginalization and lack of participation of certain communities in economic and social activities. As Kaushik Basu (referred to in De Greiff and Duthie, 2009: 178) explained:

once a group of people is left outside the system or treated as marginal over a period of time, forces develop that reinforce its marginalization. The group learns not to participate in society and others learn to exclude members of this group, and participator inequity becomes a part of the economic and societal ‘equilibrium’.)

Society also learns to maintain marginalisation of the excluded groups by stigmatizing them. In this sense the re-integration goes beyond restitution of assets, but also has to deal with past legacies in order to achieve real inclusion for the victims.

State efforts to address social exclusion also benefit the entire society by creating trust and confidence in government institutions. The possibility for groups of marginalized people to claim or exercise their rights thereby creates a clear path to peace and reconciliation.

The theoretical framework explained above defines relevant concepts for the analyses of the present research. Under a HRBA, key concepts of transitional justice, local legislation (i.e. Law 975 and Law 1448), reparation, land restitution and social exclusion, are all related to the Constitutional Court’s interventions and the enabling environment for Law 1448.

2.6 Concluding Observations

The state responsibility as duty bearer is a key element for the analyses of the Constitutional Court rulings and the Law 1448 under the HRBA. The state

obligation to realize human rights is evidently to be observed in the formulation and implementation of laws, policies, programs and plans that may affect the victims.

As the UN (2009:v) explained: ‘for transitional justice efforts to be effective, they must be human rights-based, consistently focusing on the rights and needs of the victims’. The centrality of victims in TJ is key to address their participation in the reparation process and their safety. TJ measures can:

... alleviate marginalization, exclusion, and vulnerability by bringing people and groups into the economy, recognizing and empowering them as citizens, and perhaps generating economic activity (Duthie, 2011: 20).

In Colombia reparation programs and land restitution are fundamental in achieving the objectives of the state about the realization of human rights in Law 1448. Under a HRBA, TJ mechanisms such as reparation and restitution are implemented to overcome past and present human rights violations. Amidst this picture, social exclusion is present as a structural problem that characterizes the history of Colombian afro-descents. The previous experiences addressed by the Constitutional Court, shows the roots of the challenges that Law 1448 and the TJ in general faces in Colombia. The situation of the Curbaradó y Jiguamiandó communities, as Salinas stated ‘might be the case where more lessons can be extracted to bring truth about the displacement and dispossession in order to formulate integral policies of land restitution and justice in the afro-Colombian collective territories’ (Salinas, 2009:2).

Chapter 3

Lessons Learned from the Constitutional Court Jurisprudence and the Enabling Environment of Law 1448

The Colombian Political Constitution of 1991 established the Constitutional Court. The Court is a bureau of the judicial branch aiming at safeguarding the integrity and supremacy of the Constitution. The functions of the Constitutional Court are, amongst others, to decide on the constitutional claims brought by citizens against laws and decrees issued by the government, and to review the judicial decisions related to claims issued by the citizens about the protection of constitutional rights (Constitutional Court, 2012).

Following a HRBA methodology, each of the Constitutional Court's rulings will be analysed on the basis of the four elements presented in Chapter 1: indivisibility of rights; participation of the communities; restitution and accountability; plus the government's answer to each. The lessons learned from the Court's judgements will be contrasted with the content of Law 1448 and the enabling environment for its implementation.

3.1. Sentence T025 of 2004: Unconstitutional Situation of IDPs

The adoption of Decision T025 of 2004 by the Constitutional Court was a response to hundreds of legal claims related to the ineffective reaction of the government to Law 387 of 1997, where elements of aid to the IDPs were established.

On the indivisibility of rights: social, political and economic

The Constitutional Court resolved that, due to the extremely vulnerable conditions of the IDPs, as well as the omission of the responsible authorities to provide appropriate and effective protection, the rights of this population had been violated. The Court referred to the right to dignity, life, integrity, equality, work, health, social security, education, minimum subsistence income, and special protection of elderly people, women and children. Their violation had occurred in a massive, prolonged and repeated manner, and represented a structural problem that affected all state policy: precarious institutional implementation capacity (Constitutional Court T025, 2004:24).

As Cepeda (2009: 31) explained, the Court declared the indivisibility of rights by referring to the rights simultaneously, without any privilege for any particular right. Accordingly, the state has the obligation to protect all rights (Constitutional Court T025, 2004: 52). The Court also stated that being in a displaced situation entails risks for the right to personal security:

since displacement involves specific risks, individualized, concrete, present, important, serious, clear and discernible, exceptional and disproportionate for several fundamental rights of those affected. For the interpretation of the scope of this right in the context of internal displacement, Guiding Principles 8, 10, 12, 13 and 15 are relevant (Constitutional Court T025, 2004:38, translated from Spanish).

On the participation of communities

The Constitutional Court identified a lack of inclusion of IDPs in the design and implementation of state policies that affect them. Specifically, the Court asked the state to allow IDP organizations to participate in an effective manner in the design of policies and projects, and to take their observations into account in the decision making process (T025, 2004:83).

Nevertheless, so far IDP participation is still not effective. Overcoming the unconstitutional state of affairs implies that organizations representing displaced people can have the opportunity to participate effectively.

On restitution: return and previous conditions

Decision T025 did not refer to restitution. However, the Court explicitly considered that the victims of a crime have the right to justice, truth and reparation from the perpetrator of the crime (Ibid.:85). This approach is in line with the gist of 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, that would be promoted by the United Nations only two years later in 2006.

In case of return, the state is required to allocate a budget for providing all necessary information to the IDPs, e.g. about the security and economic situation in the place of return, in order to guarantee a dignified return. Moreover, the Court asked the state to abstain from promoting the return if the lives of IDPs would be exposed to any risks (Ibid:26).

On accountability: the state as a duty bearer

According to Article 2 of the Political Constitution of Colombia (Constitución Política de Colombia, 1991), the state has the obligation to serve the community, guarantee the rights within the Constitution, and facilitate the participation of all citizens in the decisions that affect them.

The Constitutional Court declared the situation of IDPs unconstitutional. The state was found responsible for lack of action in addressing the IDPs' situation. The Constitutional Court showed figures to support this decision, such as that 92% of the displaced population had unsatisfied basic needs, 80% were poor and 49% lacked proper public services (Ibid:45).

The Court explained the state's lack of effective response to its obligations towards the IDP population by two main factors: the precarious institutional capacity to implement policies; and insufficient allocation of resources (Ibid.:51). Coordinated action from the authorities, budgetary allocation and other adjustments were required.

In fact, the Court demanded solutions to the structural causes, including: administrative capacity, with a unique system of registration to overcome the sub-registration problems; budget allocation and a mechanism to get the resources needed; immediate assistance to the IDPs; programs to guarantee housing and economic stability; public policies to protect the human rights of IDPs and follow-up reports to submit to the Court.

The government's response

The Colombian government presented periodic reports following the Court's requirements, through Acción Social, showing that the minimum level of protection for the IDPs was achieved. However, the Attorney General's Office, the Ombudsman Office (as referred to Arango, 2009: 135) and IDP organizations indicated that this was not yet realised. Indeed, there is evidence of delay in the provision of humanitarian aid (Reales, 2009: 70).

The response of the government was criticised not only for not being effective as regards the IDPs' unconstitutional situation, but also for the actions taken to satisfy the Constitutional Court rather than the IDPs (Reales, 2009: 83). As Reales explained, the IDP organizations see this reflected in the amount of irrelevant information that the reports have, as well as the short term solutions opted for. The Court has passed diverse follow up rulings (Auto 176, 177 and 178 of 2005, and 218 and 266 of 2006) in order to review the state's answer to the original decision (Arango, 2009: 123).

Strengthening minority participation, particularly of the afro-descendant communities, was reflected in the Long Term Plan for afro-Colombian Communities 2006-2010, which was part of the National Development Plan 2006-2010 (Arango, 2009: 136). This plan aimed to include the afro-Colombian communities in the formulation of public policy, as well as to create an information system that would allow the state to quantify and characterize them to make them part of the government's assistance programs. Nevertheless, these measures are for future projects and it is unclear how to measure the differential rights of the afro-descendant communities (Arango, 2009: 138).

In the following years the government did not fulfil the basic conditions of protection in the returning process for IDPs. The official entities in charge did not give the attention needed to the security conditions for return and permanence of the IDPs (Ibid.: 138). The land access program, according to Arango, was a complete failure. By 2006, only 36% or 5.500 families had benefited from the turning over of land, out of 15.000 which was the government's

goal (Ibid.: 138). Thus, the goals established by the Constitutional Court were not reached.

3.2. Auto 005 of 2009: Protection for Afro-descendant Communities

The Auto 005 of 2009 refers to the protection of the rights of afro-descendant communities that have been victims of displacement under the unconstitutional state of affairs declared in the ruling T025 of 2004. The Court stated that the disproportionate impact of displacement on afro-Colombian communities had three main causes:

(i) a structural exclusion of Afro-Colombians that puts them at greater marginalization and vulnerability, (ii) the existence of mining and agricultural processes in certain regions that impose severe strains on their ancestral territories and has favoured their dispossession, and (iii) weak legal and institutional protection of collective territories of Afro Colombians, which has encouraged the presence of armed groups that threaten the black population to leave their territories (ODC et al, 2009b: 5).

This declaration of the Court paid special attention to emblematic cases such as Curbaradó y Jiguamiandó due to the complexity of the situations involved and the vulnerability of this population. The known threats, pursuits, murder attempts, and disrespect to their cultural symbols led the Constitutional Court to ordering the government to implement the measures called for by the ICHR (Auto 005, 2009: 69). Among this measures are the requirement for mechanisms to protect the lives and personal integrity of the communities, security guarantees for the communities to continue living in their ancestral territories and security conditions for the return of the IDPs (Auto 005, 2009: 56).

On indivisibility of rights: social, political and economic

The Court verified that displaced afro-Colombian individuals and communities are not treated in accordance with their status as subjects of special constitutional protection. The afro-descendants are holders of fundamental individual and collective rights, and deserve priority and differentiated attention and protection (Auto 005, 2009: 64). As an ethnic group, the afro-Colombian communities are entitled to fundamental constitutional rights such as: collective ownership of their ancestral lands; use, conservation and management of natural resources; and the realization of prior consultation in case measures affect them directly (Auto 005, 2009: 28).

The Court recognized the problematic situation that was exposed by UNHCR 2007 about the dual effect of the public policy recognition of the afro-Colombians' collective rights:

What at first seemed a real breakthrough in legislation, with tangible benefits for the black communities in the Colombian Pacific, now runs the risk of becoming a true nightmare. As just at the time they receive the legal recognition of being the owners of the ancestral lands of the Pacific (previously considered as vacant by the Colombian government) they have been subjected to processes of de-territorialisation to be displaced violently from their land by armed actors (UNHCR, 2007, as referred in to Auto 005, 2009: 29).

Furthermore, the Court affirmed that the displacement and loss of ancestral territories put afro-Colombian communities in a more vulnerable situation. This led to more inequality, marginalization and violation of their individual, economic, social, cultural and collective rights (Auto 005, 2009: 35).

On participation of communities

The Court found that the structural marginalization of the afro-Colombians is a crosscutting issue in relation to the humanitarian crisis of this population. The afro-Colombian communities have hitherto been excluded and/or under-represented in decision-making processes, amounting to systematic violations of their right to participate (Auto 005, 2009: 28).

The Court ordered the inclusion of legitimate afro-Colombian representatives in the process of designing a general plan of assistance for the afro-Colombian communities.

Restitution: return and previous conditions

Even though the ethnic territories are inalienable, non-lapsable and guaranteed against seizure, the Court declared that these guarantees have not been applied properly to prevent violations of the rights of afro-Colombian communities. This facilitated illegal sales, dispossession, and collective expulsion of ancestral lands that are in the process of collective titling. The government has not implemented specific measures aimed at achieving effective material restitution and guaranteeing the land rights of these vulnerable groups, nor were they allocated sufficient resources for sanitation and delimitation of the territories (Auto 005, 2009: 28).

The disproportionate effect of the displacement and the territory loss for the afro-decedent communities identified by the Constitutional Court goes beyond land rights. As the Court stated: 'the territory is an expression of their collective memory, their conception of liberty (...) The territory is a holistic concept that includes land, community, nature and the interdependence of the various components (Auto 005, 2009:33, translated from Spanish).

Accountability: the state as a duty bearer

The Court stated that the public policy lacks an integral approach to special treatment for the displaced afro-Colombian population and for protection against particular risks such as violation of collective land rights; destruction of social and cultural structure; worsening of poverty and humanitarian crises; worsening of racial discrimination. As well there is an evident violation of the rights to participation, state protection and lack of the duty to prevent forced displacement, food security and secure voluntary and returns in dignify conditions. This disproportionately impacted on the right of the displaced afro-Colombian population, while the Colombian authorities have constitutional and international obligations to provide special treatment, protection and care (Auto 005, 2009).

The Court established new functions for the government institutions involved. The order was to design a general plan for the protection and assistance of the afro-Colombian communities. In this way the government institutions could focus on special treatment of the afro-descendant communities in order to overcome the persistent unconstitutional state of affairs.

The Court also ordered the Minister of the Interior and Justice to design and implement a plan to identify collective ancestral territories inhabited mainly by afro-Colombians so as to determine: the legal status of these collective territories; the socioeconomic characteristics of the communities settled in these territories; the legal and factual situation of the community councils and local authorities constituted in such territories; the risks to which these territories are exposed; legal barriers for effective protection of these territories; and mechanisms to ensure effective restitution of territories whose ownership was transferred in violation of the collective territories law by illegal transactions (Auto 005, 2009: 60).

The Court recognized the special situation of the Jiguamiandó and Curvaradó communities with a series of provisional measures adopted in the resolutions of 6 March 2003, 7 November 2004, 15 March 2005 and 7 February 2006. The Court required the Colombian State to adopt and maintain mechanisms to: protect the life and personal integrity of the members and families of the communities mentioned; ensure the members of the communities the possibility of living in areas where they have traditionally inhabited, without coercion or threat, and to ensure the communities, their members and families who have been displaced a safe return to their homes (Auto 005, 2009: 56).

The government's answer

According to the report from the Observatory of the Presidential Program of Human Rights and International Humanitarian Law from the Vice Presidency of the Colombia, the implementation of a specific plan of care and protection for each of these communities has advanced (Observatorio DDHH, 2010: 49). However, no effective action has been implemented for the protection of the lives and prevention of further violations of human rights for the afro-Colombian communities.

The situation concerning the security and protection of afro-Colombians has not changed much since 2004. The violations of human rights persisted as the ICHR outlined in 2009, recognizing the victimization of the afro communities by:

massacres, targeted killings, disappearances, torture and cruel and inhuman treatment, sexual violence, harassment and threats from armed actors looking to expand control over the territory by forced displacement, terrorizing the civilian population, information on groups adversaries, and acts of "social cleansing" (OEA/Ser.L/V/II.134, March 27, 2009 as referred to in MOA, 2012: 35).

In Chocó department, the government admitted that the violence continued, aggravating the displacement of afro-Colombians. In one of the reports (Observatorio DDHH, 2010) to the Constitutional Court, the government noted that the reasons for massive displacement in Chocó department were related to violence. The causes found were confrontations between illegal armed groups (9 events), threats and intimidation by illegal armed groups (9), widespread fear among the population by the presence of illegal armed actors (8), armed confrontation of the army with illegal armed groups as part of the territorial recovery plan (4 events), kidnapping (2), attacks on populations (1) and massacres (1) (Observatorio DDHH, 2010; 39).

The government's Early Warning System (Sistema de Alerta Temprana), put in place in January 2010, recognized the presence of illegal armed groups in the territories of Curvaradó and Jiguamiandó river basins. It also identified the inadequate legal and institutional protection of collective territories and individuals, plus the undue intervention of some companies in internal processes of the local councils (MOA, 2012: 24).

3.3. Auto 18 May of 2010: Interim measures for the displaced population of Curvaradó and Jiguamiandó

This Constitutional Court decision is a follow up of the T025 of 2004 and Auto 005 of 2009, and aimed to adopt interim measures for the protection of fundamental rights of the afro-descendant victims of forced displacement in Curvaradó and Jiguamiandó in Chocó Department.

On indivisibility of rights: social, political and economic

The Court declared once again the systematic and continuous violation of the fundamental rights of the afro-Colombian population. Furthermore, the Court recognized the existence of risks to the lives and physical integrity of the communities' members in Curvaradó and Jiguamiandó and particularly of some community leaders. The Court expressed concern about the harassment,

accusations and persecution in the areas, and found it necessary to enact measures to prevent and protect life and personal integrity against possible further displacement (Auto of May 18, 2010: 27).

The Court also stated that the aim of the characterization and census of the displaced population is an essential precondition for measuring progress in the enjoyment of their rights and for the implementation of government plans (Ibid.: 10).

On participation of communities: Subtitle? If not, remove colon

The Court stated that participation as a right has two dimensions. As an instrumental right it is a requirement for the protection of other rights. It also is an indicator of effective enjoyment of constitutional rights (Ibid.: 13).

The Court also declared that the state must guarantee the participation of the afro-Colombians in this process, under ILO Convention No. 169. Article 2 of this Convention orders the state to be responsible ‘for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity’.

The Court also stated that participation of the communities will help with the territorial delimitation and population census, and might overcome the lack of transparency and effectiveness of the material restitution process of collective territories (Ibid.: 25).

On restitution: return and previous conditions

The Court recognized the lack of effective measures for the protection and restitution of collective land for the Curvaradó and Jiguamiandó communities. The Court based its decision on evidence that proved the delay in carrying out the Auto 05, 2009. So far, protective measures have been adopted for the land in two decrees previously issued. Finally, the Court identified the potential risk of making agreements on agricultural, livestock and mining exploitation in the collective territories of Curvaradó and Jiguamiandó communities that might obstruct effective land restitution (Auto of May 18, 2010: 27).

The Court stopped the implementation of the orders respectively from the Law Court of Chocó (October 2009) and the State Council (8 April 2010), about the return of land belonging to the collective territories of Curvaradó and Jiguamiandó to the communities. According to the Court, this process was impossible to carry out until the procedures defined in Auto 005 of 2009 would be satisfied (census of the land and characterization of the community) and the legal representation of communities was clarified (Auto of May 18, 2010: 31).

On accountability: the state as a duty bearer

The Court noted the delays in compliance with Auto 005 of 2009 and particularly in the protection plan, the characterization of the territory and its inhabitants, and the emergency humanitarian assistance specific for this ethnic group.

The Court requested the government the design and implementation the integral protection plan for communities and territories of Curvaradó and Jiguamiandó as defined in Auto 005 of 2009, and to give protection to threatened leaders (Auto of May 18, 2010: 31).

The Court also requested the control institutions of the state, Ombudsman Office and the Attorney's Office, and invited the international community (IHRC, ICRC, Peace Brigades International (PBI), UNHCR, UN agencies, European Union and friendly countries) to form commissions for tracking and verifying compliance with the Court orders, focusing on the preservation of the communities' rights and the process of land restitution (Auto of May 18, 2010: 32).

The government's answer

The government answered the Court in five reports from 2009 to 2011. The advances shown in the government reports referred to the activities previous to the implementation of the measures but no characterization or concrete protection plan has been carried out. According to MOA (2012), the association of afro-Colombian organizations, three years after the Court's order none of the government reports comply with the requirements established in Auto 005 (MOA, 2012: 14).

Regarding the situation of Jiguamiandó and Curvaradó, the government reports showed a fragmented set of actions by the official institutions and no effectiveness in implementation. In fact, as found by the Constitutional Court itself in one of the follow up rulings in May 2010, the fundamental rights of individual afro-Colombian communities in this area remain massively and systematically unknown, since the orders of Auto 005 of 2009 have not been fully met by the public authorities and the national government, or compliance lags behind (MOA, 2012: 24).

In 2010, the Constitutional Court strengthened constitutional protection measures for the communities of Curvaradó and Jiguamiandó ordering the government, among other measures, to complete the characterization census of the communities of the region that are covered by the collective title in Curvaradó and Jiguamiandó.

In March 2011, regarding the integral plan of prevention, protection and assistance of the afro-Colombians, the government indicated that there was an advance after the reformulation of the creation process. However, the Court established that the government statement was not based on objective infor-

mation that helped to verify these improvements, or schedule of implementation and goals (Auto 045 of 2012: 8-9).

About the specific plans to protect and assist the afro-Colombian communities requested in the Auto 005 of 2009, in March 2011 the government had indicated that there were advances. A proposal for five phases of consultation that would link national government, department and municipal authorities, representatives and organizations of displaced persons was made. However, by October 2011 no plans had been implemented in this regard (Auto 045 of 2012: 8-9).

In the reports of the Ombudsman Office about the actions taken to comply with the provisional measures ordered by the ICHR in relation to the communities of Curvaradó and Jiguamiandó, the Ministries of the Interior and Defence had presented reports with no precise information concerning the suitability of the means adopted (Auto 045 of 2012: 8-9).

On the subject of the characterization of the territory and the population requested by the Court in the Auto 005 of 2009, and again in the Auto 18 May, 2010, the Court has not been informed of the results of that process (Auto 045 of 2012: 11). This is essential for the construction of the integral plan for prevention, protection and assistance and to ensure the sustainability of the return process and material restitution of collective territories. Therefore the Court continues to find a serious delay by the government in complying with the orders (Auto 045 of 2012: 12).

3.4. The Victim's and Land Restitution Law 1448 of 2011 and its Enabling Environment

Law 1448 created new institutions for the support, assistance and reparation of IDPs. However, since the implementation started only in the present year, it is not possible to analyse the state's response in terms of implementation. On the other hand, as a result of the follow up to the Constitutional Court's IDP rulings, it is possible to identify the structural problems that might affect the implementation of Law 1448 based on previous experiences with IDPs, afro-descendant communities and emblematic cases such as Curvaradó and Jiguamiandó. The factors that cause displacement have not disappeared. The following structural problems are still part of the enabling environment for Law 1448, as identified through a HRBA analyses.

Violence: Ongoing armed conflict

The constant violation of human rights in Colombia has continued as an effect of the armed conflict. The implementation of Law 1448 faces several challenges due to the country being in the middle of ongoing armed conflict and not in a post-conflict scenario that usually contextualizes this kind of transitional justice initiatives.

In this sense, Law 1448 is confronted with the same risks as the rulings described from the Constitutional Court. For instance, the persistence of the unconstitutional state of affairs (2004) regarding IDPs is evidence of the importance of addressing the contextual conditions of displacement in order to protect collective and individual rights. As Green argued, the state's responsibility can not only be new legislation, otherwise Law 1448 would be another advance in the victims' legislation but with no factual impact on the enjoyment of human rights on part of the victims.

The causes of displacement had not disappeared in Colombia by 2011, when Law 1448 was approved. During 2011, the displacement figures showed that approximately 259,146 people were displaced (CODHES, 2011: 5). The massive displacements were caused mainly by the armed confrontation between the FARC, the groups created after the paramilitary demobilization, and the army (CODHES, 2011: 5). These confrontations aimed to achieve control over territory but generated constant threats to the right of the civilian population.

Regarding the security measures, the government has not provided an effective response yet. The Constitutional Court, in the follow up ruling Auto 112 of 2012, requested that the Minister of the Interior and Justice submit a report with a concrete response about the gaps and problems identified in the protection program. In addition, the Court asked the government to provide a comprehensible, coordinated and reasonable plan, with a clear timetable, deadlines and budget requirements and bring institutional capacity required (Auto 112 of 2012:168).

Social exclusion

Afro-descendant organizations also found structural exclusion having an influence on the displacement of afro-Colombians. The lack of access to civil, cultural, economic, political and social rights also affects family and cultural structure, the right to food security and the risk of worsening poverty and humanitarian crises (MOA, 2012: 28).

Another issue related to social exclusion that aggravates the situation of afro-descendant IDPs is racial discrimination. According to the Alternate Report to the Fourteenth Report presented by the Colombian State to the Committee for the Elimination of all Forms of Racial Discrimination, despite certain advances to eradicate racial discrimination, the current circumstances show that there is a lack of public policy measures and affirmative action to enable these ethnic groups to overcome their marginalisation (Observatorio de Discriminación Racial et.al, 2009a: 3).

Under a transitional justice framework social exclusion is a key element since the reparations aim to create conditions for the return of victims to the situation before the displacement occurred. This condition needs to be trans-

formed in order to avoid repetition of the same violations and to start a reconciliation process.

Private economic interests

Another reason for displacement is the economic interest of private landowners, mining projects and agribusiness that benefit from the dispossessed lands. According to CODHES (2011), evidence of the resistance against restitution of land by economic interests can be seen in the murder of fifty-four victims of dispossession and displacement in the last nine years by paramilitary groups. Sixteen of them were killed in the first 16 months of the Santos government in 2010 (CODHES, 2011: 14).

Furthermore, researchers such as Bello (2003:5) have argued that displacement in Colombia is linked to the accumulation of capital. Actors involved in violent confrontations such as guerrilla groups, army, paramilitary groups, land owners, drug traffickers, emerald dealers, businessmen, companies and translational corporations satisfy their interests with displacement and dispossession.

For instance, in Curvaradó and Juguamiandó in 1997 paramilitary groups carried out the displacement of afro-descendant communities and dispossession of their land which benefited the development projects of palm oil companies in the region. According to the declaration of the ex-paramilitary leaders to the authorities under the Justice and Peace Law 975, the nexus between displacement and big agribusiness projects was a strategy to control territories and expand private business (Salinas, 2011, 2).

The state recognized the acquisition of land in bad faith in the diagnosis of the situation of the municipalities inhabited by afro-Colombian communities, in response to the requirements of the Constitutional Court, in the department of Chocó, especially in Curbaradó and Jiguamiandó. The land claimed by the communities was entitled in 2000 to palm oil companies when many residents were displaced by violence (Observatorio DDHH, 2010: 47).

According to the diagnosis, the information collected in Chocó department, there are considered to be landowners of bad faith, those who buy or acquire in a violent manner collective lands which according to Law 70 of 1993 are inalienable. Sometimes owners of bad faith claim to have reached the territories before the titling process, contrary to the arguments of many rural afro-Colombians that have declared their permanence in the portions of land that are disputed (Ibid).

Limited participation of the victims in the design of the Law 1448

Law 1448 of 2011 established the right of victims to participate, and the corresponding duty of the state to include them in the designing of programs

and plans contributing to their implementation, execution, evaluation and enforcement (Contraloría General de la República et.al, 2012: 369).

One of the forms of participation of the victims is through the consultation process of the decisions that will affect an ethnic group, requested by the Constitutional Court especially with the minorities. According to a CODHES report, consultation for Law 1448 was undertaken with bilateral meetings with a few afro-descendant leaders. IDCM and MOA support this statement, affirming that afro-Colombian communities have reported that they have not been effectively consulted (WOLA, 2011 and UN OHCHR, 2010 as referred in IDCM, 2011: 34). In this sense the state violated at least Law 70 of 1993, ILO agreement 169 and the rulings of the Constitutional Court (MOA, 2012: 34). At the time of writing this situation has been presented to the Constitutional Court for consideration (CODHES, 2011: 44).

According to the report of the Colombian Control Institutions, i.e. the Attorney General's Office, Ombudsman Office and Comptroller General, progress on measures of protection for victims' organizations is urgent and would enhance the legitimacy of the state. In fact the afro-Colombians' organizations have decided not to continue engaging in reparation and land restitution claims, until the right to life and the civil and political rights are guaranteed (Contraloría General de la República et al, 2012:385 and 390).

Lack of a displacement prevention plan from the government

Law 1448 was established under the transitional justice framework. Consequently, the protection measures must be coherent, with measures of assistance and reparation and guarantees of non-repetition (De Greiff, 2005: 12). Measures of justice and truth are needed as well in order to prosecute and punish those responsible for the threats and human rights violations committed against the persons covered by protection programs.

From the previous section, the Constitutional Court has been insisting on the necessity of a prevention plan for displacement that can be implemented as soon as possible. Article 60 of Law 1448 contemplates the prevention policy and economic stabilization for the IDPs. However the implementation component has been the problem, not the design, as the Constitutional Court has proven before.

According to the Colombian NGO CCJ, in Colombia it is difficult to implement politics to prevent displacement, since usually the programs are designed to react to imminent risks and threats rather than to prevent human rights violations (CCJ, 2012b; 20). Even though this is not a justification for the lack of answer to the constant requirements of the Constitutional Court, it could explain the difficulties in implementing a program to prevent displacement.

Following the same line of reasoning, scholars such as Arango have argued that the ‘democratic security’ policy, which began under Alvaro Uribe’s government (2002-2010), has contradicted the protection of the civil population. The ‘democratic security’ policy is the military placing the civil society at risk (Arango, 2009: 138). Measures such as the creation of peasant soldiers, networks of informants, war zones, massive detention of persons and the offering of rewards for accusations could cause more displacement (Ibid.: 148.).

On the other hand, the protection of displaced leaders has been implemented through security schemes, in the best-case scenarios, with the provision of a vehicle and a bodyguard (CODHES, 2011: 48). These security measures hardly protect a person in an urban environment. The conditions are different in rural areas where access to transportation and communication are complex where it is possible to find at all. As well, this security scheme is not capable of protecting the lives of the community members and preventing massive displacements.

3.5. Restitution: no guarantees for return

In the restitution process there are no guarantees for the security of the victims. As the Constitutional Court stated in Auto 383 of 2010:

According to the same government figures, nearly ‘70% of displaced people have returned without prior verification of safety conditions and over 90% are relocated under these same conditions. Thus, the Court concludes that the general rule is that the returns are made without public order conditions that forced displacement having been improved, putting displaced people again at risk and forcing possibly displacement again’ (Auto 383, 2010: 50, translated from Spanish).

Another fundamental aspect for return is the environmental impact on the usurped land of the use from previous years. According to INCODER (2004) palm oil companies have cut vast extensions of forest and drained soils. UNDP (2008) reported that these companies have built roads and infrastructure into the collective territories to transport their products (Rodriguez et al., 2009: 120). As Rodriguez, Alfonso and Cavelier (2009) argued that these actions have changed the land use of the closest river area with serious implications to the food security of communities. The afro-descendant communities manage to survive mainly on subsistence farming. In this way, the activities for the returning communities will have to change from their traditional use of the land (Ibid: 120).

3.6. Conclusions of the Chapter

As was presented in the previous section, the constant violation of the rights of the afro-descendant communities evidenced by the Constitutional

Court shows the ineffective response of the Colombian government to the IDPs' situation over the last decade. In this sense the Colombian state is not complying with the right to life as elaborated in the Universal Declaration of Human Rights (United Nations, 1948); article six of the International Covenant on Civil and Political Rights, (United Nations 1966); and article one of the American Declaration of the Rights and Duties of Man that 'every human being has the right to life, liberty and the security of his person' (ICHR, 1948).

In the case of the IDPs, the Guiding Principles on Internal Displacement (United Nations, 1998) urge the state to protect IDPs in all phases of displacement. According to Principle 11: 'Every human being has the right to dignity and physical, mental and moral integrity' (United Nations, 2001).

The state's obligation, from international and national legislation, is to protect citizens, especially the most vulnerable ones, through its institutions by enacting policies, plans and projects. In Colombia, the most vulnerable populations are the victims of the internal armed conflict, displaced populations and the minorities, such as the afro-Colombians.

Within Law 1448, the responsibility of the state for victims, including the situation of IDPs, afro-Colombians and the communities of Curvaradó and Jiguamiandó is not assumed by the state. In fact, Law 1448 stated that there is no responsibility, explicitly in article 9. Quoting the Law:

the measures of assistance, services and reparation undertaken by the state, shall aim to help victims coping with their suffering and, as far as possible, to restore their rights. These measures shall be understood as transitional tools to respond and overcome the violations (...) Therefore, measures of assistance, services and reparations contained in the this Law, as well as all those that have been or will be implemented by the State with the aim of recognizing the rights of victims to truth, justice and reparation, do not imply the state's responsibility or that of its agents. The fact that the state recognizes the victims under the terms of this Law shall not be taken into account by any judicial or disciplinary authority as proof of liability of the state or its agents (Ministerio del Interior, 2011: 22, translated from Spanish).

From an HRBA perspective, this statement of the government contradicts the state's responsibilities to respect, protect and fulfil human rights. Furthermore, it contradicts the Constitutional Courts decisions that have found the government responsible for the lack of effective response to the IDPs' situation (T025, 2004, Auto 005 of 2009 and Auto of May 18, 2010, among others).

The Constitutional Court declared the unconstitutional state of affairs regarding the IDPs in sentence T025 of 2004, and this would only be overcome when the IDPs could enjoy the rights. Among these rights are access to hu-

manitarian assistance, access to land, displacement prevention and guarantees of non-repetition, truth, justice and reparation.

Analysed from an HRBA perspective, Law 1448 will have to face the challenges that previous legislation and rulings regarding IDPs and afro-descendant populations have faced before. The enabling environment exposed in this part of the paper shows that the conditions of the IDPs, afro-Colombians and the communities of Cruvaradó and Jiguamiandó are still waiting for an effective response by the government. The structural problems related to violence, private interests, marginalization, lack of participation, and guarantees to protect the population and to have restitution conditions need to be part of the state's approach in the implementation of the Law. As well, the state's accountability is fundamental in order to comply with human rights obligations under the transitional justice framework. In this sense, the roots of the conflict need to be addressed to find effective solutions and justice within the process of restitution. That is, not only concerning land restitution, but with it, also regaining the victims' trust in the state and its ability to respond.

Chapter 4

Overall Conclusions and Policy Recommendations

This research has demonstrated that Law 1448 represents a limited HRBA to land restitution on the basis of the security and protection obligation of the state to the afro-descendent population in Chocó. The obligation of the state to comply with the international human rights instruments has not been fully addressed in the Law. On the other hand, the exploration of the enabling environment for the implementation of the Law, has showed that HRBA elements such as indivisibility of rights, participation, land restitution and accountability are still far from the enjoyment of rights of the afro-Colombian communities in Chocó.

The theoretical framework provided support to analyses based on the key elements from the HRBA, TJ, reparations, land restitution and social exclusion, to understand the theoretic dimension of the problem and the analyses of the rulings and the Law 1448.

Under the categories chosen from the HRBA, the findings showed that the most important lesson regarding indivisibility of rights is, that the judicial mechanisms are not enough without government cooperation to guarantee the enjoyment of human rights. As the Ombudsman Office (as referred in to Arango, 2009: 145) stated: 'Judicial strategy must be complemented with a political strategy'. The political willingness of the state needs to be transformed into coherent policies with human rights perspective.

Concerning the participation of the victims, lessons showed that the historical lack of access to the benefits and protection of the state created a dynamic of marginalization towards the afro-Colombians. The way to incorporate their participation has not been fluid or effective. The state responses to the Constitutional Court showed the continued lack of participation promoted by the stat of this ethnic group despite the international and national legislation about it. The consequences are lack of confidence in the government institutions, laws, policies and plans by the most vulnerable groups. The process of land restitution in Curvaradó and Jiguamiandó proves that without legitimate and active participation of the community the efforts made by the states institutions in the process of land restitution are limited. In fact, participation needs to be prioritized to start overcoming marginalization and exclusion from the roots and to avoid the repetition of human rights violations.

Accordingly, under the TJ framework, the centrality of the victims in the process contributes to social integration. The participation of the victims in the implementation of the Law 1448 is a step forward for including their priorities

as a collective group and guaranteeing their dignity and security in the land restitution process.

With reference to restitution, under HRBA judicial reparation measures have to complement land restitution. Not only the judicial property rights or the return of the displaced population is enough to ensure the achievement of the enjoyment of rights. The special conditions of the ethnic groups need to be addressed from a HRBA perspective, focusing on the present as well as in the future conditions of the land and the community to preserve the group's existence.

In order to implement land restitution the prevention of displacement is fundamental, as the Constitutional Court has indicated. However, according to the Control Institutions report (2012) Law 1448 does not provide a service structure in preventing displacement (Contraloría General de la República et al, 2012: 369). As the Control Institutions warned, the closest element to prevent displacement within the Law 1448 refers to the notion of non-repetition. However these guarantees are probably impossible to comply in the on-going internal conflict. Other factors that influence the continuity of displacement are the historical unequal distribution of land, disadvantage of the small farmers before the landowners and the process of land titling.

Accountability of the state for the afro-Colombian communities situation is a central aspect under a HRBA. As explained by UNDP (2012), HRBA 'seeks to address the reasons why an individual do not enjoy rights. In this way it integrates a wider context of an individual in its analysis, aiming at addressing obstacles lying outside of a legislative framework'. Accordingly, the state as duty bearer has the responsibility of respect, protect and fulfil human rights. However, the Constitutional Court has stated several times, the responsibility of the Colombian state for the systematic and continued violation of the displaced afro-descendent communities rights without a effective response. First in Sentence T025 of 2004, declaring the unconstitutional state of affairs of the IDPs, second in the Auto 005 of 2009 recognizing and warning about the historical marginalization of afro-Colombians, and finally in the Auto 28 May of 2010, claiming for interim measures to protect the lives of the Curvaradó and Jiguamiandó communities. Law 1448 reflects the state lack of responsibility in before a judicial entity for human rights violatios.

The Colombian state responses to the Court has showed that the priority has focused in the planning and institutional distribution of duties, but not in the implementation to overcome the unconstitutional state of affairs of the IDPs, the marginalization of afro-descendent communities and the lack of land restitution of the communities of Curvaradó and Jiguamiandó. Even though a proper programming takes time to give an adequate response to the problems, the protection of human rights needs to be addressed urgently.

On the other hand, the analyses of the enabling environment of Law 1448 exposed the structural problems that have affected the implementation of the Constitutional Court requests in the last eight years. These problems can be classified in two types: Problems related to the internal armed conflict and problems related to social exclusion. In the first group are violent confrontations, economic private interests and land restitution. These are deeply related to lack of land reform in Colombia and the lack of consequences for the alliances of private businessmen with paramilitary groups. In this sense, the state's responsibility is evident, but at the same time is problematic. The power relations built through violence, corruption and weak institutions are difficult to tackle without a transition of the political, economic and social system.

Within the social exclusion type, the problems are related to the previous displacement conditions, such as the marginalization of the afro-descendent population. Before the displacement of the afro-Colombians in Curvaradó and Jiguamiandó, these communities were socially excluded and without confidence in government authorities. The lack of effective response of the state to the Constitutional Court and the ICHR has created more expectations on the Law 1448.

However, if the judicial environment changes, as in the TJ framework, but the structural problems and power relations are not affected, the implementation of Law 1448 will not be effective to prevent displacement and guarantee land restitution. The inclusion of the victims in the consultation mechanisms, security schemes, and the implementation protection plans is basic to start complying effectively with the afro-descendent communities change in the history of marginalization of the displaced afro-Colombian population.

Policy recommendations

Finally, the state of Colombia is bound by human rights obligations and thus, the government should take a HRBA to the problem. Therefore, the following policy recommendations seek to contribute with the implementation of Law 1448 from the HRBA:

- Law 1448 can be complementary to previous IDPs legislation but still needs to address the prevention of displacement. However since the internal conflict is going on, the measures should aim at least to alleviate the conditions of the IDPs with effective implementation of policies.
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- The displacement prevention should focus on the roots of the displacement and dispossession. The identification and punishment of the political and economic actors involved in the displacement and those who have benefited from the dispossession should complement the land restitution process.
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- The community participation and security measures for the afro-descendent population of Curvaradó and Jiguamiandó are needed for the characterization of the population. Institutional support and security

guarantees for the communities' participation shall be constructed in a secure environment.

- The security schemes should be constructed with the specific communities in order to respond to the necessities and conditions according the geographic and risks conditions towards overcoming the risks of claiming land in Colombia. Urban and rural measures should be different according to the situation of each area.
- Returning process should involve public policies, programs and plans related to security, income generation, gender, ethnicity, culture, among others in order to comply with the fulfilment of human rights.
- The state, in order to accomplish the realization of rights, needs to link development policies to the protection of human rights and land restitution. Only through the integration of public policies aimed to redress the victims' rights violations, and the protection of human rights can Law 1448 be effectively implemented in the communities of Cruvaradó and Jiguamiandó. Otherwise, Law 1448 might turn out to be just another attempt to satisfy the Constitutional Court and the international Community as in the past without providing a effective response to the victims.

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