ABHANDLUNGEN / ARTICLES

Post-Conflict Land Restitution: The German Experience in Relation to Colombian Law 1448 of 2011

By *Dr. Björnstjern Baade*[*]

Abstract: This article compares the legal regimes of land restitution that were enacted in Germany, after World War II and again after the Cold War, with those enacted in Colombia after a decades-long armed conflict, in which many people lost their land. Many parallels can be drawn between these experiences: both countries decided to restitute land in an effective manner but also excluded groups of victims – which was accepted by both countries' constitutional courts. Important differences emerge regarding the function of restitution for the resolution of the conflict and in its implementation in practice. These differences are owed to the different origins and causes of the conflicts, and to different circumstances prevailing at the time of restitution. It can be clearly shown that post-conflict restitution of land is very context-sensitive. Neither in Germany nor in Colombia were the objectives of the restitution regimes, individual justice and further policy aims, fully achieved. Nevertheless, the considerable extent to which justice was indeed attained by restitution should not be talked down or diminished.

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A. Introduction

In the last century, many people in Colombia and Germany were unlawfully deprived of their land, and both countries have been faced with the challenge to provide redress for this injustice. The circumstances could not have been more different, however, at the time when property was dispossessed and at the time at which restitution regimes were enacted. This

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article seeks to compare the restitution of land in Germany – after World War II and after the Cold War – with Colombian Law 1448 of 2011, the Victims and Land Restitution Law.[1]

In each case, Germany and Colombia decided to restitute land to victims in an effective manner and to provide compensation in money only subsidiarily. But, in both countries, certain groups of victims were excluded from restitution (B.). Restitution sought to address the injustice that had been done to individuals, but it was also meant to play a role in the resolution of the conflict as a whole (C.). With regard to the specific features of each conflict, specific social and peace-related aims were pursued with the legislation that created a right to restitution. It will be assessed how this legislation was implemented in practice and what effect this practice of restitution had on society and on the resolution of the conflict (D.). Finally, concluding observations will be made on the role and prospects of post-conflict land restitution in general (E.).

B. The Principle of Effective Restitution and its Limits

Germany as well as Colombia experienced conflicts that had a deep impact on them and which deprived millions of their land.

I. Germany

In Germany, the question of restitution came up after the end of World War II in 1945 and once more during the accession of the German Democratic Republic (GDR) to the Federal Republic of Germany in 1990, i.e. the Reunification of East and West Germany.

1 *Methodological note*: This article follows a functionalist approach to comparative law, which analyzes the purpose of the legal regimes that are compared, their function for the solution of societal problems and conflicts of interest. See e.g.: *Uwe Kischel*, Comparative Law, Oxford 2019, Chapter 3, margin number (hereafter: MN) 1 et seq., MN 179 et seq.; or *Vicki C. Jackson*, Comparative Constitutional Law: Methodologies, in Michel Rosenfeld and András Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law, Oxford 2012, pp. 62-66. *Note on terminology and subject matter*: In order to improve readability, the terminology of the laws under investigation is unified, as far as the terms' meaning is adequately captured. "Dispossession" is used as a general term to describe an involuntary loss of property or control over it, no matter who caused it. Only dispossession by a state will be called "expropriation". The loss of other rights connected to land, e.g. of tenants or concerning mortgages, is not subject of this article. "Restitution" is the act of returning property rights and control of dispossessed or expropriated land to its former owner. Those having been dispossessed or expropriated will be referred to as "victims". "Land" refers to real, immovable property.

1. After World War II

Shortly after the end of the War, inter-state reparations for war damages,[2] as well as financial compensation for[3] and restitution of property to those persecuted in Nazi Germany were discussed. Since the Western Allies[4] USA, Great Britain and France could not agree on a uniform regulation, they passed individual laws, each for its zone of occupation[5] as well as the Western Sectors of Berlin.[6] According to these restitution laws, property that had been dispossessed for reasons of race, religion, nationality, worldview (*Weltanschauung*) or for opposing national socialism had to be restituted.[7] Anyone dispossessed either by an act of state or by certain private transactions that had, for example, only come about because of threats was entitled to restitution.

All restitution laws enacted by the Western Allies presumed a private sale of property to be a dispossession that needed to be reversed if the victim was persecuted in Nazi Germany – either personally or as a member of a group –, unless it could be shown that an appropri-

2 See for an overview *Herbert Geisler*, Restitution nach der Wiedervereinigung, Regensburg 2000, pp. 21 et seq., 54-55.

3 Federal Compensation Law (*Bundesentschädigungsgesetz*) of 18 September 1953, BGBl. I 1387; see for an overview *Geisler*, note 2, pp. 82 et seq.

4 Or Western occupying powers – *Besatzungsmächte* – as they were often referred to in Germany.

5 Germany was partitioned into four zones of occupation and Berlin into four sectors, to be administered by the four victorious powers of WWII. Originally meant to administer Germany together as a coherent territory, the beginning Cold War quickly led to a separate administration of the Western zones and sectors, which cooperated or at least coordinated in many affairs, and the Eastern zone and sector under Soviet administration. For a concise overview, see e.g.: *Mary Fulbrook*, A history of Germany, 1918 - 2014: the divided nation, Chichester 2015, pp. 113 et seq.

6 For a good overview see *Geisler*, note 2, pp. 70-81. For details on legislative history see *Walter Schwarz*, Rückerstattung nach den Gesetzen der Alliierten Mächte, München 1974.

7 Art. 1 and 2 Law No. 59 of 10 November 1947 (ABl. der Militärregierung Deutschland – Amerikanisches Kontrollgebiet [Military Government Gazette – US Zone of Control], Ausgabe G, 1) (hereafter: US Restitution Law or US-RL); Art. 1 and 2 Law No. 59: "Rückerstattung feststellbarer Vermögensgegenstände an Opfer der nationalsozialistischen Unterdrückungsmaßnahmen" (ABl. der Militärregierung in Deutschland – Britisches Kontrollgebiet [Military Government Gazette – UK Zone of Control] – 1949, No. 28, p. 1169) (hereafter UK Restitution Law or UK-RL); Art. 1 and 2 Regulation No. 120 of 10 November 1947 "über Rückerstattung geraubter Vermögensobjekte", amended by Regulation Nos. 156, 186, 213 (Journal Officiel [Military Government Gazette – French Zone of Control] 1949, p. 2060) (hereafter: French Restitution Law or F-RL); Art. 1 and 2 BKO [Berlin Kommandantura Order] (49) 180 of 26 July 1949: "Rückerstattung feststellbarer Vermögensgegenstände an Opfer der nationalsozialistischen Unterdrückungsmaßnahmen" (hereafter: Berlin Restitution Law or Bln-RL); see on this *Peter Goetze* et al., Die Rückerstattung in Westdeutschland und Berlin, Stuttgart 1950, pp. 15-16; critical with regard to the design of these regulations: *Schwarz*, note 6, pp. 44-45, 295 et seq., 376. All of the regulations cited can be found in: Rückerstattungsrecht, 1965 München/Berlin.

ate price was paid for the property.[8] From a certain date in 1935 or 1938,[9] the laws strengthen this presumption because the acts and climate of persecution intensified and put more pressure on those persecuted to sell their property and flee: the person acquiring the property from this point in time had to prove that the transaction would have taken place even without national socialist persecution, or that he or she had "in an exceptional manner and with success" cared for the financial interests of the persecuted person, e.g. by transferring assets abroad. The restitution laws (re-)assigned claims of persecuted Jews who had died heirless or for whom no application was filed (in time) to legally recognized Jewish "successor organizations" which could then claim restitution. This arrangement was intended to prevent the German state which had committed the crimes that caused dispossessions from profiting[10] from these crimes.[11] In practice, restitution claims had to be taken up by these organizations to a considerable extent.[12]

In East Germany, a completely different path was chosen. During the time of Soviet occupation from 1945 until 1949, and also after the GDR's founding in 1949, no restitution of property took place,[13] apart from two small exceptions[14]. The ruling state party of the GDR, the Socialist Unity Party (*Sozialistische Einheitspartei Deutschlands* – SED), internally discussed the possibility of restitutions, but never to the extent practiced in West Germany.[15] A "capitalist" restitution policy, which would have included enterprises and agricultural land, was out of the question; so was any restitution to persons living abroad (in the West).[16] Such a kind of restitution would have been at odds with the socialist concept of property as understood by the SED.[17] Why even private homes and small businesses were not restitut-

8 Art. 3 und 4 US-RL; Art. 3 UK-RL; Art. 3 Bln-RL; Art. 3 F-RL.

9 Art. 4 (1) US-RL; Art. 3 Abs. 3 UK-RL; Art. 3 Abs. 3 Bln-RL: enactment of racist Nuremberg Laws on 15 September 1935; different regarding the point in time and the specific conditions Art. 3 F-RL, which stipulates that after the enactment of the third regulation on the Reich Citizenship Law of 14 June 1938 an appropriate price no longer rebuts the presumption.

10 Under general German law, the inheritance of a person who dies heirless falls to the state: Section 1936 Civil Code (*Bürgerliches Gesetzbuch* – BGB).

11 Art. 10 US-RL; Art. 8 UK-RL; Art. 9 Bln-RL; Art. 9 F-RL; see on this *Hermann-Josef Brodesser* et al., Wiedergutmachung und Kriegsfolgenliquidation, München 2000, p. 12.

12 *Schwarz*, note 6, p. 392.

13 *Franz Jürgen Säcker / Bernd Hummert*, in: Franz Jürgen Säcker (ed.), Vermögensrecht, München 1995, Vor § 1, MN 2.

14 Order No. 82 of the Soviet Military Administration restituted inter alia property of Jewish communities: *Jan Philipp Spannuth*, Rückerstattung Ost: Der Umgang der DDR mit dem „arisierten" Eigentum der Juden und die Rückerstattung im wiedervereinigten Deutschland, Essen 2007, pp. 85-88. Only in the state (or *Land*) of Thuringia a restitution law existed before the founding of the GDR, but it only applied to expropriations by the state, was rarely applied and abolished after a few years: *Geisler*, note 2, p. 14; *Wolfram Försterling,* Recht der offenen Vermögensfragen, München 1993, pp. 54-57; for a more positive assessment see *Spannuth*, ibid., p. 128f.

15 *Spannuth*, note 14, pp. 47-61.

16 Ibid., pp. 47-61.

17 Ibid., p. 63; *Geisler*, note 2, p. 48.

ed, however, remains unclear.[18] Part of the explanation may be that the SED did not consider the GDR to be a successor state to Nazi Germany[19] and mainly deemed reparations necessary with regard to the Soviet Union.[20] Victims of the Third Reich were, however, compensated with additional social benefits, such as housing privileges or a higher pension.[21]

2. After Reunification

When the GDR acceded to the Federal Republic of Germany on 3 October 1990, its socialist economy had (though the various legal constructs of "socialist property") placed basically all socially relevant property under state control, in particular agricultural and industrial means of production.[22]

During the time of Soviet occupation between 1945 and 1949, the "democratic land reform" expropriated, without compensation, about a third of all agricultural and forestry land.[23] The industrial enterprises expropriated during this land reform are said to have accounted for about 40 % of 1948's industrial production.[24] Officially, these expropriations were directed against war criminals, national socialists, and owners of large areas of land; in reality, the expropriations affected many others.[25] No recourse to courts was available against these measures.[26]

From 1949, in the GDR, some expropriations were conducted with compensation. But many property owners were also pressured to sell their property by regulatory measures meant to force owners to join state "collectives" that managed in common the land, and at

18 *Spannuth*, note 14, p. 164.

19 *Geisler*, note 2, p. 47.

20 *Spannuth*, note 14, p. 65.

21 Ibid., pp. 61, 163-164; *Geisler*, note 2, p. 48.

22 See in detail *Klaus Stern*, Das Staatsrecht der Bundesrepublik Deutschland, Volume V: Die geschichtlichen Grundlagen des deutschen Staatsrechts, München 2000, pp. 2125 et seq.; Federal Agency for the Settlement of Unresolved Property Issues (*Bundesamt zur Regelung offener Vermögensfragen* – BARoV), Offene Vermögensfragen: Versuch einer Bilanz, Berlin 2001, p. 29; see on the socialist concept of property in the GDR *Kurt Kiethe*, Investitionen, Entschädigung und Restitution in den neuen Bundesländern, in: Hermann Clemm et al. (eds.), Rechtshandbuch Vermögen und Investitionen in der ehemaligen DDR, Volume 1, München 2017, MN 76 et seq.

23 BVerfGE 84, 90 (98); BT-Drucks. 11/7831, pp. 1-3; *BARoV*, note 22, pp. 9-10. See also *José Martínez*, Paz territorial y propiedad: Experiencias alemanas y europeas, in: Bernd Marquardt / José Martínez / Mariela Sánchez (eds.), Paz territorial y tierras. Una mirada crítica frente a los acuerdos de la Habana, Bogotá 2018.

24 Ibid.

25 See on this *Säcker/Hummert*, note 13, Vor § 1, MN 3-5; *Johannes Wasmuth*, Strafrechtliche Verfolgung der „Großgrundbesitzer", „Juncker" und „Feudalherren" mit Höfen über 100ha im Rahmen der „demokratischen Bodenreform", Zeitschrift für Offene Vermögensfragen 20 (2010), p. 289.

26 See also BVerfGE 84, 90 (97); 112, 1 (3-6).

times tools and machinery.[27] The property of those that had fled the GDR, of foreigners, and of those who were deprived of their citizenship by denaturalization was expropriated without compensation or otherwise placed under state administration even after 1949.[28] The Soviet occupation and the GDR thus not only failed to restitute property to victims of the Third Reich, but once again – for completely different reasons – dispossessed property to a considerable extent.

At the time of the Reunification of East and West Germany, all of this was perceived as a grave injustice in the East and the West,[29] which led to the adoption of an Act for the Settlement of Unresolved Property Issues (*Vermögensgesetz* – Property Act).[30] Having been agreed on in the Treaty on Reunification between the Federal Republic and the GDR, the Property Act was passed by the first and last democratically elected Parliament of the GDR on 23 September 1990. After Reunification, it remained in force as federal law of the reunited German state.[31] For expropriations without compensation and for other de-facto dispossessions of property in the GDR (i.e. from 1949 until 1990), the Property Act primarily gave victims a right of restitution (Section 3 Property Act) and only subsidiarily a right to compensation in money.[32] Victims could, however, opt for monetary compensation instead of restitution if desired (Section 8 Property Act). Since (almost) no restitutions had taken place in this regard in the GDR,[33] land that was dispossessed in Nazi Germany as a conse-

27 Legally, they did not lose their property but their right to dispose of it, see *Säcker/Hummert*, note 13, Vor § 1, MN 6-11; see also *George Last*, After the "Socialist Spring": Collectivisation and Economic Transformation in the GDR, New York 2009, pp. 3 et seq.

28 *Säcker/Hummert*, note 13, Vor § 1, MN 12; *BARoV*, note 22, pp. 10-19; *Gerhard Fieberg / Harald Reichenbach*, in: Gerhard Fieberg et al. (eds.), VermG: Gesetz zur Regelung offener Vermögensfragen, München 2016, Einführung, MN. 19 et seq.

29 See on this e.g. *Martin Redeker*, Zehn Jahre Wiedervereinigung – Bewältigung eigentums- und vermögensrechtlicher Fragen, Neue Juristische Wochenschrift 53 (2001), p. 3031; *Johannes Wasmuth*, An welchen rechtsstaatlichen Fehlleistungen sind weite Bereiche der wiedergutmachungsrechtlichen Aufarbeitung des SED-Unrechts systematisch gescheitert? – Teil 1: Überblick, Zeitschrift für Offene Vermögensfragen 21 (2011), p. 190.

30 Art. 9 (2), Annex II Ch. III B Part I No. 5 of the Reunification Treaty.

31 Annex II Reunification Treaty, Ch. III B Part I No. 5.

32 *Säcker/Hummert*, note 13, Vor § 1 MN 26, 40; *Stern*, note 22, p. 2138. This principle of restitution was necessary to prevent an unjustified unequal treatment between those who had been formally expropriated, and were therefore no longer the owners of their property, and those "merely" dispossessed de facto, which had formally remained owners of their land: *Fieberg / Reichenbach*, note 28, MN 43.

33 The Federal Republic even assured the Western Allies that it would do so in a letter of 27/28 September 1990, see BGBl. II 1990, 1386; see on this *Hermann-Josef Rodenbach*, Das deutsche Recht der offenen Vermögensfragen: Sterbendes Recht oder Vorbild für andere Länder?, Zeitschrift für Offene Vermögensfragen 22 (2012), p. 318. See also BT-Drucks. 11/7831, p. 3; *Spannuth*, note 14, p. 231.

quence of national socialist persecution was to be restituted, too (Section 1 (6) Property Law).[34]

II. Colombia and the Victims and Land Restitution Law (Law 1448 of 2011)

Since at least the 1960s, a non-international armed conflict developed in Colombia between the Colombian state and leftwing armed groups (in particular the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* [FARC or FARC-EP] and *Ejército de Liberación Nacional* [ELN]); paramilitary rightwing groups also intervened in this conflict.[35] In 2017, the number of internally displaced persons was an estimated 7 million people.[36] Many of those displaced had been dispossessed of their land over the years by various actors.[37]

Even before the Colombian state and FARC reached a peace agreement in 2016,[38] the Colombian Congress passed Law 1448 of 2011 "whereby measures of care, assistance and comprehensive reparation are issued to the victims of the internal armed conflict", commonly referred to as the Victims and Land Restitution Law (*Ley de Víctimas y Restitución de Tierras*).[39] Before the law was passed, however, the Colombian Constitutional Court had determined in 2004 that an unconstitutional state of affairs (*estado de cosas inconstitucional*) existed with regard to the state's duty to protect those who were displaced.[40] The

34 Concerning evidentiary matters the law referred to the Restitution Law for West Berlin: *Spannuth*, note 14, p. 191.

35 For a short introduction into the origins of the conflict in the *Violencia* of the 1940s and 1950s and the emergence of left- and rightwing armed groups since the 1960s see, with further notes *David L. Attanasio / Nelson Camilo Sánchez*, Return Within the Bounds of the Pinheiro Principles: The Colombian Land Restitution Experience, Washington University Global Studies Law Review 11 (2012), pp. 13-14.

36 *Jenniffer Vargas / Sonia Uribe*, State, war, and land dispossession: The multiple paths to land concentration, Journal of Agrarian Change 17 (2017), p. 749; *R. Albert Berry*, Reflections on injustice, inequality and land conflict in Colombia, Canadian Journal of Latin American and Caribbean Studies 42 (2017), pp. 277-278; *Catherine C. LeGrand, Luis van Isschot / Pilar Riaño-Alcalá*, Land, justice, and memory: challenges for peace in Colombia, Canadian Journal of Latin American and Caribbean Studies 42 (2017), p. 259.

37 *Rocío del Peña-Huertas* et al., Legal dispossession and civil war in Colombia, Journal of Agrarian Change 17 (2017), p. 759: at least 2 million hectares; *Amnesty International*, A Land Title is Not Enough, London 2014, p. 5: 8 million hectares; *Berry*, note 36, pp. 280-281.

38 The disarmament of FARC was completed on 27 June 2017: *LeGrand / van Isschot / Riaño-Alcalá*, note 36, p. 260.

39 Ley 1448 de 2011 por la cual se dictan medidas de atención, asistencia y reparación integral a las víctimas del conflicto armado interno y se dictan otras disposiciones, Diario Oficial No. 48.096 de 10 de junio de 2011. The restitution of Land to indigenous and afro-Colombian communities is regulated separately in Decrees 4633 and 4635 of 2011; see on these *Amnesty International*, note 37, p. 26.

40 Corte Constitucional de Colombia, Decision T-025/04; see on this *Manuel José Cepeda Espinosa / David Landau*, Colombian Constitutional Law, Oxford 2017, pp. 178-190.

Law grants victims of the armed conflict a right to truth, justice and compensation, including a guarantee of non-repetition (Art. 1). To those who were dispossessed of their land in connection with the armed conflict, it accords a right to restitution (Art. 75). Monetary compensation is available only exceptionally if restitution is impossible for one of the reasons stated in the law and, additionally, no equivalent other plot of land is available as a substitute (Art. 72, 73 No. 1). A right to freely choose either restitution or compensation in money does not exist.

Law 1448 assumes victims to act in good faith and therefore applies a lower standard of proof for them to show the damage they suffered (Art. 5). In court proceedings concerning the restitution of land, summary evidence (*prueba sumaria*)[41] given by the claimant reverses the burden of proof (Art. 78). Additionally, several presumptions apply in favor of the victim: it is presumed that any transaction to sell the land took place without consent, or that it had an illegal cause, if the victim sold its property to someone who was found guilty on criminal charges for drug trafficking or as a member, collaborator or financier of illegal armed groups (Art. 77 No. 1 and 2 (c)). The same applies when the property sold is located in an area which at the time suffered from general violence, collective forced displacement or grave human rights violations (Art. 77 No. 2 (a)),[42] and when the land was sold below 50 % of its market value (Art. 77 No. 2 (d)). Moreover, it is presumed that there was either no consent or an illegal cause for the sale of the land when, after hostilities were conducted in an area, the property of land in that area was concentrated in the hands of one or only a few persons and the land was put to entirely different use (Art. 77 No. 2 (b)). If one of these presumptions is not rebutted by evidence to the contrary, the transaction is null and void (Art. 77 No. 1 and No. 2 (e)).

III. Temporal Limitations

This principle of effective restitution was, in Germany as well as in Colombia, only applied to a certain time frame. The unequal treatment of different groups of victims that these limitations caused was subject to constitutional judgments in both countries, which show remarkable parallels.

1. Colombia

Law 1448 awards different forms of compensation depending on the time at which the damage was done. Restitution of land cannot be claimed if it was dispossessed before

41 The standard of summary proof is met when the claimant advances sufficient evidence to convince the court, the difference to the normal standard of proof being that the court does not take into account objections of the opposing party, see Corte Constitucional de Colombia, Sentencia C-523/09, § 6.

42 See also *Jon D. Unruh*, Crafting land restitution in Colombia: Optimizing a legal, social and institutional framework, Land Use Policy 80 (2019).

1 January 1991 (Art. 75). Whoever became a victim within the meaning of Art. 3 between 1 January 1991 and 1 January 1985, can claim monetary compensation for grave human rights violations that are connected to the armed conflict (Art. 3, 25 and 28).[43] Whoever suffered damages before 1 January 1985 can only claim symbolic compensation (Art. 3 § 4), which may include the preservation of historic memory, a guarantee of non-repetition, public recognition of the crimes, a public request for forgiveness, and the restoration of the dignity of the victims (Art. 141).

This temporal differentiation, which Amnesty International criticized as a "hierarchization" of victim groups,[44] was the subject of a constitutional complaint (*demandas de inconstitucionalidad*).[45] The complaint argued that this differentiation ignored the historical reality of the armed conflict which had existed at least since the 1960s, was therefore arbitrary and in violation of the principle of equality.[46]

In its judgment, the Colombian Constitutional Court ruled that the time frames used in Law 1448 would only be unconstitutional if they had been chosen in a way that is manifestly arbitrary (*manifiestamente arbitraria*).[47] Congress, being the legislative body, enjoys a margin of appreciation (*margen de configuración legislativo*), in particular if the rule under consideration is the result of an intensive parliamentary debate.[48] In contrast to the opinion of some NGOs, the Court accepted that fiscal reasons are a legitimate aim which could justify not bestowing comprehensive compensation that includes restitution and/or compensation in money on all victims.[49] Expectations might otherwise be raised that would be impossible to meet because of limited state resources.[50]

Excluding land that was dispossessed before 1 January 1991 from restitution was held to be constitutional according to these standards. This date was justified because only from this point forward displacements and dispossessions became an important strategy for armed groups, and thus most persons dispossessed would in fact have a right to restitution. The Court also noted that dispossessions were only being officially registered since that point in time and therefore fact-finding for prior dispossessions would entail more difficulties. Finally, the adoption of a new constitution at that time, and other developments, were considered valid arguments. The date was consequently neither chosen arbitrarily nor did it

43 See on this Inter-American Commission of Human Rights, Truth, Justice and Reparation: Fourth Report on Human Rights Reparation in Colombia, 31 December 2013, OEA/Ser.L/V/II, Doc. 49/13, § 484; *Amnesty International*, Colombia: The Victims and Land Restitution Law, London 2012, p. 7.

44 *Amnesty International*, ibid., p. 7; *Amnesty International*, note 37, pp. 31-32, 57, arguing for the limitation's abolishment.

45 Art. 241 No. 4 of the Colombian Constitution.

46 Corte Constitucional de Colombia, Sentencia C-250/12, II.2.

47 Ibid., II.9.1.

48 Ibid.

49 Ibid.; see however the interventions (*intervenciones)* of some NGOs ibid., II.2.

50 Ibid., II.9.1.

pursue a legitimate aim in a disproportionate manner.[51] The difference made by Law 1448 between groups of victims was therefore justified and did not violate the right to equality.

2. Germany

Allied restitution laws post-WWII covered the entire period of the Third Reich from 1933 to 1945 but they also stipulated stringent deadlines:[52] the US law, for example, required the necessary applications to be filed within a year.[53] The other occupying powers' restitution laws provided for similar deadlines.[54]

The Property Law passed after Reunification made provision for restituting property dispossessed between 1949 and 1990,[55] but it excluded any expropriations that had taken place during the Soviet occupation between 1945 and 1949 from a right to restitution (Section 1 (8)(a) Property Law). This temporal limitation was likewise the subject of a constitutional complaint (*Verfassungsbeschwerde*)[56] which also argued a violation of equality rights.[57]

An important difference has to be noted though: this temporal limitation was not only laid down in the Property Law but had also been enshrined in Art. 143 (3) of the reunited German state's constitution, the Basic Law. This new article of the constitution had been agreed on in Art. 4 No. 5 of the Reunification Treaty. The purpose of entrenching this time limit on a constitutional level was to restrict scrutiny by the Federal Constitutional Court of (West) Germany: a violation of the right to equality in Art. 3 Basic Law could not be argued, because according to Art. 79 (3) of the Basic Law, constitutional amendments need not comply with the entire constitution but can only be measured against the principles enshrined in Art. 1 (human dignity) and 20 (in particular, democracy and rule of law). Reading these provisions together, the Court found them to guarantee at least the fundamental elements of the right to equality (*Grundelemente des Gleichheitssatzes*), i.e. a prohibition of arbitrary unequal treatment.[58]

51 From a German perspective, the simultaneous application of a prohibition of arbitrariness and of the principle of proportionality is noteworthy Corte Constitucional de Colombia, Sentencia C-250/12, II.9.2.; see also *Attanasio / Camilo Sánchez*, note 35, pp. 30-31.

52 *Schwarz*, note 6, pp. 265-266.

53 Art. 56 US-RL.

54 Art. 13 (1) F-RL; Art. 50 (2) Bln-RL; Art. 48 UK-RL.

55 *Säcker/Hummert*, note 13, Vor § 1, MN 26, 40; *Stern*, note 22, p. 2138.

56 See *Lothar Determann / Markus Heintzen*, Constitutional Review of Statutes in Germany and the United States Compared, Journal of Transnational Law & Policy 28 (2018-2019), pp. 99-101.

57 Art. 93 (1) No. 4a Basic Law.

58 BVerfGE 84, 90 (127-128); see, on all this *Stern*, note 22, p. 2136. The German Federal Constitutional Court applies a more stringent standard alike to the principle of proportionality in other cases.

The German Federal Constitutional Court considered this unequal treatment to be justified since the GDR and the Soviet Union had made their agreement to Reunification conditional on this temporal limitation: the GDR considered social peace endangered; the Soviet Union – which, like the other former occupying powers, participated in the negotiations [59] – did not want its actions during the occupation, and their legality, called into question.[60] So, to achieve Reunification, the Federal Constitutional Court ruled, the Federal Government could agree to these terms without violating the constitution.[61] If Reunification indeed hinged on this demand – or if negotiations could have led to a different outcome – was the subject-matter of another constitutional complaint and remains controversial as a historical question.[62] The Court accorded a wide margin of appreciation to the Federal Government in this regard (*ein breiter Raum politischen Ermessens*).[63]

Regarding monetary compensation by the reunited German state, however, the more stringent right to equality under Art. 3 Basic Law was directly applicable. Providing no redress at all to those dispossessed between 1945 und 1949 could not be justified, the Court held. To meet the requirements emanating from this right to equality, those who were excluded from a right to restitution had to be afforded at least a financial compensation.[64] At the discretion of the legislative bodies, the amount offered as compensation could, however, be below market value. Faced with the historic challenge of Reunification, the legislator had to balance many objectives, prioritize some of them and also take into account limited financial resources.[65] The Court also noted the "desolate" economic state of the acceding states (or *Länder*) of the former GDR, which would make necessary subsidies and investments running into the three-digit billion range.[66]

Several cases concerning interferences, during Reunification, with the right to property enshrined in Protocol 1 of the European Convention on Human Rights were later decided by the European Court of Human Rights. The Court confirmed that "in the context of a

59 See *Helga Haftendorn*, The unification of Germany, 1985-1991, in: Melvyn P. Leffler and Odd Arne Westad (eds.), The Cambridge History of the Cold War, Vol. III: Endings, Cambridge 2010, pp. 346 et seq.

60 BVerfGE 84, 90 (127-128); see on this *Försterling*, note 14, pp. 199-200; see also *Fulbrook*, note 5, pp. 271-276.

61 BVerfGE 84, 90 (127-128); see on this *Försterling*, note 14, pp. 199-200.

62 *Stern*, note 22, pp. 2146-2147; *Fieberg / Reichenbach*, note 28, MN 30-34a; see in detail, very critical *Constanze Paffrath*, Macht und Eigentum, Köln 2004, pp. 217-259, 375-376. See also *Johannes Wasmuth*, Wider den Mythos eines Rückgabeverbots für besatzungsbezogene Enteignungen zur Vermeidung von Unrechtsvorwürfen gegenüber der Sowjetunion, Zeitschrift für Offene Vermögensfragen 26 (2016), p. 78.

63 BVerfGE 94, 12 (34-46); see on this: *Martínez*, note 23.

64 BVerfGE 84, 90 (128 et seq.); *Försterling*, note 14, p. 200; see on the Compensation Act for Expropriations that cannot be reversed (*Ausgleichsleistungsgesetz* – AusglLeistG) of 13 July 2004, BGBl. I, 1665, that implements this duty, *Kiethe*, note 22, MN 731 et seq.

65 BVerfGE 84, 90 (130-131); 102, 254 (303).

66 BVerfGE 84, 90 (131).

change of political and economic regime“ states enjoy a wide margin of appreciation and found no violation in this regard.[67]

IV. Summary

In Colombia as well as in Germany, legislative bodies opted for a principle of effective post-conflict land restitution that generally enjoyed primacy over monetary compensation. In each case, the constitutional courts granted the legislator a considerable margin of appreciation when faced with constraints of a political or fiscal nature which prevented full and comprehensive compensation for all victims.

C. The Role of Land Restitution for Conflict Resolution

While similar in their general approach to restitution and concerning the fact that groups of victims were excluded by temporal limitations, the restitution regimes of Colombia and Germany also show marked differences. These differences are owed to the different challenges that had to be met at the time of restitution and hence originate in the different functions that restitution of land is supposed to serve in the resolution of a conflict.

I. Colombia: Individual Justice and Social Policy

The manner in which land is distributed among the population, and the way in which it is used, have – it is generally agreed – played a major part in the development of the Colombian armed conflict.[68] The peace agreement of 2016 accordingly attaches great importance to the question of land reform and restitution.[69] The restitution policy pursued by Law 1448 seeks not only to right individual wrongs but to address the causes of the conflict. The Law is meant to be a part of its sustainable resolution. Economic development that – to put it bluntly – only benefits an elite and foreign enterprises, and does not generate prosperity for

67 ECtHR, *Jahn et al. v. Germany* [GC], Judgment of 30.6.2005, App. No. 46720/99, § 113; *von Maltzan et al. v. Germany*, Judgment of 2.3.2005, App. Nos. 71916/01 et al., § 77. Once it has been granted, a right to restitution is prima facie protected by the Convention, see ECtHR, *Althoff v. Germany*, Judgment of 8.12.2011, App No. 5631/05, §§ 37 et seq.

68 *World Bank*, Violence in Colombia: Building Sustainable Peace and Social Capital, Washington D.C. 1999, pp. 7-9; *Vargas/Uribe*, note 36, pp. 749-750; *Berry*, note 36, pp. 278, 283-286; *Frances Thomson*, The Agrarian Question and Violence in Colombia: Conflict and Development, Journal of Agrarian Change 11 (2011), pp. 323-324, 333 et seq; *Amnesty International*, note 37, p. 5; *Julia E. Sweig*, What Kind of War for Colombia?, Foreign Affairs 81 (2002), p. 125; *Thomas Edward Flores*, Vertical Inequality Land Reform and Insurgency in Colombia, Peace Economics Peace Science and Public Policy 20 (2014), p. 7.

69 Peace Agreement between the Colombian State and FARC of 24 November 2016, available at http://especiales.presidencia.gov.co/Documents/20170620-dejacion-armas/acuerdos/acuerdo-final-ingles.pdf (last accessed on 25 September 2020). See also *LeGrand / van Isschot / Riaño-Alcalá*, note 36, p. 260.

the population as a whole, would (re-)produce vast inequality and thereby recreate the same conditions which triggered and fueled the conflict in the first place.[70]

If you agree that one of the reasons for the conflict's formation and its long duration was the failure to generate a socially acceptable economic development and sufficient safety in rural areas,[71] then Law 1448 can be understood as an attempt to correct this failure. For Law 1448 and for the Peace Agreement, land restitution is part of a strategy to address in a sustainable manner the issue of the conflict's many internally displaced persons:[72]

According to Art. 73 No. 3 of Law 1448, restitution aims at the progressive restoration of victims' life projects. Making financial compensation available only exceptionally – even if the person in question prefers it –, creates an incentive to make use of one's right to return.[73] Restricting victims' ability to sell their regained land for the first two years to anyone but the state serves the same purpose (Art. 101). This arrangement is complemented by judges responsible for safeguarding victims' land use after restitution (Art. 102).[74] All of these incentives for return are based on the presumption that most displaced persons will have a professional background in agriculture and would, in urban areas or without their own land, run into economic difficulties.[75]

By restituting or allocating land for the first time to those who make use of agricultural land not owned by any private person and thus by the state (*terrenos baldios* within the meaning of Art. 675 Colombian Civil Code), Art. 75 of Law 1448 to some degree also pursues a policy of property redistribution. This aim is legitimized by Art. 64 of the Colombian Constitution which obliges the state to support agricultural workers' access to land ownership.[76] Rural economic development is also supposed to be reinforced by priority access to loans, technical help and tax reforms (Art. 206). Another important change introduced by Law 1448 is the institution of a land register (Art. 76). Ownership structures, which in rural

70 *Thomson*, note 68, pp. 326-327.; *Peter van der Auweraert*, Institutional aspects of resolving land disputes in post-conflict societies, in: Jon D. Unruh / Rhodri C. Williams (eds.), Land and Post-Conflict Peacebuilding, Abington 2013, p. 352; *Sweig*, note 68, p. 122.

Negative experiences with speculative investments by foreign companies played a role in this, see *Oxfam*, Divide and Purchase: land ownership is being concentrated in Colombia, Oxford 2013, p. 5; *Flores*, note 68, p. 24; *Oliver Kaplan / Michael Albertus*, Land for Peace in Colombia, Foreign Affairs of 15 April 2013, https://www.foreignaffairs.com/articles/el-salvador/2013-04-15/land-peace-colombia (last accessed on 25 September 2020).

71 *Thomson*, note 68, p. 328; *Sweig*, note 68, p. 125.

72 Cf. Corte Constitucional de Colombia, Sentencia C-715/12, VI.6.4.; *Attanasio / Camilo Sánchez*, note 35, pp. 7-8; *Flores*, note 68, p. 25.

73 *Attanasio / Camilo Sánchez*, note 35, p. 38.

74 This "follow-up" care is a lesson learned from the application of Law 160 of 1994, which gave state-owned land to farmers: many were forcibly displaced from this land again, see *Amnesty International*, note 37, p. 19.

75 *Attanasio / Camilo Sánchez*, note 35, p. 8 (fn. 27), pp. 35-37.

76 Similar initiatives had been taken in earlier decades, see *Robert J. Alexander*, Agrarian Reform in Latin America, Foreign Affairs 41 (1962), pp. 196-198; *Flores*, note 68, p. 21.

areas had traditionally often been informal, are hereby formalized to improve legal certainty and strengthen the prospects for economic development.[77]

The social purpose of Law 1448 is evident in many other measures too, e.g. when restitution to women is prioritized and specifically supported (Art. 114-117). It even pursues a gender-related aim of redistribution of property by restituting land to both partners of a couple – regardless of whether both or only one of them owned the land before being dispossessed.[78] With these and other support measures,[79] Law 1448 can be characterized as pursuing a holistic social policy meant to serve sustainable conflict resolution.

II. Germany: Individual Justice und Economic Policy

The predominant purpose of German restitution laws was to achieve justice for violations of individual property rights.[80] After the Second World War, this was seen as morally and legally imperative. Further social aims concerning the victims were generally not pursued. Section 141 of the Federal Compensation Law (*Bundesentschädigungsgesetz*) which promised returnees an "immediate help" (*Soforthilfe*) of 6,000 German Marks is to some extent an exception to this rule.[81] But this support for returnees was only introduced in 1956, extended in 1965, and was rather meant to provide compensatory justice.[82] From an international relations perspective, the role that compensation of victims was understood to play for Germany's rehabilitation on the international level should not be underestimated.[83] Having committed unimaginable crimes, the newly founded West-German state needed to show that it had changed for the better. Righting certain wrongs of the past was seen as one way of doing so. But all these were secondary aims. Economic policy was mostly not pursued through restitution but rather through exceptions to the principle of restitution, e.g. by exempting land that served public purposes.[84]

77 *Amnesty International*, note 37, p. 6; *Berry*, note 36, p. 286.

78 With a positive assessment *Attanasio / Camilo Sánchez*, note 35, pp. 32-33; *Amnesty International*, note 37, p. 48.

79 Protection of children (Art. 181 et seq.); residential construction Art. 123-127; education (Art. 130); psychological and medical support (Art. 135-138); duty to safeguard the memory (Art. 142-148).

80 BVerfGE 84, 90 (126); *Geisler*, note 2, pp. 221-226.

81 See on this *Hendrik G. Van Dam*, Bundes-Entschädigungs-Gesetz (Novelle), Düsseldorf 1956, pp. 38-39.

82 See, likewise critical with regard to the aim of "reintegration": *Otto Gnirs*, Soforthilfe für Rückwanderer, in: Hans Giessler et al. (eds.), Das Bundesentschädigungsgesetz: Zweiter Teil (§§ 51 bis 171 BEG), München 1983, pp. 337, 344.

83 *Ernst Féaux de la Croix*, Vom Unrecht zur Entschädigung: Der Weg des Entschädigungsrechts, in: Ernst Féaux de la Croix / Helmut Rumpf (eds.), Der Werdegang des Entschädigungsrechts unter national- und völkerrechtlichem und politologischem Aspekt, München 1985, pp. 5-6, 10-11.

84 See Art. 18 (1) US-RL.

Taking place in the wake of Reunification, the restitution of dispossessed land was closely connected to the integration of the GDR's socialist economy and property regime into the social market economy and capitalist property regime of the Federal Republic.[85] East Germany's socialist economic model had failed – clearly and for all to see – and the promotion of a positive economic development was of paramount importance. Partly, this aim was pursued by restitution itself; mainly, however, the priority of economic development translated into exceptions from restitution. The legislator made it clear that individual justice would be subordinated to the general interest of economic development if necessary. It has to be noted that Law 1448 also seeks to preserve investments of agricultural projects operating on land that can be claimed for restitution.[86] Germany's rules on investment in this context, however, go much further.

To begin with, Sections 4 and 5 Property Law stipulated that land was not to be restituted if the public interest in continuing its current use outweighed the individual interest in restitution.[87] This was not only the case when the land was designated for public use (e.g. as a public street) or when it was used for "complex" residential areas (i.e. the high-rise buildings and their surrounding infrastructure, often considered typical of the GDR). Land was also not restituted when it was owned by a company the operations of which would be considerably compromised by restitution.

In the Treaty on Reunification between the GDR and the Federal Republic, a further exception from restitution was included for urgent economic investments.[88] This so-called "primacy of investment" (*Investitionsvorrang*)[89] was reformed later on by federal legislation that made it successively even more "investment-friendly", inter alia by extending deadlines and the range of eligible investment types.[90] The requirement to show the "urgen-

85 *Rodenbach*, note 33, pp. 316, 322.

86 With judicial assent, victim and project may conclude an agreement on the further use of the land by the project, insofar the project acted with bona fide (Art. 99). The Colombian Constitutional Court confirmed the constitutionality of the provision emphasizing that the difference in power between agricultural enterprises and the victims gave rise to a duty of care on the part of the state (cf. Art. 99 (3)). The liberal concept of freedom of contract does not reflect reality in these cases, the Court held. In case the project did not act bona fide, the project shall be administered by the state and its proceeds shall be given to a victims' fund (Art. 99 (2)). See Corte Constitucional de Colombia, Sentencia C-715/12, VI.8.5. This takes account of the experience that economic investments often profited from unlawful dispossession, see *Amnesty International*, note 37, pp. 5, 57.

87 *Försterling*, note 14, p. 214.

88 Art. 41 (2) Reunification Treaty; see on this *Säcker/Hummert*, note 13, Vor § 1, MN 47; *Försterling*, note 14, pp. 160 et seq.

89 See e.g. BT-Drucks. 12/2480; Gesetz über den Vorrang für Investitionen bei Rückübertragungsansprüchen nach dem Vermögensgesetz (Law on the Primacy of Investment – *Investitionsvorranggesetz* – InVorG) of 4 August 1997, BGBl. I, 1996.

90 *Kiethe*, note 22, MN 460 et seq.; *Försterling*, note 14, pp. 160-161, 164-165; *Geisler*, note 2, p. 182.

cy" of the investment was dropped in the end because all investments in East Germany were considered to be urgent.[91]

Ultimately, a clear primacy of investment over restitution was established.[92] To create or safeguard jobs and housing, and to build infrastructure projects that served these goals, the state could sell, lease or rent land to private investors that was potentially subject to restitution claims.[93] If restitution was unavailable for one of these reasons, the victims received monetary compensation.[94] Investments were, according to the German legislator, of "elementary importance" for the stimulation of economic and social development in East Germany.[95] All citizens were supposed to profit from this development in the end.

D. The Implementation and Effects of Restitution

Similarities and differences between the restitution regimes in Colombia and Germany become equally apparent in their implementation and effects in practice.

I. Germany

Germany's restitution laws, after World War II and after Reunification, led to the restitution of land in a considerable number of cases. It remains nonetheless unclear – even retrospectively – whether the goals of individual justice and economic development were fully accomplished.[96]

Statistics on restitution after the Second World War only exist to a limited degree. The most detailed statistics are available for the US zone of occupation in which more than

91 *Försterling*, note 14, p. 167; *Kiethe*, note 22, MN 484.

92 *Stern*, note 22, p. 2139.

93 *Försterling*, note 14, pp. 100-101, 164-165.

94 For dispossessions in the GDR, see Section 1 Gesetz über die Entschädigung nach dem Gesetz zur Regelung offener Vermögensfragen (Compensation Law – *Entschädigungsgesetz* – EntschG) of 13 July 2004, BGBl. I, 1658; for dispossessions in the Third Reich, see the Nazi Victim Compensation Act (*NS-Verfolgtenentschädigungsgesetz* – NS-VEntschG) of 13 July 2004, BGBl. I, 1671; in case of decisions based on the primacy of investment, see Section 16 InVorG; see on the latter *Kiethe*, note 22, MN 506.

95 BT-Drs. 11/7817, p. 62; see on this *Geisler*, note 2, p. 182.

96 Very critical e.g. *Johannes Wasmuth*, Keine Sternstunde des Rechtsstaats: Zwei Jahrzehnte Aufarbeitung von SED-Unrecht, JuristenZeitung (2010), p. 1142; *Johannes Wasmuth / Julius A. Kempe*, An welchen rechtsstaatlichen Fehlleistungen sind weite Bereiche der wiedergutmachungsrechtlichen Aufarbeitung des SED-Unrechts systematisch gescheitert? – Teil 7: Folgen unterbliebener Aufarbeitung von SED-Unrecht, Zeitschrift für Offene Vermögensfragen, 23 (2013), p. 13; *Fritz Enderlein*, Zur nochmaligen Enteignung der nächsten Generation, Zeitschrift für Offene Vermögensfragen 24 (2014).

17,000 plots of land were restituted.[97] Most applications in that zone came from abroad and most of these again from the United States.[98]

Overall, many victims did not, or not to the fullest extent, profit from the Allied restitution laws.[99] Not a few lived abroad and did not have the resources for a cost- and time-intensive administrative procedure in Germany.[100] Many amicable settlements, in which victims at least partially waived their claims, probably resulted from this.[101] A tendency of Germany's 1950s administration to downplay the historical context may have contributed to it. For example, in one case, an applicant's deportation to an extermination camp during World War II was referred to euphemistically as a "transfer to the East in the course of hostilities" by German restitution authorities.[102] Against this background, the importance of Art. 178 of Law 1448 becomes clear which requires Colombian authorities to treat victims with respect.

Subsequent to Reunification, more than 500,000 plots of land were restituted in East Germany and in over 100,000 cases financial compensation was paid; about half of the more than 2,000,000 applications were rejected.[103] Until the year 2000, more than 90 %,[104] by now more than 99 % of all applications have been processed.[105] In addition, several thousand plots of land that had been dispossessed in the Third Reich on the territory that was later part of the GDR were restituted after Reunification.[106]

Politicians and entrepreneurs often considered restitution claims to be an obstacle to economic development in East Germany that impeded direly needed investments.[107] A prompt resolution of restitution claims was generally seen as crucial.[108] The complexity of the legal regime that was dispersed over several laws was problematic but can easily be explained by the political and time constraints under which Reunification took place.[109] Most likely due to inadequate staffing, many restitution procedures took years to be completed,

97 *Schwarz*, note 6, p. 390; see for more statistics *Jürgen Lillteicher*, Raub, Recht und Restitution, Göttingen 2007, pp. 113 et seq.

98 *Schwarz*, note 6, p. 366.

99 *Lillteicher*, note 97, p. 319, who considered the results of a contemporaneous investigation "devastating".

100 *Schwarz*, note 6, pp. 383, 267-268; *Spannuth*, note 14, pp. 227-230.

101 *Spannuth*, note 14, p. 227.

102 Ibid., p. 228.

103 *BARoV*, Statistische Übersichten vom 31.12.2015, available at: https://www.badv.bund.de/DE/OffeneVermoegensfragen/Statistik/start.html (last accessed on 15 September 2020).

104 *Redeker*, note 29, p. 3031.

105 *BARoV*, note 103.

106 Ibid.

107 *Säcker/Hummert*, note 13, Vor § 1, MN 60, 62; *BARoV*, note 22, p. 46.

108 *Säcker/Hummert*, note 13, Vor § 1, MN 63.

109 *Försterling*, note 14, p. 1.

some even more than a decade.[110] The resulting legal uncertainty was in practice resolved – in the absence of speedy administrative-judicial clarification – by the free market: investors simply bought victims' (potential) restitution claims.[111]

Restitution in the course of Reunification led to various inequalities and hardships. Those who had been expropriated during the Soviet occupation, and those who were refused restitution for public interest reasons, only received a financial compensation below market value.[112]

At least one empirical study on restitution in Berlin and its surroundings showed that the restitution regime was not considered to be particularly just. It was seen as facilitating a transfer of property to West Germany or perceived as a lottery that ultimately did not serve individual justice.[113] Restitution to Jewish victims of national socialism (or to their heirs and Jewish successor organizations) after 1990, for the most part, seems not to have resulted in reestablishing Jewish life in these areas.[114] Many victims who had survived the Third Reich never returned.[115]

II. Colombia

Concerning Law 1448, only some tentative observations can be made since the process of restitution is still on-going and the observations are made in a comparative manner from far away.[116]

In 2010, a survey showed a large majority of displaced persons to have no intention of returning, for the most part due to a fear that the reasons for their flight still persisted.[117] Since then, restitutions effected by Law 1448 seem to have resulted in more people returning to and using the land restituted to them.[118] To that extent, the Colombian Victims and Restitution Law is deemed to be a success and potentially a model for other societies in transition after a conflict.[119] Various states, Germany among them, considered the Law to

110 See e.g. ECtHR, *Althoff v. Germany*, Judgment of 8.12.2011, App. No. 5631/05, § 44; *Wasmuth*, note 29, p. 191; *Rodenbach*, note 33, p. 322.

111 *Försterling*, note 14, p. 148-149.

112 Vgl. *Birgit Glock* et al., Die sozialen Konsequenzen der Restitution von Grundeigentum in Deutschland und Polen, Berliner Journal für Soziologie 11 (2001), pp. 534, 547.

113 Ibid., p. 544.

114 Ibid., p. 545.

115 *Lillteicher*, note 97, p. 506.

116 See on the latter *Kischel*, note 1, Chapter 1, MN 62-67.

117 *Attanasio / Camilo Sánchez*, note 35, p. 8.

118 *Unruh*, note 42.

119 Ibid..; *Amnesty International*, note 37, p. 23; *Nicole Summers*, Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict?, Harvard Human Rights Journal 25 (2012), p. 235.

be an integral part of the peace process during Colombia's Universal Periodic Review in the UN Human Rights Council in 2013.[120]

Others, however, describe the Law's implementation as very slow.[121] Until 2014, merely about 30,000 of at least 2 million (some speak of 8 million) hectares of dispossessed land had been restituted to only a few thousand displaced persons.[122] Reportedly, Law 1448 is often used to formalize title to land that is already being used anyway rather than to restore factual control over their land to displaced persons.[123]

At least with regard to the extent that it is applied, the Law falls short of its potential: even though 300,000 hectares of land had been restituted until 2018,[124] only about 100,000 of the estimated 360,000 victims entitled to restitution had filed an application until August 2017.[125] The security situation, which remains fragile, will be a major reason for this restraint by victims.[126] By establishing a National Protection Unit (*Unidad Nacional de Protección*) which protects from violence not only unionists and human rights activists but also claimants under Law 1448, a step was taken to tackle this problem early on.[127] Nonetheless, many who apply for restitution or advocate land rights were still threatened or even murdered.[128]

120 *UN Human Rights Council*, Report of the Working Group on the Universal Periodic Review, 4 July 2013, UN-Doc. A/HRC/24/6, §§ 16, 23-25, 38, 54, 58, 64, 68, 70, 76.

121 *Jemima García-Godos / Henrik Wiig*, Ideals and Realities of Restitution: the Colombian Land Restitution Programme, Journal of Human Rights Practice 10 (2018), p. 54; *Cristopher Cramer / Elisabeth J. Wood*, Introduction: Land rights, restitution, politics, and war in Colombia, Journal of Agrarian Change 17 (2017), p. 734; *Kaplan / Albertus*, note 70; also, extremely critical, implying a neoliberal agenda of the law's authors *Paula Martínez Cortés*, The Victims and Land Restitution Law in Colombia in Context, Berlin 2013, pp. 7-17.

122 *Amnesty International*, note 37, p. 29. Contracts on the continuation of agricultural projects according to Art. 99 of Law 1448 were, until 2014, concluded in nine cases, see *Amnesty International*, note 37, p. 41.

123 Ibid., p. 30.

124 UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Colombia, 9 July 2018, UN-Doc. A/HRC/39/6, § 50.

125 *Frances Thomson*, Land restitution in Colombia: why so few applications?, Forced Migration Review 56 (2017), pp. 35-36.

126 United Nations Verification Mission in Colombia: Report of the Secretary-General, 28 September 2018, UN-Doc. S/2018/874., § 44; *Thomson*, note 125, pp. 35-36; *Amnesty International*, note 37, pp. 31-32. Similar issues came up during the implementation of earlier laws meant to support displaced persons, see *World Bank*, note 68, p. 31.

127 *UN Human Rights Council*, Report of the Working Group on the Universal Periodic Review, 4 July 2013, UN-Doc. A/HRC/24/6, § 99.

128 *Karen McVeigh*, 2017 was deadliest year on record for Colombian human rights defenders, The Guardian (UK) of 1 May 2018, https://www.theguardian.com/global-development/2018/may/01/2017-deadliest-year-on-record-colombian-human-rights-defenders (last accessed on 25 September 2020); *Thomson*, note 125, pp. 35-36; *Fin-Jasper Langmack*, Reforming Land Restitution – A Concerted Effort to Derail Colombia's Transitional Justice System?, EJIL-Talk!, 2

Further reasons for a slow implementation of the Law seem to include disillusionment, a lack of trust in state institutions, ignorance of the law, and the expenses necessary for pursuing a restitution claim, in particular the cost of traveling to authorities located far away.[129] The implementation of judicial decisions reportedly fails at times due to a lack of resources and due to a lack of political will.[130] Despite the far-reaching presumptions in favor of claimants, some are still said to run into difficulties when making their case.[131] Moreover, the gender equality aimed for by the Law seems to collide with an inequality traditionally rooted in society at times.[132]

E. Concluding Observations

The restitution of land plays a major role in the sustainable resolution of conflicts which addresses the underlying issues and prevents the conflict from flaring up again. It is not only necessary to achieve justice for individuals. The distribution and use of land are also of immense economic and social importance, and thus highly significant for post-conflict societies and their development.[133]

Besides public interests, the individual interests of third parties can conflict with restitution claims, e.g. persons who in the meantime acquired the land in good faith,[134] or in Colombia the interests of the afro-Colombian community and indigenous peoples[135]. These and other issues need to be confronted by transitional societies, in order to prevent them from becoming a source of new conflict. The restitution of a different, but equivalent piece

November 2018, https://www.ejiltalk.org/reforming-land-restitution-a-concerted-effort-to-derail-colombias-transitional-justice-system/ (last accessed on 25 September 2020).

129 *Thomson*, note 125, pp. 35-36.

130 *Amnesty International*, note 37, p. 46.

131 *Peña-Huertas* et al., note 37, pp. 763-764.

132 *Cramer / Wood*, note 121, p. 734; *Amnesty International*, note 37, p. 48.

133 *Jon D. Unruh / Rhodry C. Williams*, Land: A foundation for peacebuilding, in: Jon D. Unruh / Rhodry C. Williams (eds.), Land and Post-Conflict Peacebuilding, Abington 2013, p. 1.

134 An issue not dealt with in detail in this article. It was handled completely differently from law to law: the restitution laws of the Western allies explicitly excluded protection for bona fide purchasers, Art. 1 (2) US-RL; Art. 1 (3) UK-RL; Art. 1 (3) Bln-RL; cf. Art. 6 F-RL; Sections 5 and 15 (2) Gesetz zur Abgeltung von Reparations-, Restitutions-, Zerstörungs- und Rückerstattungsschäden of 12 February 1969, BGBl. I 1969, 105; see on this: *Lillteicher*, note 97, pp. 463 et seq; *Försterling*, note 14, pp. 25-27, 183; *Schwarz*, note 6, pp. 168-169. The Property Law protects in its Art. 4 (3) purchasers who relied in good faith on the existence of the GDR's legal order (*redlicher Erwerb), see Försterling*, note 14, p. 181. Law 1448 does not exclude land acquired by third parties in a bona fide manner from restitution but Art. 91 (r) and Art. 98 grant a compensation in these cases. Even those who cannot prove their good faith may receive socio-economic support, see *Unruh*, note 42. See on all this also *Langmack*, note 128.

135 *UN Human Rights Council*, Report of the Working Group on the Universal Periodic Review: Colombia, 9 July 2018, UN-Doc. A/HRC/39/6, § 50; see also Art. 205 (b) of Law 1448.

of land may sometimes be able to alleviate such conflicts. Colombia[136] as well as Germany[137] have made use of that possibility. But the complexity of the conflicts of interest – a complexity that becomes even more apparent when comparing Colombia and Germany – clearly shows that there is no universally applicable blueprint for restitution regimes; one size does not fit all transitional societies.[138] On an international level, such as in the Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons,[139] this is not always sufficiently taken into account.[140]

Successfully coping with such complexity will normally require decisions backed by sufficient democratic legitimacy. Unlike Law 1448 that is the result of an intensive parliamentary debate in which also controversial points such as temporal limitations of restitution rights were discussed,[141] the restitution regimes in Germany were never democratically legitimated in an adequate manner. The decision to restitute land after World War II was taken by the Allied occupying powers, and was thus not democratically decided on by the German society at all.[142] At the time of Reunification, many members of parliament only voted for the restitution regime of the Property Law because it was inextricably intertwined with the Treaty on Reunification and they did not want to endanger the historic chance of Reunification.[143] Having virtually no influence on the design of the restitution regime that was

136 According to Art. 97 of Law 1448, (a) if the land is under a high risk of flooding or other natural disasters, (b) it was restituted to a different victim, (c) if a risk to life and limb of the victim or his or her family exists in case of restitution, or (d) if the land has been destroyed wholly or in part and a restoration to its original condition is impossible.

137 Section 9 (2) Property Law; see on this *Försterling*, note 14, p. 227.

138 This became apparent early on in the critique directed at the French Restitution Law after WWII, which applied to Germany concepts that had been established for the situation prevailing in France. Since most dispossessions in France had been conducted by the German state, the law's provisions regarding forced private sales of property were inadequate, see *Schwarz*, note 6, pp. 290 et seq., 378; *Spannuth*, note 14, pp. 33-45.

139 UN, ECOSOC, Sub-Commission on the Promotion and Protection of Human Rights, Principles on Housing and Property Restitution for Refugees and Displaced Persons, 28 June 2005, UN Doc. E/CN.4/Sub.2/2005/17, Principle 2. On the basis of the right to restitution in international human rights law, see in detail Corte Constitucional de Colombia, Sentencia C-715/12, VI.6.1, 8.1.3.

140 In a similar vein *Anneke Smit*, The Property Rights of Refugees and Internally Displaced Persons: Beyond Restitution, Abington 2012, pp. 167-170, 206-207.

141 Corte Constitucional de Colombia, Sentencia C-250/12, II.7.

142 The obvious reason for this might be that a large part of German society and certainly all of its state institutions had been the persecutors. Nonetheless, a deficit of legitimacy remains that was felt in German society, even though the US Law No. 59 had been drafted in cooperation with German lawyers, see *Geisler*, note 2, pp. 14-15. For the rejection of these restitution laws as "victor's justice" and the criticism that private individuals were made liable for injustices committed by the state, see *Lillteicher*, note 97, pp. 502-505.

143 *Spannuth*, note 14, p. 185; *Stern*, note 22, pp. 2133-2134.; see also BR-Plenarprotokoll 618 of 7.9.1990, p. 463; cf., however, for a more positive assessment of the debate *Fieberg / Reichenbach*, note 28, MN 1.

negotiated internationally between governments,[144] the German parliament accepted even the exclusion of any restitution for the time of Soviet occupation between 1945 and 1949 – even though this aspect was subject to particularly harsh criticism.

As a consequence, many groups of victims in Germany never felt adequately represented and taken into account.[145] Despite repeated clarifications by the Federal Constitutional Court, the exclusion of the time of Soviet occupation from restitution remained highly controversial among legal practitioners and scholars as well as in public opinion. The expropriations that had been conducted without compensation during this time were seen as particularly violent and unjust. Monetary compensations paid after Reunification were perceived as too low.[146] Some even speculated that the Federal Government secretly sought to cover the costs of Reunification this way, since most of the land to which the exclusion applied was – according to them – public property, now owned by the Federal Republic of Germany.[147] On the other hand, it was a concern commonly held that not only genuine victims but also others would, by chance, profit from restitution or financial compensation.[148]

In spite of all these shortcomings, it can be said that German restitution laws at least strove to provide effective restitution to victims, in particular by presumptions in their favor, but without ignoring countervailing public and private interests. Besides victims' interest in restitution, societal interests of reconstruction after World War II and, during Reunification, conflicting interests of bona fide purchasers were taken into account.[149] In particular the latter may have been central for a largely successful conflict resolution – despite all imperfections. Social peace and political stability were most certainly strengthened by recognizing and protecting the interests of individuals who had trusted in the existence of the GDR's 40-year-old legal order, in so far as their trust seemed worthy of protection measured against the standards of the rule of law.[150]

144 Art. 59 (2) Basic Law requires legislative consent for such treaties but does not give parliament a right to be involved in negotiations.

145 See only *Féaux de la Croix*, note 83, p. 118; *Gerald Prüfer*, Die vergessenen Entschädigungsberechtigten, Zeitschrift für Offene Vermögensfragen 19 (2009), p. 286; *Geisler*, note 2, pp. 200 et seq. For the exclusion of the period of Soviet occupation from restitution, see *Johannes Wasmuth*, An welchen rechtsstaatlichen Fehlleistungen sind weite Bereiche der wiedergutmachungsrechtlichen Aufarbeitung des SED-Unrechts systematisch gescheitert? – Teil 2: Unterschiedliche Formen des SED-Unrechts in SBZ und DDR, Zeitschrift für Offene Vermögensfragen, 21 (2011), p. 240.

146 See on this, with further notes *Stern*, note 22, pp. 2141, 2149; *Rodenbach*, note 33, p. 323. Attempts failed to amend the constitution in order to make restitution possible after all, see *Stern*, note 22, p. 2143.

147 *Paffrath*, note 62, p. 380; *Geisler*, note 2, pp. 44 et seq.

148 See, e.g., after WWII *Goetze* et al., note 7, pp. 1-2; and after Reunification *August Kayser*, Die Befriedung der Unrechtsopfer tut not, Zeitschrift für Offene Vermögensfragen 10 (2000), p. 138.

149 See note 134.

150 *Redeker*, note 29, pp. 3031, 3035.

Colombia, on a general level, pursues the same aims of individual justice and societal development. The latter, however, in a completely different manner owed to the different history and causes of the conflict. The fact that both, Colombia's and Germany's restitution regimes, were criticized by some as inconsistent, inefficient and unjust may raise hope that such problems need not pose an insurmountable obstacle for sustainable conflict resolution. The Inter-American Court of Human Rights once considered the possibility of providing complete post-conflict redress for all human rights violations:

> *Think of the image of a stone that is thrown into a lake and that is producing in the waters concentric circles increasingly distant and less perceptible. Thus, each human act produces remote and distant effects. Forcing the author of an illicit act to erase all the consequences that his act caused is entirely impossible because his action had effects that multiplied immeasurably.*[151]

And yet, societies must find a way, even after existential conflicts, to undo past injustice as far as possible; without, however, losing sight of the future. That individual justice may only be available to a limited extent sometimes is a sobering insight,[152] which the Federal Constitutional Court once expressed as follows for Germany:

> *The consequences of the Second World War, a period of rule under [Soviet] occupation and a post-war dictatorship [in the GDR] must be borne by the Germans as a community of fate [Schicksalsgemeinschaft] and also, within particular limits, as the individual experience of injustice, without it being possible in every case to obtain adequate compensation, to say nothing of restitution in kind.*[153]

The many public and individual interests that confront each other after years of conflict probably cannot be reconciled without some of them sometimes standing back. Maybe, striking a balance between them occasionally is not even possible without serious uncertainties and inconsistencies.[154] This cannot excuse anyone from the duty to do the humanly possible to strike a just balance. But the justice that is in fact realized should not be talked down or diminished because it is not absolute. Justice should be done in a way that it can be perceived as such by society and thus contribute to conflict resolution.[155]

151 IACtHR, *Caso Aloeboetoe y otros Vs. Surinam,* Reparaciones y Costas, Judgment of 10.9.1993, Series C No. 15, § 48; also cited by Corte Constitucional de Colombia, Sentencia C-250/12, II.4.

152 *Geisler*, note 2, p. 224.

153 BVerfGE 112, 1 (39), official translation by the Court available at http://www.bverfg.de/e/rs20041026_2bvr095500en.html.

154 Vgl. *BARoV*, note 22, p. 110; *Glock* et al., note 112, p. 534; very critical also *Geisler*, note 2, pp. 340-341.

155 Vgl. *Unruh*, note 42.

Colombia's Law 1448, the extension of which is currently on the agenda,[156] is an ambitious attempt to meet these demanding expectations. It is most certainly called for to point out implementation problems and counteract undesirable developments when they become apparent. Reality may fall short of our expectations for conflict resolution to some degree. This should not, however, blind us to the fact that living together in peace must be possible even in the absence of absolute justice.

156 United Nations Verification Mission in Colombia: Report of the Secretary-General, 26. September 2019, UN Doc. S/2019/988, § 10; Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, 26 February 2020, UN Doc. A/HRC/43/3/Add.3, §§ 38-39. The Colombian Constitutional Court recently held the expiration date of Law 1448 to be unconstitutional and required Congress to extend it; in case the legislator does not take action, the Court ordered the Law to be applied until 2030, see Corte Constitucional de Colombia, Sentencia C-588/19.